

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
Hon. Pat M. Donofrio, P.J., Hon. Henry William Saad, Hon. Kathleen Jansen

RONNISCH CONSTRUCTION GROUP, INC.,
a Michigan corporation,

Supreme Court No. 150029

Appellee,

v.

LOFTS ON THE NINE, LLC, a Michigan limited
liability company, et al.,

Appellant.

REPLY BRIEF ON APPEAL OF APPELLANT LOFTS ON THE NINE

*****ORAL ARGUMENT REQUESTED*****

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INTRODUCTION

RCG's Response continues to ignore this Court's holding in *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987; 742 NW2d 120 (2007), that requires a lien claimant to actually "prevail" on its lien foreclosure claim before it may be awarded attorneys fees. The Construction Lien Act ("Act") does not, as RCG apparently contends, guarantee a lien claimant's right to payment "together with reimbursement of attorneys fees and expenses." Nothing in the Act, its preamble or case law gives the trial court discretion to award attorneys' fees to a lien claimant that recovered some contract amount in arbitration where no one ever adjudicated the Claim of Lien.

RCG's flawed Response is further addressed below. In the end, this Court should reverse the Court of Appeals and reinstate the Trial Court's Opinion and Order.

ARGUMENT

I. "Liberal" Construction of the Act does not Override the Statutory Requirements.

RCG first attempts to avoid this Court's *Decina* holding by arguing that the preamble's reference to a "remedial statute" that should be "liberally construed" essentially means that the Act is designed to ensure that lien claimants receive their attorneys' fees and expenses. Nothing in the preamble speaks to guaranteeing "attorneys' fees" or "expenses" to a lien claimant in all cases.

The Act states:

[i]n an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant . . . The court **may** allow reasonable attorneys' fees to a lien claimant who is the prevailing party.

MCL 570.1118(2) (emphasis added). Consequently, before a trial court may even weigh whether an award of reasonable attorneys' fees is within its discretion it must first: (1) find there is an action to enforce a construction lien through foreclosure; (2) examine the lien claims, defenses and amounts due; and (3) determine whether a lien claimant is the "prevailing party." See *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420 (2003). Absent these threshold findings, there is no basis for the trial court to exercise any discretion whatsoever with respect to an award of attorneys' fees under the Act. No "liberal construction" of this statutory language can escape the fact that neither the Arbitrator nor trial court made these findings or otherwise adjudicated RCG's Claim of Lien.

II. RCG's Attempts to Distinguish *Decina* Fail.

This Court's Order Granting Leave to Appeal specifically directed the parties to address its holding in *Decina*. (**App. 138a**). RCG's Response does not attempt to do so until page 30, and then RCG misconstrues and misinterprets the holding.

In *Decina*, this Court succinctly explained:

[t]o be awarded attorney fees as a 'prevailing party' under MCL 570.1118(2), the party must prevail on the lien foreclosure action. . . . **The language of MCL 570.1118(2) does not permit recovery of attorney fees on the contract action merely because it was brought together with the lien foreclosure action.**

Id., at 988 (emphasis added). This holding rejected the Court of Appeals' contrary conclusion that a prevailing party is "one who prevails in a CLA claim or a claim brought in the alternative for the same injury or loss raised in the CLA claim". *HA Smith Lumber & Hardware Co v Decina*, 265 Mich App 380, 384; 695 NW2d 347 (2005). Here, the trial court correctly followed this Court's ruling in *Decina* and concluded that RCG is not entitled to seek recovery of its

attorneys' fees as a "prevailing party" lien claimant because neither the Arbitrator nor the trial court adjudicated RCG's lien foreclosure claim. (**App. 119a-129a**),

In a fruitless effort to avoid *Decina's* holding, RCG devotes several pages of its brief to analyzing facts discussed in the Court of Appeals' decision in *Decina*—but not addressed by this Court in its decision—showing that the liens in that case had not "attached". In reality, the trial court in *Decina* found the subcontractor's had "valid liens" but that they did not attach to the property because the homeowners paid the entire amount of their contract to the general contractor. 265 Mich App at 382.¹ Thus, according to RCG, this Court's holding in *Decina* merely stands for the proposition that a lien claimant seeking attorneys' fees "must actually have had a legally perfected lien that attached to the real property of a non-paying owner[.]" (**RCG's Brief on Appeal, p 34 n 33**).

