# STATE OF MICHIGAN

# COURT OF APPEALS

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GENZINK PLUMBING, INC.,

Plaintiff-Appellee,

v

BANK WEST,

Defendant-Appellant,

and

BARTON J. KALKMAN and JOAN E. KALKMAN, d/b/a BARTON J. KALKMAN MBI, SUMMIT REALTORS, INC., d/b/a SUMMIT PROPERTIES, INTERIOR IMAGES LTD, LEE WINNER, d/b/a WESTERN MICHIGAN DECORATORS, A.R.T. FINANCIAL SERVICES, d/b/a FRANKLIN MORTGAGE, METROPOLITAN TITLE COMPANY, BOERS & VANDENBRAND, T.C. FLOOR COVERING, INC., and DEPARTMENT OF TREASURY,

Defendants.

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UNPUBLISHED
April 29, 2003

No. 234110
Ottawa Circuit Court
LC No. 99-033624-CZ

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In this action to foreclose on a contractor's lien under the Construction Lien Act, MCL 570.1101, *et seq*., defendant Bank West appeals by right from a judgment entered in favor of plaintiff Genzink Plumbing, Inc., in the amount of $21,742.75. We affirm.

Defendant was the construction lender for Barton and Joan Kalkman and had a mortgage lien on their property. The Kalkmans' plumbing subcontractor, Genzink, had a contractor's lien on the property. As payment for initial plumbing service, specifically, water service installation that Genzink provided, the Kalkmans and Genzink executed a "full unconditional waiver" of liens form. Genzink asserts that this form was modified to a partial waiver of liens when it wrote in the following description of the service and specific amount: "plumbing- water service, $1050." When the Kalkmans failed to pay their subcontractors and defaulted on defendant's

loan, defendant foreclosed on the Kalkmans' property and succeeded to the interests of the Kalkmans, subject to all applicable liens. Genzink filed a claim of lien to recover the balance owed to it for the remainder of its plumbing work. Following a bench trial, Genzink's lien claim against defendant was resolved in favor of Genzink. The trial court awarded Genzink the full amount of its lien on the Kalkman property, and also used its discretion to award attorney fees.

The issue on appeal is whether the waiver form executed by Genzink operated as a full and unconditional waiver of Genzink's lien rights, or as a partial waiver of lien rights limited to the amount expressly written on the waiver form. If the waiver form operated as a full unconditional waiver of liens, then Genzink had released all its lien rights against the property and defendant owed Genzink nothing. However, if the waiver form operated only as a partial waiver of lien rights, limited to the amount signified on the form, then Genzink released only its lien rights against the property in that amount and thus still had a valid lien on the property for the remainder of the amount owed for its plumbing work. On appeal, defendant argues that the execution of the statutory full unconditional lien waiver form was, as a matter of law, a full waiver of Genzink's lien rights. We disagree.

We review findings of fact in a bench trial for clear error. MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support the finding, a review of the entire record leaves us with a definite and firm conviction that the trial judge made a mistake. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). The standard for appellate review of a trial court's conclusions of law is de novo. *Id*.

Subsection 115(2) of the Construction Lien Act provides that "[a] lien claimant who receives full payment for his or her contract shall provide to the owner, lessee, or designee a full unconditional waiver of lien." MCL 570.1115(2). Regarding the form of such waivers, MCL 570.1115(8) provides:

> The following forms shall be used in substantially the following format in executing waivers of construction liens:
>
> ***
>
> (c) FULL UNCONDITIONAL WAIVER
>
> My/our contract with (other contracting party) to provide _____ for the improvement of the property described as: _____ having been fully paid and satisfied, all my/our construction lien rights against such property are hereby waived and released.
>
> _____
> _____
> (signature of lien claimant)
>
> Signed on: (date) Address: _____
> _____
>
> Telephone: _____

DO NOT SIGN BLANK OR INCOMPLETE FORMS.
RETAIN A COPY.

The burden of proof regarding the validity of a lien waiver is on the party who seeks to rely on that waiver. *Durant Constr, Inc v Gourley*, 125 Mich App 695, 699; 336 NW2d 856 (1983).

