STATE OF MICHIGAN

COURT OF APPEALS

POLARIS CONSTRUCTION, INC., Plaintiff-Counterdefendant-Appellant,	UNPUBLISHED June 20, 2013
v	No. 308254 Wayne Circuit Court
NICOLA DELICATA, Defendant-Counterplaintiff-Appellee,	LC No. 09-031105-CH
and ND PROPERTY MANAGEMENT, INC., Defendant-Counterplaintiff,	
and MICHIGAN COMMERCE BANK, Defendant.	

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Polaris Construction, Inc., appeals as of right the trial court's order granting summary disposition for defendant, Nicola Delicata.[1] Plaintiff also challenges the trial court's orders denying its motion for reconsideration and granting defendant's motion for costs and attorney fees. Because plaintiff presented sufficient evidence to establish a genuine issue of material fact with respect to its breach of contract and unjust enrichment claims, we remand for further proceedings on those claims only. The trial court properly granted summary disposition for defendant on plaintiff's fraud and lien foreclosure claims. Further, the trial court abused its discretion by awarding defendant attorney fees pursuant to the Construction Lien Act (CLA),

[1] Because the trial court dismissed plaintiff's claims against defendants ND Property Management, Inc. and Michigan Commerce Bank and they are not parties to this appeal, our reference to "defendant" refers to Delicata only.

MCL 570.1101 *et seq*. We therefore affirm in part, reverse in part, vacate in part, and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case stems from water damage to a commercial building in Detroit. Defendant owned the building and leased a portion of it to Confidential, Inc. (Confidential), which operated a nightclub and restaurant in the leased space. On January 19, 2009, a water pipe in the nightclub burst, causing damage to both the nightclub and restaurant as well as to a portion of the building not leased to Confidential. After the water damage was discovered, Peter Arabo, Confidential's president, contacted plaintiff to perform the remediation work. Robert Kato, plaintiff's head of operations, met with Arabo and defendant at the building. According to Kato and Arabo, defendant authorized plaintiff to proceed with the remediation work.

Pursuant to the terms of its lease agreement with defendant, Confidential maintained insurance coverage that included coverage for water damage to the leased premises. Confidential filed a claim with its insurer, Badger Mutual Insurance Company, which paid $254,989 to plaintiff and Confidential for the remediation work. At issue in this case is whether defendant had a contract with plaintiff to perform remediation work on the nonleased portion of the building and whether defendant owed plaintiff $120,000, which was the balance of the total contract amount of $374,989 for the entire building. Plaintiff filed a claim of lien against the property in the amount of $120,000 and filed a complaint against defendant seeking foreclosure of the lien and alleging breach of contract, unjust enrichment, and fraud.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that no enforceable contract existed between he and plaintiff for the work performed. Defendant also argued that he did not commit fraud because his assurance to Kato that Kato would be paid for the work performed was not false at the time that it was made. Regarding plaintiff's unjust enrichment claim, defendant argued that the work that plaintiff performed did not directly benefit defendant. Further, defendant argued that plaintiff's lien foreclosure claim failed because plaintiff did not serve a notice of furnishing as required by MCL 570.1111(4). The trial court granted defendant's motion. Thereafter, the court denied plaintiff's motion for reconsideration and granted defendant's motion for attorney fees and costs. The court awarded defendant attorney fees and costs totaling $29,183.94.

II. MOTION FOR SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition. We review de novo a trial court's order granting summary disposition under MCR 2.116(C)(10). *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). A motion under subrule (C)(10) "tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is proper if there is 'no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.'" *Id.*, quoting *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the

nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). On appeal, "[t]his Court considers only the evidence that was properly presented to the trial court in deciding the motion." *Lakeview Commons Ltd Partnership*, 290 Mich at 506.

We first address plaintiff's breach of contract claim. "A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). The elements of a valid contract are: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) (quotation marks and citations omitted). A unilateral contract, however, is a contract "in which the promisor does not receive a promise in return as consideration." *In re Certified Question*, 432 Mich 438, 446; 443 NW2d 112 (1989). Rather, the promisee accepts the offer by performing the act upon which the contract is based, and the promisee's performance in reliance on the promisor's promise constitutes sufficient consideration to make the promise legally binding. *Cunningham v 4-D Tool Co*, 182 Mich App 99, 106; 451 NW2d 514 (1989). "[T]here is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 139 n 9; 666 NW2d 186 (2003) (citations omitted). Here, the promisor is defendant and the promisee is plaintiff.

Plaintiff presented sufficient evidence to establish a justiciable question of fact regarding the existence of a unilateral contract. Plaintiff relied on Kato's deposition testimony stating that defendant repeatedly asked plaintiff to perform the repair work. According to Kato, defendant assured him that plaintiff would be paid for the work performed and defendant told him that Kato should get whatever needed to be completed done so that the nightclub could reopen in time for a preplanned event. Kato also testified that defendant told him, "[w]e need to get the bar back up and running so that I can collect my rent." Kato further testified that defendant authorized the work by stating, "go ahead and get it done," "go ahead and do the work, let's see how much we can get done," and "[g]et the work done and let's get the bar back open." Plaintiff also presented evidence that it accepted defendant's offer by performing the remediation work. According to Kato, plaintiff performed the work beginning in February 2009 and ending in June 2009. Moreover, defendant admitted that plaintiff completed at least some work on the building that directly benefited defendant. Kato testified that plaintiff performed the work in accordance with his written estimate, which indicated the repairs to be made to both the leased and unleased portion of the building. A party accepts a unilateral contract by performance. *Sniecinski*, 469 Mich at 139 n 9. Thus, reviewing the evidence in the light most favorable to plaintiff, plaintiff presented sufficient evidence to create a justiciable question of fact regarding the existence of a unilateral contract for plaintiff to perform the remediation work on the building. Accordingly, the trial court erred by granting summary disposition for defendant on plaintiff's breach of contract claim.

Plaintiff also presented sufficient evidence to overcome defendant's motion for summary disposition with respect to plaintiff's unjust enrichment claim. Plaintiff asserted its unjust enrichment claim as an alternative to its breach of contract claim. When an explicit contract does not exist, the parties' conduct, language, and other circumstances that indicate an intent to

contract may give rise to an implied contract. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). An unjust enrichment claim is the equitable counterpart to a legal claim for breach of contract. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). "[U]nder the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006) (quotation marks, brackets, and citations omitted). "Unjust enrichment requires a plaintiff to prove (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Hudson v Mathers*, 283 Mich App 91, 97-98; 770 NW2d 883 (2009).

According to Kato, plaintiff completed the work to the building in accordance with Kato's estimate, which specified the repairs to be made to Confidential's leased premises and those to be made to the remainder of the building. Defendant admitted that plaintiff completed at least some work on the nonleased portion of the building. Further, Kato testified that while plaintiff received approximately $254,000 for the repairs to the "bar portion," which was paid by the "bar portion," plaintiff did not receive the remaining balance totaling approximately $120,000, which was defendant's portion of the repairs to the remainder of the building. Accordingly, plaintiff presented sufficient evidence to establish a genuine issue of material fact with respect to plaintiff's unjust enrichment claim, and the trial court erred by granting summary disposition for defendant on that claim.

Plaintiff also challenges the trial court's dismissal of its fraud claim, which was based on defendant's assertion to Kato that plaintiff would be paid for the work performed. "[A]n action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud." *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009). Here, defendant's statement did not relate to a past or existing fact. Rather, the statement related to a future occurrence, i.e., whether plaintiff would be paid if it completed the work. Moreover, Kato admitted that he did not have any evidence that defendant's statement was false at the time that defendant made the statement. Therefore, plaintiff did not present any evidence in support of a common-law fraud claim.

Plaintiff argues that it presented sufficient evidence to support a claim of fraud in the inducement. "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Plaintiff's argument is misplaced given that plaintiff seeks to enforce the purported contract between the parties. "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Id.* at 640. Because plaintiff does not seek to void the purported contract, but rather, seeks to enforce it, plaintiff's reliance on the theory of fraud in the inducement is unavailing. Accordingly, the trial court properly granted summary disposition for defendant on plaintiff's fraud claim.

Plaintiff also argues that the trial court erroneously granted summary disposition for defendant on its lien foreclosure claim. We note that plaintiff did not preserve this issue for our review by advancing any argument in opposition to defendant's motion for summary disposition with respect to plaintiff's lien foreclosure claim. Accordingly, our review of this issue is limited

to plain error affecting plaintiff's substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

The trial court granted summary disposition for defendant on plaintiff's lien foreclosure claim because plaintiff failed to provide a notice of furnishing. Neither MCL 750.1109 nor MCL 570.1111(4), however, required plaintiff, as the "contractor"[2] or "general contractor,"[3] to provide a notice of furnishing. MCL 570.1109 requires only a "subcontractor,"[4] "supplier,"[5] or laborer"[6] to provide a notice of furnishing. In fact, MCL 570.1109(1) states that "[a] contractor is not required to provide a notice of furnishing to preserve lien rights arising from his or her contract directly with an owner or lessee." Thus, the trial court erred by granting defendant's motion for summary disposition on that basis.

Summary disposition for defendant was nevertheless proper because plaintiff failed to provide a sworn statement to defendant as required by MCL 570.1110, which states, in relevant part:

> (1) A contractor shall provide a sworn statement to the owner or lessee in each of the following circumstances:
>
> (a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.
>
> (b) When a demand for the sworn statement has been made by or on behalf of the owner or lessee.
>
> * * *

---

[2] A "contractor" is "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(5).

