

STATE OF MICHIGAN
COURT OF APPEALS

J.L. CONSTRUCTION COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v

FAIRVIEW CONSTRUCTION, INC., NATIONAL
BANK OF DETROIT, and K&S ENTERPRISES,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
January 28, 1997

No. 182744

Oakland Circuit Court
LC No. 90-400247-CK

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order awarding it \$4,397.80 in attorney fees pursuant to § 118(2) of the construction lien act, MCL 570.1118(2); MSA 26.316(118)(2). Defendants cross-appeal. We affirm.

Plaintiff, a subcontractor, brought this breach of contract action to recover \$83,997.23 it claimed it was owed by defendant Fairview Construction, a general contractor, for work completed on a condominium construction project. The matter proceeded to arbitration, and plaintiff was awarded \$29,580.50. Counterclaims brought by Fairview and defendant K&S Enterprises were denied. The trial court entered a judgment confirming the arbitration award, but Fairview failed to pay the judgment. To collect the judgment, plaintiff sought to foreclose on its construction lien; it also sought costs and attorney fees in the amount of \$38,340.72. The trial court concluded that the construction lien act authorizes an award of attorney fees incurred in pursuing foreclosure on a construction lien, but not those fees incurred in proving the underlying breach of contract claim. Accordingly, the court entered an order allowing plaintiff to foreclose on its construction lien and awarding plaintiff \$4,397.80 in attorney fees and \$252.87 in costs.

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

In its appeal, plaintiff contends that the trial court abused its discretion in its award of attorney fees. We disagree. Unlike *Sturgis Savings & Loan Ass'n v Italian Village, Inc*, 81 Mich App 577; 265 NW2d 755 (1978), upon which plaintiff relies, plaintiff's complaint in this case alleged a breach of contract in addition to seeking foreclosure. The contract claim sought recovery under the parties' agreement and was not related to the construction lien. "Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services and is separate and distinct from an action for breach of contract. The enforcement of the lien through foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose." *Dane Construction, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 292-293; 480 NW2d 343 (1991) (citations omitted). Furthermore, as noted by the trial court, plaintiff did not actively seek foreclosure on its construction lien until after arbitration was complete and Fairview refused to pay the judgment entered against it. Under these circumstances, therefore, we find no error in the trial court's decision to consider the breach of contract claim as a distinct action from the foreclosure proceedings, and to award plaintiff attorney fees under § 118(2) for the fees incurred in the foreclosure proceedings.

In their cross-appeal, defendants argue that § 118(2) violates equal protection and due process guarantees of the United States and Michigan Constitutions by providing special treatment to construction lien claimants as compared to defendants. Specifically, they contend that the statute unconstitutionally provides that a lien claimant may be awarded attorney fees if it is a prevailing party, but a prevailing defendant may be awarded attorney fees only if the lien claimant's action was vexatious. We reject the argument.

Statutes are presumed to be constitutional and the party challenging a statute's constitutionality has the burden of proof. *Ullery v Sobie*, 196 Mich App 76, 79; 492 NW2d 739 (1992). Unless the legislation creates a suspect class or affects a fundamental right, the legislation is reviewed using the rational basis test. *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992). Under the rational basis test, a statute will not be struck down if the classification scheme it creates is rationally related to a legitimate governmental purpose. *Id.* A rational basis for legislation exists when any set of facts is known or can be reasonably conceived to justify the scheme. *Wartella v East Detroit*, 161 Mich App 552, 556; 411 NW2d 751 (1987).

The purpose of the construction lien act is to protect the right of lien claimants to payment for wages or materials and to protect owners from paying twice for such services. *M D Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992). The Legislature could reasonably have believed that allowing all prevailing defendants to recover attorney fees would place a financial burden on lien claimants bringing a claim to enforce a lien which, although justified, is ultimately unsuccessful. Because such a situation provides a rational basis for the legislation, we decline to find § 118(2) unconstitutional.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Kathleen Jansen

/s/ Terrence R. Thomas