But, that is not what this Court held in *Decina*. This Court confirmed that recovery on companion claims alone does not make a lien claimant a "prevailing" party under the Act. *Decina, supra* at 988. The *Decina* holding is not dependent upon the specific facts of that particular case. The holding is based on the express language of the Act. Under the plain and unambiguous language of MCL 570.1118(2) attorney fees may be awarded only to a prevailing lien claimant in a lien foreclosure action.

Here, RCG only recovered on a breach of contract claim in Arbitration and accepted full payment (with all applicable interest) before moving for an award of attorney's fees. RCG

¹ The Act provides that construction liens will not attach to a residential structure, to the extent payments have been made, provided the homeowner files an appropriate affidavit. MCL 570.1203(1).

cannot be construed a “prevailing party” under the Act when no one adjudicated its lien claim.² By declaring RCG the “prevailing party” under the Act and then requiring the Trial Court to consider whether RCG should be awarded any attorney fees, the Court of Appeals ignored the language of the Act and over-stepped its bounds.

III. RCG Confuses a “Perfectured” Lien with an Adjudicated Lien under the Act.

In arguing that it is a prevailing lien claimant, RCG places much emphasis on the trial court’s statement that “RCG perfected its lien within the timeline required under Michigan law.” (**App. 123a**). However, the fact that RCG timely followed the steps to record its lien within 90 days of its last work did not necessarily mean that its lien for \$626,163.17 (plus contract interest of \$173,000) is valid and enforceable. Under the Act, the trial court is first required to adjudicate all claims and defenses regarding RCG’s, and the other subcontractor, liens. For example, on its face RCG’s Claim of Lien is overstated and the trial Court may have deemed the overstated lien void and unenforceable.³ See *Sacchetti v Recreation Co*, 304 Mich 185 (1943); *Superior Products Co v Merucci Bros, Inc*, 107 Mich App 153, 158 (1981).

Neither the trial court nor the Arbitrator adjudicated these issues, which RCG admits in its brief. (**RCG’s Brief on Appeal, p 31**). Therefore, the trial court’s statement that RCG timely “perfected” its lien is of little to no value. It is not the same as adjudicating a lien and should not be construed to mean that RCG “prevailed” on its Claim of Lien.

² Notably, RCG’s counsel asked LON to enter into a stipulated order agreeing that payment of the Award would not terminate RCG’s Claim of Lien or result in the dismissal of its lien foreclosure claim. (**App. 97a-100a**). LON’s counsel refused to sign the proposed stipulated order. RCG never returned or attempted to return LON’s payment.

³ Throughout its brief, RCG tries to portray LON as a deadbeat company that dragged RCG through needless litigation rather than just pay what it owed. This is an unfair characterization. The Arbitrator held that RCG was not entitled to over \$173,000 in charged interest and that LON was entitled to a setoff of over \$185,000. Once the Arbitrator ruled on LON’s final obligation, LON promptly paid.

RCG's continued reliance on *Schuster Const Servs v Painia Dev Corp*, 251 Mich App 227; 651 NW2d 749 (2002), is equally unavailing. RCG relies on *Schuster* for the proposition that any party "perfecting" or entitled to a lien is a "prevailing party." *Id.* at 238. In *Schuster*, the trial court granted summary disposition on the plaintiff's lien claim. *Id.* at 229-30. The Court of Appeals affirmed, and with respect to attorneys' fees held that "[g]iven our determination that plaintiff is entitled to a lien, plaintiff is the prevailing party under subsection 118(2)[.]" *Id.* at 238. Thus, in *Schuster*, the trial Court already entered judgment in favor of the plaintiff on its lien claim, so the Court of Appeals properly declared the plaintiff to be "the prevailing party". None of these facts are present here. Adjudication of RCG's Claim of Lien was not necessary because LON promptly paid, and RCG accepted, the Arbitration award in full, including all applicable interest.

