STATE OF MICHIGAN

COURT OF APPEALS

DANNY EPPS and JOYCE EPPS,

Plaintiffs-Appellees,

v

4 QUARTERS RESTORATION, L.L.C., DENAGLEN CORP., d/b/a MBM CHECK CASHING, EMERGENCY INSURANCE SERVICES, and TROY WILLIS,

Defendants-Appellants,

and

AM ADJUSTING & APPRAISALS, L.L.C., MICHAEL N. ANDERSON, JR., HOME OWNERS INSURANCE COMPANY, PAULA MATHEWS, MAXIMUM RESTORATION, L.L.C., AUTO OWNERS INSURANCE COMPANY, CHARLES WILLIS, and COMERICA BANK,

Defendants.

UNPUBLISHED
June 6, 2013

No. 305731
Wayne Circuit Court
LC No. 09-018323

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant Troy Willis misrepresented himself as a licensed residential builder and convinced plaintiffs Danny and Joyce Epps to hire his companies to restore their home after a flooding event. Willis's misrepresentations rendered the contracts between the parties void and nullified the legal effect of a contemporaneously granted power of attorney. Absent a valid power of attorney, Willis had no authority to accept delivery of, endorse, or negotiate insurance checks on the Epps' behalf. The circuit court therefore correctly ruled that Willis and his companies must return the insurance check proceeds to Danny and Joyce Epps.

As the Epps were entitled to the proceeds as a matter of law, defendant MBM Check Cashing, which paid the check proceeds to Willis, could have no meritorious defense as to the

Epps. The court properly awarded the Epps the facial value of the checks from funds that had been debited from MBM's bank account and placed in escrow. We affirm.

I. BACKGROUND

In July 2006, plaintiffs Danny and Joyce Epps (the Epps) experienced a flooding event in the basement of their home. The Epps contacted their homeowner's insurance carrier, which, acting through an intermediary adjusting company, recommended that the Epps contract with defendant Troy Willis and his companies, defendants 4 Quarters Restoration (4QR) and Emergency Insurance Services (EIS) (collectively the "contractor defendants") to complete the remediation and reconstruction work. Willis met with the Epps at their home and showed them a book depicting some of his work. The book also displayed a copy of Willis's residential builder's license. The Epps hired Willis, signing a misnamed "Fire Repair Agreement" with EIS and a "Work Authorization" with 4QR. The Epps also signed an "Insurance Power of Attorney" prepared on EIS letterhead that included the phrase "Licensed Residential Builders #2101157151." The power of attorney itself provided:

> To: The Insurance Companies
> Their Agents
> All Concerned Parties
>
> I Danny Epps & Joyce Epps, hereby give my (Contractor), Troy Willis Power of Attorney, to sign my name to all documents pertaining to settling the insurance claim and restoring the damage to my property located at 5503 Pennsylvania, Detroit, Michigan.

Despite the representation included on the EIS letterhead and the license contained in Willis's portfolio, the state had actually revoked Willis's residential builder's license on January 31, 2006. The parties dispute the quality of the work performed by the contractor defendants and whether the work was actually completed. It is not disputed, however, that during the construction process Willis alone endorsed all checks issued by the insurance carrier regardless of whether the Epps were named as the only payees or as copayees. The Epps assert that this was done without their knowledge or approval. Willis negotiated the checks at defendant Denagen Corporation d/b/a MBM Check Cashing (MBM).[1]

On July 23, 2009, the Epps filed suit against every insurer, company, bank, and principal involved in the actual work done to their basement or with the flow of funds related to the project. In relation to the contractor defendants, the Epps complained that none of the workmen were licensed residential builders as required by state law. The Epps asserted that Willis misrepresented himself as licensed and thereby fraudulently induced them to hire him and his companies. The Epps sought "a declaration that the contract was illegal, void and unenforceable,

[1] It appears from documentation in the lower court record that the Epps may have chosen to forego personal property restoration services and used the funds for that portion of the renovation to hire the contractor defendants to perform elective work on the home's main floor.

that defendants [] Willis, [4QR] and EIS were not entitled to receive any monies for their work as unlicensed contractors and that all monies they received were received illegally and must be returned to" the Epps. The Epps also sought to rescind the contracts.

The Epps further complained that the contractor defendants failed to complete the contracted-for work and that the completed portion was not done in a workmanlike manner. As a result, the Epps claimed they were damaged by the loss of the insurance proceeds. The Epps accused the contractor defendants of embezzling, stealing or converting those proceeds and sought treble damages under MCL 600.2919a. Willis allegedly committed this tort by instructing payors to remit any checks to his address and then endorsing and negotiating the checks without the Epps' knowledge.