[3] A "general contractor" is "a contractor who contracts with an owner or lessee to provide, directly or indirectly through contracts with subcontractors, suppliers, or laborers, substantially all of the improvements to the property . . . ." MCL 570.1104(4).

[4] A "subcontractor" is "a person, other than a laborer or supplier, who pursuant to a contract between himself or herself and a person other than the owner or lessee performs any part of a contractor's contract for an improvement." MCL 570.1106(4).

[5] A "supplier" is "a person who, pursuant to a contract with a contractor or a subcontractor, leases, rents, or in any other manner provides material or equipment that is used in the improvement of real property." MCL 570.1106(5).

[6] A "laborer" is "an individual who, pursuant to a contract with a contractor or subcontractor, provides an improvement to real property through the individual's personal labor." MCL 570.1104(6).

(4) A sworn statement shall list each subcontractor and supplier with whom the person issuing the sworn statement has contracted relative to the improvement to the real property. The sworn statement shall contain a list of laborers with whom the person issuing the sworn statement has contracted relative to the improvement to the real property and for whom payment for wages or fringe benefits and withholdings are due but unpaid and the itemized amount of such wages or fringe benefits and withholdings.

* * *

(9) If a contractor fails to provide a sworn statement to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien, until the sworn statement has been provided.

The record fails to show and plaintiff does not contend that it followed the requirements set forth in the above statute to enforce the construction lien. Accordingly, MCL 570.1110(9) precluded plaintiff from filing suit to enforce the lien. Therefore, summary disposition for defendant was proper on plaintiff's lien foreclosure claim. We will not reverse a trial court's decision that reaches the correct result albeit for the wrong reason. *Miller-Davis Co*, 296 Mich App at 70.

III. MOTION FOR RECONSIDERATION

Plaintiff next argues that the trial court erred by denying its motion for reconsideration with respect to its breach of contract and unjust enrichment claims. This issue is moot in light of our decision to reverse the trial court's grant of summary disposition to defendant on those claims and remand this case for further proceedings regarding those claims. An issue is moot when it is impossible for an appellate court to fashion a remedy. *Kieta v Thomas M. Cooley Law School*, 290 Mich App 144, 147; 799 NW2d 579 (2010).

IV. MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff next argues that the trial court erred by awarding defendant attorney fees and costs. The trial court awarded defendant attorney fees and costs pursuant to MCL 600.2591 on the basis that plaintiff's claims were frivolous as that term is defined in MCL 600.2591(3)(a). In light of our decision to reverse the trial court's grant of summary disposition on plaintiff's breach of contract and unjust enrichment claims, we vacate the trial court's award of sanctions pursuant to MCL 600.2591 because defendant is no longer the prevailing party. Under MCL 600.2591(1), the trial court shall award costs and fees only to "the prevailing party," which is defined as "a party who wins on the entire record." MCL 600.2591(3)(b). Because of our decision to reverse the trial court's ruling with respect to plaintiff's breach of contract and unjust enrichment claims, defendant is no longer entitled to attorney fees and costs pursuant to MCL 600.2591. We thus vacate the trial court's award of sanctions pursuant to MCL 600.2591.

The trial court also awarded defendant attorney fees pursuant to MCL 570.1118(2) of the CLA on the basis that plaintiff's lien foreclosure claim was vexatious. We review for an abuse

of discretion a trial court's decision whether to award attorney fees under the CLA. *ER Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 651; 717 NW2d 370 (2006).

MCL 570.1118(2) provides:

> In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. *The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious*. [Emphasis added.]

A vexatious proceeding within the meaning of MCL 570.1118(2) is "a proceeding undertaken 'without any reasonable basis for belief that there was a meritorious issue to be determined . . . .'" *ER Zeiler Excavating*, 270 Mich App at 652, quoting MCR 7.216(C)(1)(a).

The trial court abused its discretion by determining that plaintiff's lien foreclosure claim was vexatious. The trial court granted summary disposition for defendant on plaintiff's lien foreclosure claim on the basis that plaintiff failed to provide a notice of furnishing. As previously discussed, the court's ruling was erroneous because plaintiff was not statutorily required to provide a notice of furnishing. Although summary disposition was nevertheless proper because plaintiff failed to provide defendant with a sworn statement as required by MCL 570.1110, the record does not indicate that plaintiff filed its claim without any reasonable basis to believe that there was a meritorious issue to be determined. Accordingly, the trial court abused its discretion by concluding that plaintiff's claim was vexatious and awarding defendant attorney fees pursuant to MCL 570.1118(2). We therefore vacate the trial court's award of attorney fees under the CLA.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction. Neither party having prevailed in full, no costs are taxable pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio