STATE OF MICHIGAN

COURT OF APPEALS

JL DUMAS & CO AND PAUL BOROCK,
CHAPTER 7 BANKRUPTCY TRUSTEE,

Plaintiffs-Appellants,

v

FORTY-NINE HIGHLAND LIMITED DIVIDEND, CULLEN DUBOSE, KENNETH FOWLER, MICHIGAN HOUSING DEVELOPMENT AUTHORITY and THE AMERICAN TITLE COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 27, 1996

No. 186016
LC No. 90-017181-CH

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). Plaintiffs had sought foreclosure of a construction lien against defendants. We affirm.

First, we find that the trial court did not err in finding no genuine issue of material fact regarding the maximum contract price payable to plaintiffs. Defendants presented evidence that the "maximum upset price" of the contract was $6,840,449 and that the contract provided that any right to payment for extra work was subject to the condition precedent of express approval by the Michigan State Housing Development Authority (MSHDA). Defendants then presented evidence that the maximum amount which could be claimed by plaintiff was the amended "maximum upset price," plus the cost of approved change orders, totaling $7,316,740.79. Plaintiffs failed to set forth any evidence, documentary or otherwise, to demonstrate that the amended "maximum upset price" was other than what defendants claimed.

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* Circuit judge, sitting on the Court of Appeals by assignment.

We also find no genuine issue of material fact regarding the amount actually paid by defendants to various subcontractors on the project. Defendants presented affidavit evidence that a total of $8,117,385.14 had been disbursed to contractors on the project, and that this amount was in excess of the contract price. Although plaintiffs claim that certain payments by defendants were made to the wrong parties, plaintiff failed to present documentary evidence to support such allegations, and thus did not show a genuine issue of material fact rebutting defendants' evidence that the total payments exceeded the agreed contract price. *McCart v J Walter Thompson USA*, 437 Mich 109, 115; 469 NW2d 284 (1991).

Plaintiffs argue that affidavits submitted by defendants in support of summary disposition were legally deficient. First, plaintiffs claim that the affidavit of Carl Bryson was based on inadmissible hearsay. We disagree. Bryson's affidavit was based on the records of MSHDA, a public body created by the MSHDA Act of 1966, MCL 125.1401 *et seq*., MSA 16.114(1) *et seq*., *Comstock Village Ltd Dividend Housing Ass'n v Comstock Twp*, 168 Mich App 755, 756; 425 NW2d 702 (1988). Under MRE 803(8), records from public agencies are excluded from the hearsay rule. Accordingly, the records are not hearsay. Nor is the affidavit defective for failure to attach the referenced records. Under MCR 2.119(B)(2)(c), public records need not be attached to an affidavit in which they are referenced. Finally, the lack of a statement in the affidavit indicating that Bryson was competent to testify regarding the contents of the MSHDA records was not prejudicial to plaintiffs and is, therefore, not grounds for reversal. *Hubka v Pennfield Twp*, 197 Mich App 117, 120; 494 NW2d 800 (1992), rev'd on other grounds, 443 Mich 864; 504 NW2d 183 (1993). Also, we find that the documents underlying the affidavit of Felicia Cheatum were admissible under the business records exception to the hearsay rule, MRE 803(6).

We note that the affidavit of William Meiselbach was admissible even though certain documents upon which the affidavit was based were unavailable. MRE 1004(1) states that "other evidence" of contents of a writing is admissible if the originals have been lost or destroyed, unless the proponent acted in bad faith. Here, there was testimony that the original documents had been destroyed in a fire and, therefore, there was no showing of bad faith. Plaintiffs argue that *Hamann v Ridge Tool Co*, 213 Mich App 252; 539 NW2d 753 (1995), requires a different result. In *Hamann*, we concluded that the defendant was prejudiced by plaintiff's expert's testimony regarding a defective product after the product was inadvertently lost. The instant case does not, however, involve a products liability issue. The lost records in the instant case were writings, other evidence of which is allowed under MRE 1004(1).

Affirmed.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello