

STATE OF MICHIGAN
COURT OF APPEALS

PITSCH CONTRACTORS, INC.,

Plaintiff-Appellant,

v

M.A. MORTENSON COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED

July 15, 1997

No. 198386

Kent Circuit Court

LC No. 95-002818-CZ

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. We affirm.

I

Defendant was awarded a contract, as principal contractor, by the City of Grand Rapids, for construction of the Combined Sewer Overflow Control Retention Basin. Defendant, acting as principal contractor, entered into a contract with James P. Barkman, Inc. (Barkman), as a subcontractor, for the excavation of the site. Barkman contracted with plaintiff to haul and dispose of contaminated soil from the site. An irrevocable letter of credit was issued by Citizens Bank, in favor of defendant, for an account held by Barkman.

Plaintiff completed the work it was to perform, and subsequently billed Barkman \$910,279. Barkman disputed the bill and paid plaintiff only \$503,370. Plaintiff filed an action against Barkman, but three days before trial, Barkman filed bankruptcy; therefore, plaintiff was unable to recover the money from Barkman.

Plaintiff filed the instant action against defendant, alleging that defendant assumed the duty to secure payment for all parties completing work on the project, and that in furtherance of that duty, defendant secured the letter of credit from Barkman. Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's remedy lay in its statutory claim against defendant's payment and performance bond. MCL 129.201-203; MSA 5.2321(1)-(3). Defendant

further argued that plaintiff's claim is one to compel defendant to answer for the debt of another and is thus barred by the statute of frauds. MCL 566.132(1)(b); MSA 26.922(1)(b). The trial court granted defendant's motion.

II

Plaintiff argues that the trial court erroneously granted summary disposition in favor of defendant because defendant assumed a duty to insure that plaintiff received payment for work it performed on the project by obtaining the letter of credit. We disagree.

A trial court's decision to grant a motion for summary disposition is reviewed de novo by this Court to determine if the defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documents, and construes the evidence in favor of the nonmovant. *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995).

Defendant is correct that on public works projects protection for subcontractors, such as plaintiff, is afforded by a statute that requires principal contractors, like defendant, to obtain payment and performance bonds. MCL 129.201; MSA 5.2321(1). Because materialmen and contractors cannot obtain a mechanics' lien on a public works project, the purpose of the payment bond is to protect "claimants . . . supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in the contract." MCL 129.203; MSA 5.2321(3). *Kammer Asphalt Paving Co, Inc. v East China Twp Schools*, 443 Mich 176, 181-182; 504 NW2d 635 (1993). The statute requires that claimants seeking to make a claim against the bonds satisfy certain notice procedures. MCL 129.207; MSA 5.2321(7). Strict compliance with these procedures is required or recovery will be denied. *Square D Environmental Corp v Aero Mechanical, Inc*, 119 Mich App 740, 744; 326 NW2d 629 (1982). Plaintiff failed to assert a timely claim against the payment bond; therefore, plaintiff filed this negligence action, arguing that defendant negligently released the letter of credit, which extinguished the only source of funds available to satisfy the Barkman debt.

However, plaintiff's claim must fail because it is based on the erroneous conclusion that by obtaining a letter of credit, defendant was insuring that Barkman's subcontractors, including plaintiff, would be paid. Plaintiff inaccurately interprets the purpose of the letter. The letter of credit was solely for the benefit of defendant. In addition, if, as plaintiff contends, defendant promised to pay Barkman's debts, such a promise must be in writing and signed with an authorized signature by defendant. MCL 566.132(1)(b); MSA 26.922(1)(b); *Roulo v Automobile Club of Mich*, 386 Mich 324, 328-329; 192 NW2d 237 (1971). There was no such writing in the present case. The trial court did not err by granting defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Maureen P. Reilly