IV. This Court should not Rule on the Reasonableness of RCG's Attorneys' Fees.

RCG also spends several pages of its brief defending the amount of its fees and expenses. Neither the Trial Court nor the Court of Appeals addressed these issues so they should not be before this Court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (when a trial court does not address an issue it is not preserved on appeal). Suffice it to say that RCG incurred no fees or expenses in adjudicating its lien. They were all incurred in the Arbitration and are not recoverable under the parties' Agreement or the Act.

V. The Court of Appeals' Opinion is Contrary to Michigan Public Policy Favoring Arbitration.

RCG and LON are sophisticated commercial entities that freely entered into an arbitration agreement that does not contain a fee shifting provision. As RCG itself points out, such agreements are common in the construction industry. But, if allowed to stand, the Court of Appeals' Opinion discourages parties from abiding by these agreements in two respects.

First, it encourages lien claimants to first file needless breach of contract actions (coupled with lien foreclosure actions) with the circuit court, even if these actions are filed in contravention of an agreement to arbitrate. This incentive exists because the Court of Appeals' Opinion allows a lien claimant to believe it can put itself in a position to recover attorneys' fees upon the entry of any net award in its favor, regardless the amount of the award (even a nominal amount) or the validity of the dispute, so long as the lien claimant asserts a lien foreclosure claim in circuit court.

RCG continues to side step the fact that it could have arbitrated its demand and received the appropriate recovery all before any lawsuit or lien foreclosure action became necessary. RCG had one year to file its lien foreclosure action from the date of recording the Claim of Lien. During that year, the parties could have arbitrated the true amount owed RCG. Once determined and if not paid, then RCG could have filed its lawsuit to confirm the award and then to foreclose its lien. This process is consistent with Michigan public policy favoring arbitration and discouraging the filing of unnecessary lawsuits.

Secondly, the Court of Appeals' decision essentially overrides the parties contractual bargain concerning attorneys' fees. By not including a fee shifting term, the parties understood each would be responsible for their own attorneys' fees in the event of an arbitration. Now, contractors and subcontractors will have no reason to bargain for, or need, any fee shifting terms in the contract. All they need to do is file a breach of contract suit and include a lien foreclosure claim to shift the risk of paying attorneys' fees onto owners regardless of what the parties' contract says or doesn't say. Under the Court of Appeals' decision, so long as lien claimants are awarded some amount on their contract claim, they will have a right to seek attorneys' fees without having to do anything further.

These outcomes are contrary to this Court's decision in *Decina* and the language of the Act. Nothing in the Act states that it exists as a tool to guarantee attorneys' fees for any lien claimant who recovers any amount on any claim in Arbitration or elsewhere. Rather, the Act provides the trial court discretion to award attorneys' fees only to those plaintiffs forced to pursue lien foreclosures to recover the amounts they are owed. Providing a broader assurance of attorneys' fees to anyone who merely includes a lien foreclosure claim in a complaint requires rewriting the Act, which neither this Court nor the Court of Appeals is empowered to do.

CONCLUSION

RCG's Response does little to address the specific language of the Act and this Court's unambiguous holding in *Decina* that a lien claimant may seek attorneys' fees only when it actually prevails on a lien foreclosure claim. RCG did not prevail on its lien foreclosure claim because that claim was never adjudicated. Therefore, this Court should reverse the Court of Appeals' published Opinion and affirm the trial court's Opinion and Order.

Respectfully submitted,

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