

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WICKES LUMBER COMPANY,

Plaintiff-Appellant,

v

GARY L. FLONES and PAMELA L. FLONES,

Defendants/Cross-Plaintiffs/  
Third-Party Plaintiffs-Appellees,

and

OLD KENT BANK OF PETOSKEY,

Defendant/Cross-Plaintiff-Appellee,

and

STUART ROCHESTER,

Defendant/Cross-Defendant-Appellee,

and

HOME OWNERS CONSTRUCTION LIEN  
RECOVERY FUND,

Defendant-Appellee,

and

CHEBOYGAN STRAITS AREA TITLE COMPANY,

Third-Party Defendant.

UNPUBLISHED

June 27, 1997

No. 189706

Cheboygan Circuit Court

LC No. 94-004031-CH

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Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a final judgment entered by the Cheboygan Circuit Court disposing of all remaining claims in this case in which plaintiff attempted to foreclose on a lien on the Flonas defendant's house. The lien arose from plaintiff's supply of materials to defendant Rochester, the general contractor for the construction of the house for the Flonas defendants. On appeal, plaintiff challenges the trial court's earlier grant of summary disposition, pursuant to MCR 2.116(C)(10), in favor of the Flonas defendants. We reverse, and remand for further proceedings.

In granting summary disposition, the trial court found that plaintiff had not complied with the requirement under MCL 570.1109(1); MSA 26.316(1) of giving notice of furnishing to the designee, defendant Cheboygan Straits Area Title Company, within 20 days of first supplying material. In fact, plaintiff never gave notice to the designee; instead, plaintiff served notice of furnishing on Rochester and on the Flonas. The parties do not dispute that plaintiff gave notice to Rochester and the Flonas more than 20 days after first supplying material and after the construction mortgage had already been discharged.

However, we believe that plaintiff's failure to give timely notice of furnishing to the designee is not automatically fatal to its claim. MCL 570.1109(6); MSA 26.316(6) provides, in relevant part:

The failure of a lien claimant, to provide a notice of furnishing within the time specified in this section shall not defeat the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant before the service of the notice of furnishing except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to either a contractor's sworn statement or a waiver of lien in accordance with this act for work performed or material delivered by the lien claimant.

Pursuant to this subsection, a subcontractor's delay in providing notice of furnishing will reduce his lien by the amount that the owner has already paid pursuant to a contractor's sworn statements or waiver of lien for the work before the notice was provided. *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 123; 560 NW2d 43 (1997). Here, defendants argue that plaintiff's lien rights were cut off under this provision because Cheboygan Straits Area Title Company made payments to Rochester on behalf of the Flonas' mortgagee, defendant Old Kent Bank of Petoskey, pursuant to documents submitted by Rochester.

While Rochester did submit a number of documents to the title company, these forms by virtue of their incompleteness do not automatically preclude plaintiff from enforcing its lien pursuant to MCL 570.1109(6); MSA 26.316(6). Although forms upon which defendants attempt to rely indicate on their face that they are for the purpose of representing to the owner that the above property is free from claims of construction liens, here we conclude that Rochester's failure to properly complete the forms,

including but not limited to his failure to sign and have several of the forms notarized, can be of benefit to plaintiff. Had Rochester properly completed the sworn statements or the purported partial unconditional waiver of lien rights by plaintiff, which plaintiff never signed, we would agree that plaintiff's failure to provide a proper notice of furnishing invalidates their lien. However, because neither of these conditions were met, we believe plaintiff should not be precluded from arguing that it is entitled to enforce its lien pursuant to MCL 570.1109(6); MSA 26.316(6). Accordingly, the trial court's grant of summary disposition was erroneous.

Given our decision that the trial court improperly granted summary disposition, we need not reach plaintiff's argument regarding the trial court's denial of its motion for rehearing or reconsideration.

The lower court decision granting summary disposition against plaintiff is reversed. In addition, the Fones' cross-claim against third-party defendant Cheboygan Straits -- which was dismissed by the trial court based on the grant of summary disposition against plaintiff -- is reinstated. This case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski