

STATE OF MICHIGAN
COURT OF APPEALS

CHURCH & CHURCH, INC. d/b/a CHURCH'S
LUMBER YARDS,

UNPUBLISHED
December 20, 1996

Plaintiff-Appellant,

v

No. 182521
Oakland County
LC No. 93-463611-CK

RONALD B. GABEL, JUDITH A. GABEL, STATE
OF MICHIGAN DEPARTMENT OF LICENSING
AND REGULATION, HOMEOWNER
CONSTRUCTION LIEN RECOVERY FUND,

Defendants-Appellees.

Before: Sawyer, P.J., and Markman and H. A. Koselka,* JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and awarding defendants Ronald and Judith Gabel \$2,210 in sanctions and costs. We reverse.

This matter arises out of the construction of a deck addition. Defendants Ronald and Judith Gabel apparently contracted with Unlimited Woodworks, Inc in April 1992 for the addition of a deck to their home. The total contract price was \$7458. Plaintiff supplied and delivered the lumber for the Gabels' deck, pursuant to a promise to pay by Eric Andreasson, a licensed builder. Andreasson subsequently informed the Gabels that Unlimited would be unable to construct the deck. He executed a release that stated:

Unlimited Woodworks, Inc. hereby releases Ronald B. Gabel from any further contractual responsibility re "Quotation/Proposal" dated 4/20/92 Customer has made payments totaling \$3,729 for deck design, permits, and purchase of lumber, which is deemed to be his property. The balance due upon completion (\$3279) is

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

waived in view of the inability of Unlimited Woodworks, Inc to complete construction of the proposed deck.

We note that the exact relationship of Andreasson to Unlimited is unclear from the record. The Gabels contracted with another builder to complete the project.

Plaintiff alleged that Andreasson failed to pay for the lumber and subsequently brought an action against him. A judgment was entered against Andreasson, but he failed to satisfy it. On October 14, 1992, plaintiff filed a claim of lien in the amount of \$2713.32 plus interest against the Gabels for materials furnished on August 27, 1992. The Gabels alleged that they provided plaintiff with a copy of the contract with Unlimited, a copy of the release, proof of payment of \$3729 and an affidavit that complied with MCL 570.1203(1); MSA 26.316(203)(1) -- affidavit preventing attachment of lien on residential structure. On October 6, 1993, plaintiff filed suit to foreclose on its construction lien on the Gabels' home. In this complaint, plaintiff also brought suit against the State of Michigan Department of Licensing and Regulation, Homeowner Construction Lien Recovery Fund, alleging that it was entitled to recover the amount of the construction lien from the fund if § 203(1) prevented attachment of the lien to the Gabels' home.

The Gabels moved for summary disposition. They claimed that plaintiff's claim was barred by MCL 570.1107; MSA 26.316(107) because the contract, as modified by the release, had been paid in full and barred by § 203(1) because they had supplied plaintiff with the required affidavit. The Gabels also moved for costs and attorney fees on the basis that plaintiff's claim was frivolous. At a hearing, the trial court indicated that pursuant to a bench conference, it understood that the case would be dismissed with prejudice because it was properly an action against the fund and both sides agreed. On August 2, 1994, the trial court issued an order granting the Gabels' motion for summary disposition and granting them costs and sanctions totaling \$2210 (\$250 for a summary disposition motion hearing that had to be rescheduled due to plaintiff's untimely filing of a brief, \$1940 in legal fees for defending against plaintiff's frivolous claim and \$20 for the motion fee).

Plaintiff first argues that the trial court clearly erred in granting the Gabels' motion for summary disposition. A supplier is entitled to a lien in the amount of its contract on the interest the owner who contracted for the improvement has in the improved property. MCL 570.1107; MSA 26.316(107). Here, plaintiff qualifies as a supplier, assuming that Andreasson was the contractor with whom the Gabels contracted for the deck. See MCL 570.1106(5); MSA 26.316(106)(5). Section 203(2) provides that in the absence of a written contract pursuant to MCL 570.1114; MSA 26.316(114), the filing of an affidavit under § 203(1) creates "a rebuttable presumption that the owner or lessee has paid the contractor for the improvement" that can be overcome by "clear and convincing evidence to the contrary." Section 114 requires a contract to contain a statement relating to applicable licensing. The putative contract between the Gabels and Unlimited did not meet this requirement. Accordingly, the Gabels' filing of the affidavit pursuant to § 203(1) merely created a rebuttable presumption that remained untested due to the court's granting of defendants' motion for summary disposition. In addition, several questions of material fact remained unresolved, including the relationship of Andreasson to Unlimited and whether plaintiff in fact sold the materials to a "contractor" as defined by

MCL 570.1103(5); MSA 26.316(103)(5). Thus, the trial court erred in granting defendant's motion for summary disposition.

Plaintiff next argues that the trial court erred in sanctioning plaintiff on the basis of its finding that plaintiff's claim had no legal merit. This Court reviews trial court determinations whether a claim is frivolous for clear error. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1991). Here, the court's finding that plaintiff's claim against the Gabels was frivolous turned on its conclusion that plaintiff's claim was precluded by § 203(1). Because the trial court clearly erred in determining that § 203(1) precluded plaintiff's claim, we reverse its award of sanctions.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Stephen J. Markman

/s/ Harvey A. Koselka