Defendant relies primarily on *Durant*, *supra*, where this Court held that a full unconditional lien waiver executed by a contractor operated as a complete waiver of all past and future liens, despite the contractor's claim that the waiver was intended to apply only to past work. *Id*. at 697, 700. This case is, however, factually distinguishable from *Durant*. Most notably, the "full unconditional waiver" at issue here was not clear and unequivocal on its face, but rather had been modified in a manner showing that its intent was more limited. Moreover, the evidence at trial demonstrated that the Kalkmans and Genzink both understood and intended that the July 7, 1997, full unconditional waiver of lien apply only to the $1050 owed to Genzink for the water service installation it provided. Indeed, there was evidence at trial that it was Mr. Kalkman, not Genzink, who used the wrong statutory form to draft the initial waiver, and that Genzink, with Mr. Kalkman observing, modified the waiver document to state that it pertained to the $1050 payment for the water service installation.

Furthermore, defendant knew or should have known that additional plumbing work needed to be completed on the Kalkman project, and thus should have known that the waiver was not a full unconditional waiver as to those services, implicitly excluded from the completed document's coverage. The Kalkmans provided defendant with inaccurate sworn statements meant to show payments to subcontractors in support of each draw request. However, even those statements should have suggested to defendant that additional plumbing work still needed to be completed.

In sum, there was evidence here showing that all parties knew or should have known that the waiver was only intended to be partial and that the clear intent of the Kalkmans and Genzink was that the waiver applied only to the service identified and the amount indicated. The present case is thus analogous to *Sturgis S & L Ass'n v Italian Village, Inc*, 81 Mich App 577; 265 NW2d 755 (1978). In *Sturgis*, the lien claimant signed an unconditional full waiver of lien that contained the following language: "The undersigned hereby waive . . . any and all claims or right of lien which the undersigned now have or may have hereafter . . . for labor rendered, material supplied." *Id*. at 579-580. Just as in the present case, the defendant bank argued that this waiver of lien not only released the liens that existed as of the date of the waiver, but also released all future liens. However, noting the past tense of the words "rendered" and "supplied," this Court rejected the defendant's interpretation of the language. *Id*. at 580. It further stated:

> Since plaintiff was aware that defendant was doing additional work on the premises and the parties did not discuss the possibility of waiving lien rights for future work, the trial court was not clearly erroneous in finding from this circumstantial evidence that plaintiff's agents knew that the defendant did not intend to waive his rights to liens for future work. [*Id*. at 583].

Even though the waiver referred to lien claims that "the undersigned now have or may have hereafter," this Court reasoned that "[a]fter reviewing all the evidence, one cannot say that the trial court was clearly erroneous in finding that the plaintiff had not met his burden of showing

that the waiver was clear and unequivocal as to liens for work to be done in the future." *Id*. at 581. As in *Sturgis*, the trial court here did not clearly err in finding that the full unconditional waiver form was modified and limited to the amount specifically indicated for the service specifically described.[1]

Defendant also argues that the trial court erred in construing any ambiguity in the waiver form against defendant, when the waiver was not prepared by defendant. Ambiguous terms in a printed form are to be strictly construed against the preparer. *Id*. at 580. The trial court correctly ruled that any ambiguity in the waiver should be construed against the Kalkmans and their successors in interest, as it was Mr. Kalkman who prepared the full unconditional waiver form and presented it for signature. In any event, the intent that the waiver was partial is evidenced by the specifications of service and amount placed by Genzink on the form. The trial court's finding in this regard was not clearly erroneous.

Defendant further argues that the trial court erred in placing the burden on defendant to look behind the statutory sworn statements and full lien waivers to confirm their accuracy, and that to do so would defeat the purpose of the legislative scheme. Defendant asserts that the Legislature has created a statutory scheme in which the owner or builder and the contractors are required to execute statutory forms on which the banks and disbursing agents may then rely. Defendant's argument is, at best, exaggerated. Defendant did not have to go out of its way to investigate the accuracy of the sworn statements or the lien waiver in order to discover Genzink's intent to limit the waiver. The face of the completed waiver form itself showed that to be the case. Furthermore, inaccurate or not, Mr. Kalkman's sworn statements indicated that much of the plumbing work was still to be completed.

Finally, while acknowledging that the statute applicable here allows reasonable attorney fees to plaintiff as the prevailing party, MCL 570.1118(2), and that the trial court's award of such fees is reviewed for an abuse of discretion, *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 133; 560 NW2d 43 (1997), defendant cites no authority by which we might conclude that awarding attorney fees to plaintiff was an abuse of discretion here. The statute does not require, as defendant implies, that attorney fees are appropriate only when there is no colorably valid defense against or attempt to settle a lien claim.

We affirm.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

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[1] Defendant argues that Genzink could have made its intent more clear by adding the words "through the above date" or "in the above amount" to the form. However, whether Genzink could have made its intent more clear is of no matter. What matters is whether the trial court's finding is clearly erroneous with regard to the evidence that was presented.