The Epps secured a default judgment against MBM, which the circuit court repeatedly refused to set aside. Comerica Bank, at which MBM maintained accounts and through which MBM satisfied the subject checks, filed an interpleader complaint, seeking to place the challenged sum in escrow until the court could determine the rightful owner. The court granted that request. The claims against Comerica were thereafter dismissed with prejudice. The claims against the various other defendants were whittled away through dismissals and defaults.[2]

In relation to the contractor defendants, the parties filed competing motions for summary disposition that were eventually resolved in the Epps' favor. Citing MCL 339.2412, which precludes an unlicensed contractor from bringing a collection action, the Epps contended that the various contracts entered with the contractor defendants were void *ab initio* as Willis was an unlicensed contractor. The power of attorney was never valid. Therefore, Willis lacked the authority to endorse the insurance checks on the Epps' behalf and the proceeds had to be returned to them.

The contractor defendants sought partial summary disposition, arguing that Willis's lack of a license was not a ground for vitiating the contract and depriving defendants of the funds paid for the work completed. As the Epps otherwise suffered no damages, the contractor defendants asserted that their claim lacked merit. These defendants further noted that Willis's unlicensed status did not preclude them from raising the lack of actual damages as a defense.

At a June 24, 2011 hearing on these competing motions, the circuit court promised the parties, "I'll get back to you in a few days." Without explaining its reasoning, the court entered an order on July 11, 2011, granting summary disposition in the Epps' favor. The court found simply, "MCL 339.2412(1) is applicable in this case and [the Epps] are entitled to summary disposition as a matter of law."

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[2] The Epps contend that this Court lacks jurisdiction to consider defendants' claim of appeal pursuant to *Detroit v Michigan*, 262 Mich App 542, 545-546; 686 NW2d 514 (2004), because the claims against Charles Willis, who is not a party to this appeal, were dismissed without prejudice. Even if that dismissal eliminated the existence of a final judgment from which a claim of appeal could be taken, MCR 7.202(6)(a)(i), we could consider this appeal as if taken on leave granted "in the interest of judicial economy." *Detroit*, 262 Mich App at 546.

II. STANDARD OF REVIEW

We review de novo a circuit court's resolution of a summary disposition motion. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). The Epps sought summary disposition under MCR 2.116(C)(7) (without citing a justification under the subrule), (8) (failure to state a claim), (9) (failure to state a valid defense), and (10) (failure to create a genuine issue of material fact). As the circuit court considered evidence beyond the pleadings, we will review the motion as if granted under (C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

We also review underlying issues of statutory interpretation and applicability de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001). The goal of statutory interpretation is to discern the intent of the Legislature. Where the legislatively chosen language is plain and unambiguous, we must apply the statute as written. Only where a statute is ambiguous may we employ the tools of statutory construction. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

III. APPLICATION OF MCL 339.2412

The circuit court determined that MCL 339.2412(1) applied to this case as a matter of law and nullified the contractor defendants' entitlement to the funds they received for the contract work. The statute provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor *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. [Emphasis added.]

Because the contractor defendants did not "bring or maintain an action . . . for the collection of compensation," the circuit court improperly held them liable based on the statute.

"Under the statute, a builder may not bring an action for collection of compensation unless it can prove that it possesses the license 'required by this article.'" *Stokes v Millen Roofing Co*, 466 Mich 660, 664; 649 NW2d 371 (2002). In *Stokes*, the unlicensed defendant argued that MCL 339.2412(1) did not prevent it "from recovering the reasonable value of the

labor and materials furnished to the plaintiffs. . . . [S]uch an action would be seeking merely a reimbursement for its materials, and not 'compensation' as that word is used in the act." *Stokes*, 466 Mich at 665. The Court defined "compensation" "as something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment." *Id.* (quotation marks and citation omitted). The unlicensed defendant was therefore precluded from seeking compensation for its labor and materials provided under the contract. *Stokes* also held that a court may not employ equitable remedies to circumvent the statutory prohibition on unlicensed builders seeking compensation. Doing so would "allow[] an unlicensed contractor leverage to force payment, using equity in a circumstance where no equity was required." *Id.* at 671.

In *Roberson Builders, Inc v Larson*, 482 Mich 1138; 758 NW2d 284 (2008), our Supreme Court heard oral arguments but then decided to deny leave to appeal in a case in which an unlicensed residential builder sought a set off against a homeowner's counterclaim for damages. Concurring in the order, Justice Marilyn Kelly, joined by Justice Young, reasoned that a builder that defends an action by seeking a set off against the damages claimed is actually seeking payment that is forbidden under *Stokes*' interpretation of the statute. *Id.* at 1140.

An unlicensed builder is not deprived of all rights, however. As stated by this Court in its brief decision in *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471; 335 NW2d 7 (1983), "But the statute nowhere prohibits an unlicensed contractor from defending a breach of contract suit on its merits. The statute removes an unlicensed contractor's power to sue, not the power to defend. It was intended to protect the public as a shield, not a sword."

Here, the contractor defendants simply defended against the Epps' claims of poor workmanship and stealing funds. The contractor defendants were free to defend on the merits by claiming that the work completed was of adequate quality and that the insurance proceeds collected by Willis funded the renovation project. There is no precedent for allowing a homeowner to use MCL 339.2412(1) to recoup funds already paid to a builder for completed work based solely on his unlicensed status. The Epps presented no evidence beyond bare assertions that the renovations performed at their home were unsatisfactory. Similarly, the Epps provided no support for their assertion that Willis converted the insurance proceeds for his own personal use, rather than to cover the costs of the renovations. Under these circumstances, the circuit court should not have summarily disposed of the claims against the contractor defendants based on the statute.

IV. CONTRACT VOID *AB INITIO*

The Epps were entitled to summary disposition in their favor on other grounds, however. Willis misrepresented that he and his companies, 4QR and EIS, were licensed residential builders as mandated by state law. Had Willis truthfully informed the Epps that his license had been revoked, the Epps contend that they would not have hired him to perform the renovation work at their home.

Generally, "[f]raud in the inducement to enter into a contract does not render the instrument void but merely voidable." *Whitcraft v Wolfe*, 148 Mich App 40, 52; 384 NW2d 400 (1985), citing *Dunn v Goebel Brewing Co*, 357 Mich 693, 697; 99 NW2d 380 (1959). "Where a license or certification is required by statute as a requisite to one practicing a particular

profession," and a party enters a contract without possessing the required license, the contract is void. *Wedgewood v Jorgens*, 190 Mich 620, 622; 157 NW 360 (1916) (quotation marks and citation omitted). "[C]ontracts by a residential builder not duly licensed are not only voidable but void." *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964) (quoting from and adopting the circuit court's reasoning in that matter). By fraudulently inducing the Epps to enter into the project contracts by misrepresenting his possession of a statutorily-required license, Willis rendered the contracts void.

Willis's fraud rendered the power of attorney entered by the Epps void *ab initio*. Willis therefore had no authority to endorse and negotiate checks issued by the insurance company on the Epps' behalves. Without the power to negotiate the checks, Willis had no right to maintain the proceeds. It is on this ground, rather than based on MCL 339.2412, that Willis must return the insurance proceeds to the Epps. Although the circuit court based its decision on improper grounds, it correctly granted summary disposition in the Epps' favor.[3]

V. TREBLE DAMAGES UNDER MCL 600.2919A

After the circuit court entered summary disposition in the Epps' favor, they sought treble damages against the contractor defendants, arguing that those defendants had converted the Epps' property by endorsing the insurance checks without the authority to do so. In their reply brief on appeal, the contractor defendants contend that this award was improper. As this issue was not properly presented to this Court as an issue on appeal, we need not address it. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008). We note, however, that as Willis lacked the authority to endorse the insurance checks, he did convert the proceeds by accepting delivery and cashing those instruments. See MCL 440.3420(1) ("An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment."). MCL 600.2919a(1) specifically provides for treble damages in the face of such a conversion.

VI. DEFAULT AGAINST MBM

Early in the proceedings, the circuit court entered a default judgment against MBM. MBM had not timely responded to the complaint, believing that the Epps had granted them an extension. After the circuit court granted summary disposition in the Epps' favor, the court declined to conduct a hearing to determine the amount of damages. As noted by the court, there was no fact question regarding the damages amount; damages were simply measured by the face value of the insurance checks. The court ordered the interpleader funds paid out to the Epps to

[3] The contractor defendants contend that they should be able to retain at least that portion of the proceeds covering work for which no license was required. This misses the point that the Epps would not have entered into any contract with defendants had Willis truthfully informed them that his builder's license had been revoked. Absent a contract, the Epps would not have given Willis a power of attorney.

cover the damages award. The interpleader funds had been debited from MBM's accounts at Comerica Bank.

MBM argues that it was entitled to a jury trial on the damages issue. If a trial court decides to conduct a hearing to determine the amount of damages, a defaulted party is entitled to a jury trial on that issue. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554; 620 NW2d 646 (2001). No hearing was required in this case as the damages were a sum certain. MBM was therefore not entitled to a jury trial.

We note that MBM has a cause of action against Willis for wrongfully negotiating the Epps' insurance checks and causing MBM to be liable for the sums paid out. As emphasized by the Epps' attorney at a motion hearing seeking the entry of a money judgment, MBM did not file such an action against Willis because "they are represented by the same lawyer." We cannot discern from the record whether the contractor defendants and MBM are connected through interested individuals. It is curious, however, that even after the conflict of interest was brought to MBM's attention, MBM did not secure independent counsel and joined the contractor defendants in filing a single appeal. And there is no evidence that defendants waived the conflict. We suggest that MBM consider and protect its interests if those interests truly are separate from those of the contractor defendants.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood