STATE OF MICHIGAN

COURT OF APPEALS

DELAGRANGE REMODELING, INC., Plaintiff/Counter Defendant-Appellant,	UNPUBLISHED March 24, 2005
V	No. 250022 Branch Circuit Court
DAVID ANTHONY and HOLLY ANTHONY, Defendants/Cross-Defendants-Appellees.	LC No. 01-003210-CH

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants in this action to recover costs incurred in the construction of defendants' summer home. We affirm.

I

The genesis of this case is set forth in a companion case, *Anthony v Delagrange Remodeling, Inc,* unpublished opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 252644), in which the Anthonys, homeowners-defendants in this case, were awarded a judgment of $461,860.29 against defendant Delagrange Remodeling, and three other defendants,[1] following a bench trial.

> In the summer of 1999, plaintiffs, residents of Illinois, purchased two lakefront lots on Lake George in Branch County and thereafter entered into an oral agreement with defendant Delagrange Remodeling through its principals, defendants Gregory Dalman and Dennis Yoder, for construction of a summer home.[2] The parties agreed that the home would be constructed on a cost-plus

[1] The Anthonys proceeded against Delagrange Remodeling, its principals, Gregory Dalman and Dennis Yoder, and Delagrange Homes, a related corporation co-owned by Yoder, which formerly employed Dalman.

[2] Although Yoder was the majority shareholder and president of Delagrange Remodeling, Dalman managed the day-to-day operations. Dalman negotiated the contract with plaintiffs and oversaw the construction of the home with minimal involvement from Yoder.

basis, whereby Delagrange Remodeling would invoice plaintiffs each month for the cost of work performed by subcontractors plus a twenty percent (later, eighteen percent) markup. Plaintiffs paid a deposit of $60,000 in August 1999, and construction began in the fall.

Following several months of construction, in May 2000, the parties reached an impasse when plaintiffs refused to continue paying invoiced monthly charges and Delagrange Remodeling ceased construction. At that point, plaintiffs claimed that they had paid the full cost of construction as agreed upon, approximately $668,000. However, Dalman claimed there was no agreed upon price and informed plaintiffs that final invoices would bring the cost to approximately $970,000.

Plaintiffs secured new contractors to complete the home and filed the instant action to recover damages. Defendants filed a countercomplaint for damages based on breach of contract, quantum meruit/quantum valebant, and foreclosure of a construction lien filed by Delagrange Remodeling. The trial court granted plaintiffs' motion to dismiss the countercomplaint on the ground that Delagrange Remodeling was not a licensed residential builder in Michigan and therefore was barred from filing a claim for compensation for home construction services, pursuant to MCL 339.2412.[ ]

In dismissing the defendants' countercomplaint in the first action on January 29, 2001, the trial court ordered that Delagrange Remodeling was not prohibited from commencing separate proceedings to allege appropriate claims, such as valid claims based on the assignment of liens filed by subcontractors involved in the construction of defendants' home. On March 15, 2001, plaintiff filed this action seeking damages against defendants for breach of contract (Count I), quantum meruit/quantum valebante (Count II), and foreclosure of assigned construction lien (Count III), on the basis of assigned lien claims of material suppliers and subcontractors. Plaintiff also claimed a breach of fiduciary duty (Count IV) and promissory estoppel (Count V), on the basis of duties owned to plaintiff.

Plaintiff subsequently obtained two successive defaults in this action, each of which was set aside by the trial court. The first default, entered May 24, 2001, was set aside for lack of jurisdiction based on improper service of the summons and complaint; however, the trial court ordered issuance of an additional summons effective until July 7, 2002. Although defendants also raised an issue of improper service concerning the second default, the trial court found service was proper. The court nevertheless set aside the default on the basis of good cause and a meritorious defense. Following a hearing on June 19, 2003, the court granted defendants' motion for summary disposition, dismissing plaintiff's claims.

II

Although plaintiff raises numerous issues on appeal, the essential questions for our resolution are whether the trial court erred in setting aside the defaults and in subsequently granting summary disposition in favor of defendants. Given the arguments and evidence, we find no error.

A

At the outset, we note that plaintiff's claims for breach of fiduciary duty[3] and promissory estoppel were properly dismissed in light of plaintiff's status as an unlicensed residential contractor in Michigan. As discussed in the companion case, *Anthony, supra,* slip op, pp 12-13, plaintiff may not seek compensation or equitable relief in regard to the construction undertaken as an unlicensed builder:

> The Michigan residential builders act, MCL 339.2412(1), provides, in relevant part:
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> "[A] residential builder ... shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract."
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> The residential builders act, MCL 339.2412, bars an unlicensed builder from seeking compensation on a residential construction contract. *Stokes v Millen Roofing Co,* 466 Mich 660, 662, 664; 649 NW2d 371 (2002); *HA Smith Lumber,* [*& Hardware Co v Decina,* 258 Mich App 419, 436; 670 NW2d 729 (2003) vacated in part on other grounds, ___ Mich ___; 689 NW2d 227 (2004)]. This prohibition extends to counterclaims as well as complaints, and includes damages for labor and materials, enforcement of a construction lien, and equitable relief.[4] *Stokes, supra* at 665-667, 673; *Parker v McQuade Plumbing & Heating, Inc,* 124 Mich App 469, 471, 335 NW2d 7 (1983). The prohibition also applies to suits between subcontractors and contractors. *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476, 477-478; 516 NW2d 99 (1994). An unlicensed subcontractor may not recover compensation if the contractor also was unlicensed. *Id*. at 478.
>
> It was undisputed that defendant Delagrange Remodeling is an Indiana Corporation and was not licensed as a residential builder in Michigan. Defendants have presented no convincing argument or authority to support a conclusion that they were entitled to maintain a counterclaim on the basis of the assignment of two subcontractor lien claims and thereby "defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction." *Stokes, supra* at 673. We find no error in the trial court's dismissal of defendants' counterclaim.

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[3] Plaintiff's breach of fiduciary duty claim alleged that "[i]n contracting with interested parties and others, Delagrange did so on behalf of the Anthonys as their agent."

[4] A narrow exception applicable in cases in which the plaintiff seeks equitable relief does not apply in this case. *Stokes, supra* at 669-670.

Section 2412 disallows an action for "compensation," which includes the reasonable value of materials conveyed. *Id*. at 666. Further, equity may not be invoked to avoid the application of MCL 339.2412(1). *Stokes, supra* at 671-672. Regardless of how unjust the statutory penalty might seem, an equitable remedy may not be used to avoid the harsh result of an unambiguous, validly enacted legislative decree. *Id*.; *HA Smith Lumber, supra* at 437. The trial court did not err in dismissing Count IV (Breach of Fiduciary Duty) and Count V (Promissory Estoppel) of plaintiff's complaint.

B

Defendants moved for summary disposition of Counts I, II, and III pursuant MCR 2.116(C)(10). This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

This Court reviews a trial court's ruling on a motion to set aside a default or default judgment for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id*.; citations omitted. "Where there has been a valid exercise of discretion, appellate review is sharply limited." *Id*.

III—Jurisdiction

Plaintiff claims that the trial court erred in setting aside the defaults because the court acquired continuous jurisdiction over defendants upon the filing of the complaint and the countercomplaint in the companion case, and the court continues to hold jurisdiction. For purposes of personal jurisdiction, "[a]ny subsequent action based on the original judgment, even if brought pursuant to a new complaint, is deemed to be a continuation of the original action so that jurisdiction is proper in the court that rendered the original judgment." *Ewing v Bolden*, 194 Mich. App. 95, 101; 486 NW2d 96 (1992); see also *McGraw v Parsons*, 142 Mich App 22, 24-25; 369 NW2d 251 (1985).

We decline to address plaintiff's claim of error with regard to the first default. At the December 5, 2001, hearing on the motion to set aside the first default and dismiss plaintiff's claims, plaintiff's counsel himself suggested that the court set aside the default and permit defendants to answer the complaint. A party may not take a position in the trial court and subsequently seek redress in the appellate court on the basis of a contrary position. *Phinney v Perlmutter,* 222 Mich App 513, 544; 564 NW2d 532 (1997). Further, plaintiff has failed to show that any error was not harmless since plaintiff subsequently obtained a second default, which the court also set aside, and which plaintiff also challenges on appeal.

In any event, we find no error in the court's conclusion that jurisdiction was lacking because plaintiff failed to comply with MCR 2.107(B)(1)(a). The court rule requires that the original service of the summons and complaint be made on the party as provided by MCR 2.105. It was undisputed that there was no service upon defendants. A default or default judgment is properly vacated on the basis of defective service of process; the defective service deprives the trial court of personal jurisdiction over the defendant and the trial court is, therefore, without legal authority to render a judgment. MCR 2.603(D)(1); *CR Mechanical, Inc v Temp-San Corp*, 394 Mich 102, 103; 228 NW2d 784 (1975); *Dogan v Michigan Basic Prop Ins Ass'n,* 130 Mich App 313, 320; 343 NW2d 542 (1983).

With regard to the June 19, 2003 hearing, plaintiff has failed to show how this argument is germane to the court's decision. The court found that service was proper, and the issue of jurisdiction is not appealed. This issue is deemed abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). An appellant may not merely assert an error and then leave it up to the Court to discover and rationalize the basis for his claims or search for authority to either sustain or reject his position. *Id*. Nor may a party give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

IV—Default

Defendant also claims that the trial court erred in setting aside the second default on the basis of good cause and plaintiffs' affidavit showing a meritorious defense. Plaintiff argues that defendants failed to show good cause or to allege facts with sufficient particularity to state a meritorious defense. We find no abuse of discretion.

A motion to set aside a default or default judgment shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 223; 600 NW2d 638 (1999). Good cause sufficient to set aside an entry of default includes (1) a substantial defect or irregularity in proceedings upon which the default was based, or (2) a reasonable excuse for failing to comply with the requirements that created the default. *Id.* at 233.

A trial court's ruling on a motion to set aside a default must be accorded great deference. *Id.* at 228. This Court may not substitute its judgment for that of the trial court. *Id*. In light of these standards, we find no basis for reversing the trial court's decision.

The trial court set aside the default on the basis of defendants' arguments that they had presented good cause and affidavits of a meritorious defense. With respect to good cause, defendants argued that David was not properly served and therefore the court lacked jurisdiction over him. It was undisputed that the process server left the summons and complaint with Holly for David because David was out on the lake when the process server arrived at defendants' home. Defendants argued that under these circumstances David was not properly served under MCR 2.105(A), which requires a physical delivery of the summons and complaint to the party. Plaintiff responded that the process server observed David pick up the complaint and read it. The court found that service was adequate, although "barely" under the court rules. Under these circumstances, we find no basis for disturbing the trial court's finding of good cause.

Concerning Holly, defense counsel stated that he mistakenly understood that she was served out of state in Illinois where she resides, and therefore he prepared a response based on the permissible 28-day period rather than the applicable 21-day period to answer. Plaintiff filed a default on the twenty-first day. Counsel acknowledged that delay by an attorney is not normally good cause, but under the circumstances of this case, given the underlying litigation, the overlap of issues, and the lack of prejudice to plaintiff, good cause should be found.

Defendants also argued that there was a meritorious defense. That is, their affidavits averred that they had no direct dealings with the subcontractors and material suppliers, that the lien claims were not properly executed, and the validity of the lien claims was questionable. Defendants provided supporting documentation and a detailed analysis of the defects in the lien claims. Further, they argued plaintiff would suffer no prejudice if the defaults were set aside and manifest injustice would result if the defaults were permitted to stand.

In light of the circumstances, we cannot conclude that the court abused its discretion in setting aside the default. We find unpersuasive plaintiff's argument that defendants' affidavits were insufficient because they essentially state conclusions of law without averring relevant facts. The affidavits sufficiently responded to plaintiff's claims. Even if the good cause shown with respect to Holly is not strong, considered with the meritorious defense shown, we find no abuse of discretion. While a showing of good cause is not excused if a meritorious defense is shown, the strength of the defense affects the good cause showing that is necessary. *Alken-Ziegler, supra* at 233. Moreover, defendants acted promptly in responding to the summons and complaint, and the delay caused by counsel was minor. *Bednarsh v Winshall,* 364 Mich 113, 114; 110 NW2d 729 (1961).

V—Summary Disposition

Plaintiff's complaint alleged claims of breach of contract (Count I), quantum meruit/quantum valebante (Count II), and foreclosure of assigned construction liens (Count III), all of which were based on an assignment of claims of subcontractors and material suppliers. The court granted summary disposition of these claims.

With regard to the foreclosure of the construction liens, the trial court concluded that the liens were defective because they failed to conform to requirements of state law, MCL 570.1111. They were acknowledged, but not sworn.[5] Further, some of the liens were not filed within the

[5] Although defendants argue, and the court concluded, that this shortcoming is fatal to the asserted lien claims in this case, we note that MCL 570.1111(2) requires that the claim of lien be in "substantially" the form indicated, which includes being "[s]ubscribed and sworn." Whether the acknowledgements in this case substantially conform to the form apparently was not addressed below and is not raised by plaintiff on appeal. See *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 510; 667 NW2d 379 (2003) (a statement of construction lien not sworn before a notary, MCL 570.1110(8), does not defeat the notice purpose of the statement; it still gives the owner notice of who the subcontractors are and the amount owing to each for the materials and labor supplied).

requisite ninety days of the last date of furnishing. The liens that were timely filed were not protected by filing suit within the one-year time requirement.

With regard to the contract claims, the court found that plaintiff was not in a position to seek judicial redress for the claims of subcontractors. The court concluded that the evidence did not establish a contract between defendants and the subcontractors and suppliers. Rather, defendants' contract was with plaintiff as the general contractor. Further, although defendants certainly would have understood that the subcontractors and suppliers had to be paid, defendants had no direct contact with them. Defendants did not engage their services and did not promise specifically to pay their charges. Rather, defendants understood that plaintiff would make arrangements and pay for the services or supplies received.

With regard to the quantum meruit claim, the court concluded that there was no basis for a claim of unjust enrichment. The court noted that there was no misunderstanding regarding the contract beyond the promise to pay, which the court found defendants had done.

On appeal, plaintiff alleges error with respect to several theories underlying the remaining three counts. We find no alleged error that warrants reversal of the grant of summary disposition.

A. Lien Foreclosure

Plaintiff argues that the trial court erred in applying the statute of limitations defense to the foreclosure of lien actions and that the court erred in dating the foreclosure of lien limitations period as ending June 15, 2001. We reject these arguments. Plaintiff has failed to present any cogent argument warranting appellate relief. An appellant may not merely assert an error and then leave it up to the Court to discover and rationalize the basis for his claims or search for authority to either sustain or reject his position. *Id*. Nor may a party give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp, supra* at 99.

First, plaintiff argues that the limitations period defense is "a non-issue" because the statute of limitations was tolled by the filing of the "initial" counterclaim dated October 10, 2000, and the "second" complaint dated March 15, 2001. Plaintiffs' cursory argument with little or no citation to authority is insufficient to determine whether the trial court erred in concluding that this action to foreclose the liens was filed within one year of the recording of those liens that were otherwise valid and timely recorded.

MCL 570.1117(1) provides:

> Proceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded.

The failure to bring a foreclosure action within the one-year period effectively discharges and renders ineffective the claim of lien. MCL 570.1128. Likewise, plaintiff has failed to adequately argue the merits of its claim with respect to the filing of the counterclaim in the companion case.

Second, plaintiff argues that the court erred in dating the end of the foreclosure of lien limitations period at June 15, 2001, because a pending lien claim action ran from October 10, 2000 to January 29, 2001. Plaintiff apparently contends that the trial court should have included in the tolling period, that period during which the counterclaim was pending in the companion case because it was a lien claim action. Again, plaintiff's cursory argument is insufficient to evaluate the merits of this position or to determine whether plaintiff was prejudiced by any alleged error.

"Where a prior action has ended without an adjudication on the merits, the tolling statute is applicable to a renewed action by a different plaintiff who represents the same interest as the original plaintiff." *Federal Kemper Ins Co v Isaacson,* 145 Mich App 179, 183-184; 377 NW2d 379 (1985). "A dismissal without prejudice is not an adjudication on the merits and, therefore, the tolling statute applies." *Yeo v State Farm Fire & Cas Ins Co,* 242 Mich App 483, 484; 618 NW2d 916 (2000). In this case, however, the lien foreclosure action in plaintiff's countercomplaint in the companion case was based on plaintiff's own lien claim, not the assigned lien claims of the subcontractors and suppliers. As an unlicensed builder, plaintiff was barred from pursuing a foreclosure of its lien; thus, that action could not be "renewed." Further, plaintiff has failed to properly argue its contention that the court lacked jurisdiction to dismiss lien claims. Plaintiff cites no authority to support this contention and fails to identify the particular valid lien claims referenced. Moreover, this issue was not raised in the statement of the questions presented. An argument that is not raised in the appellant's statement of the issues presented is unpreserved for appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

B. Contract Claims

Plaintiff argues that defendants are liable on the basis of a unilateral contract with the subcontractors and suppliers, and because the subcontractors and suppliers are third-party beneficiaries of the contract between plaintiff and defendants. We are unpersuaded that these arguments provide a basis for reversing the grant of summary disposition.

We concur with the trial court that, based on the evidence, no express contract existed between defendants and the subcontractors and suppliers. Defendants' monthly receipt of invoices and acceptance of materials from the subcontractors and suppliers did not ripen into a unilateral contract.[6] We also agree with the court's conclusion that the subcontractors and suppliers were not entitled to pursue their contract claims on a third-party beneficiary theory.

As a general rule, subcontractors or suppliers are held not to be the third-party beneficiaries of the contract between the general or supervisory contractor and the project owner. *Dynamic Const Co v Barton Marlow Co,* 214 Mich App 425, 428; 543 NW2d 31 (1995). Plaintiff has shown no justification for an exception to this general rule.

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[6] A unilateral contract is one in which the promisor receives no promise in return as consideration. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 138-139 n 9; 666 NW2d 186 (2003).

MCL 600.1405 provides in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Only intended third-party beneficiaries, not incidental beneficiaries, may enforce a contract under § 1405. *Koenig v South Haven,* 460 Mich 667; 680, 694; 597 NW2d 99 (1999); *Greenlees v Owen Ames Kimball Co,* 340 Mich 670, 676; 66 NW2d 227 (1954); "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof." *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993), quoting *Greenlees, supra*. "Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract." *Dynamic Const, supra* at 428. Whether the parties to the contract intended to make a third person a third-party beneficiary should be examined under an objective standard. *Dynamic Const, supra* at 427.

Defendants contracted with plaintiff for construction of the home, and payment for services was made to plaintiff. The construction contract was not intended to directly benefit the subcontractors and suppliers. There was no express promise to act for their benefit; any benefit to them was indirect. The cost-plus payment arrangement was a method of payment for the benefit of defendants, and to a lesser extent, plaintiff; it was not a promise to perform directly for the benefit of the suppliers of those "costs." As incidental beneficiaries, the subcontractors and suppliers are not entitled to maintain an action on the contract.

C. Quantum Meruit

Plaintiff argues that an implied contract arose between defendants and the subcontractors and suppliers and therefore the equitable doctrine of quantum meruit requires that defendants pay the subcontractors and suppliers the reasonable value of services performed for defendants. We disagree.

A contract will only be implied in situations where "there is no express contract covering the same subject matter." *Barber v. SMH (US), Inc,* 202 Mich App 366, 375; 509 NW2d 791 (1993); see also Frey & Mantese, *Limits on a subcontractor's right to bring a quantum meruit claim against the property owner,* 71 Mich BJ 1042 (1992). In this case, there is a contract covering defendants' payment obligations for the home construction. Although the contract is between defendants and plaintiff, it covers the same subject matter as the claims assigned to plaintiff by the subcontractors and material suppliers.

> The Michigan Construction Lien Act gives subcontractors a powerful remedy to force payment by an owner, even though the owner has no contract with the subcontractor. The subcontractor can place a lien on the owner's real property and--in the event the owner fails to pay for services or labor--the subcontractor

> can foreclose the lien and cause a sale of the property. Michigan case law and statutory law strongly suggest that, absent claims arising out of direct dealing between the subcontractor and owner, these lien rights are the subcontractor's sole remedy against the owner, and quantum meruit claims by the subcontractor against the owner are generally not valid. [71 Mich BJ 1046.]

Plaintiff is not entitled to recover on the assigned claims on a theory of quantum meruit.

VI

The Construction Lien Act, MCL 570.1101 *et seq*., provides a systematic means whereby a construction subcontractor, supplier, or laborer, will be able to recover compensation from the owner of real property improved by their services. 71 Mich BJ 1042. The act also is intended to prevent a situation where the owner must pay twice for the same work to clear liens filed by subcontractors or suppliers with whom the owner never had any dealings. *Id*. To obtain protection under the act, a subcontractor or supplier must comply with the statutory requirements for lien claims. *Id*. Where a subcontractor fails to properly pursue the legal protections afforded, recovery may be limited or nonexistent. *Id*. It is not for the courts to create hybrid common-law remedies where subcontractors or suppliers have not availed themselves of those provided by the Legislature for their specific protection and compensation.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper