

STATE OF MICHIGAN
COURT OF APPEALS

VISUAL RESTORATION CONSTRUCTION,
INC.,

UNPUBLISHED
June 16, 2009

Plaintiff/Counter-Defendant-
Appellee,

v

No. 282925
Wayne Circuit Court
LC No. 05-524309-CK

DERRICK DENNIS and TOI DENNIS,

Defendants/Cross-Defendants-
Appellants,

and

D & S HOME IMPROVEMENT, INC.,

Defendant/Cross-Plaintiff/Counter-
Plaintiff-Appellee,

and

COUNTRY WIDE HOME LOANS, INC.,
TELECOM CREDIT UNION, and
DEPARTMENT OF CONSUMER INDUSTRY
SERVICES,

Defendants.

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendants Derrick Dennis and Toi Dennis appeal as of right from a judgment in favor of plaintiff Visual Restoration Construction, Inc. (“Visual Restoration”), on its claim for a construction lien under the Construction Lien Act, MCL 570.1101 *et seq.* (“CLA”). We affirm.

I. Facts and Proceedings

This case arises from work performed on the fire-damaged home of defendants Derrick and Toi Dennis. After their home was damaged by fire, the Dennises contracted with defendant D & S Home Improvement, Inc., to perform the repair work approved by the Dennis' homeowners' insurer, State Farm. The Dennises also worked out an agreement with D & S to perform upgrades to the house unrelated to the fire damage.

At some point during the repair process, D & S contracted with Visual Restoration to perform the remainder of repairs for a total price of \$80,000. The agreement was in writing and specified what repairs needed to be completed. Visual Restoration was never paid for the work it performed, so after filing a construction lien in the amount of approximately \$80,000, it filed this breach of contract lawsuit against D & S, the Dennises and others seeking to foreclose on the lien. After several responsive pleadings between the parties, rulings by the trial court, a stipulated consent order, and a combined jury and bench trial, Visual Restoration was awarded \$80,000 against D & S, and D & S was awarded \$80,000 against the Dennises for breach of contract. Additional amounts for interest, case evaluation sanctions and attorney fees were added to the final judgment, from which the Dennises now appeal.

II. Analysis

The Dennises first argue that Visual Restoration was not entitled to judgment on its construction lien claim because it failed to comply with MCL 570.1113(2) and MCL 570.1110 and, therefore, did not perfect its lien. However, we conclude that this issue is waived for three reasons: (1) despite a request from this Court, the Dennises failed to provide a transcript of the March 2, 2007, hearing at which this issue was addressed, *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005); (2) the Dennises entered into a consent order that provided that "Plaintiff's lien against the property . . . is perfected," *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986); and (3) at a posttrial hearing, appellant Toi Dennis expressly conceded, "[Plaintiffs] said that the lien was perfected and I do not have a problem with that, it was perfected under the Michigan construction lien act," *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006).

For their next argument the Dennises assert that the trial court erred by failing to instruct the jury on a clear and convincing standard of proof as specified in MCL 570.1203(2). Because the Dennises did not request such an instruction below, this issue is not preserved. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). We review unpreserved claims of instructional error for plain error affecting substantial rights. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; 660 NW2d 361 (2003). The presumption of payment created by MCL 570.1203(2), and the clear and convincing evidence standard necessary to overcome that presumption, is applicable only to construction lien claims under the CLA. In this case, however, only common-law claims for breach of contract were submitted to the jury. The jury did not consider any claim under the CLA. Thus, there was no plain error in failing to instruct the jury in accordance with MCL 570.1203(2).

The final argument on appeal is that the trial court erred in denying the Dennis' motion for a directed verdict with respect to any claim for recovery in excess of \$32,646. This Court reviews de novo a trial court's decision on a motion for a directed verdict, *Coble v Green*, 271 Mich App 382, 385; 722 NW2d 898 (2006), viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party to determine if the evidence fails to establish

a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In determining whether a question of fact existed that would preclude a directed verdict, this Court draws every reasonable inference in favor of the nonmoving party, while recognizing the trial court's superior opportunity to observe witnesses. *Coble, supra* at 386.

The amount of a construction lien should be for the cost of labor and materials actually incurred for the project. See *Tempo, Inc v Rapid Electric Sales & Service, Inc*, 132 Mich App 93, 104; 347 NW2d 728 (1984). Although Visual Restoration presented evidence of expenses of approximately \$32,000, there was also evidence that it expended significant additional labor that was not reflected in that sum. Moreover, the contract was for \$80,000, and there was evidence that 90 percent of the contract work was completed, but Visual Restoration did not receive any payment. Viewing the evidence in a light most favorable to Visual Restoration, the trial court properly denied the Dennis' motion for a directed verdict with respect to any amount in excess of \$32,646.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray