

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

TIM NIEBOER and STEPHANIE NIEBOER,

Plaintiffs,

v

File No. 00-20027-CK
HON. PHILIP E. RODGERS, JR.

JOHN A. PAXSON, SR. individually and in
his representative capacity on behalf of WELCOME
HOME BUILDERS, INC., a Michigan corporation,
and DIG IT EXCAVATORS, INC., a Michigan
corporation,

Defendants.

Shelley A. Kester (P46312)
Attorney for Plaintiffs

John A. Paxson, Sr.
Defendant in Pro Per

DECISION AND ORDER GRANTING
PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

This is an action for breach of mutual release, slander of title, extortion and fraud. The Plaintiffs entered into a construction contract with the Defendant on July 27, 1999, for the construction of a home. On October 14, 1999, Plaintiffs notified the Defendant that they were terminating the contract because of the Defendant's breach thereof. On October 22, 1999, the Defendant recorded a Claim of Lien. On December 1, 1999, in full and final settlement of their dispute, the parties entered into a Mutual Release. The Plaintiffs paid the Defendant \$3,000, the construction contract was terminated and the Claim of Lien was released.

By letter dated December 7, 1999, the Defendant notified the Plaintiffs that he was recording another Claim of Lien because the contract had called for him to obtain all subcontractors and his inspections of the job site had confirmed that all of the subcontractors were "crews referred by [the

Defendant]” and he was therefore entitled to additional commission. On December 9, 1999, the Defendant recorded a second Claim of Lien in the amount of \$5,000.

On February 4, 2000, the Plaintiffs filed this action. On March 2, 2000, the Defendant filed his answer. He claims that the release was for commissions owned from August 10, 1999 through October 23, 1999 only and that he is still owed commissions for October 23, 1999 through November 30, 1999.

On April 11, 2000, the Plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (9). The Plaintiffs claim that the Defendant’s second Claim of Lien was recorded in breach of the Mutual Release and that the Defendant is attempting to extort additional monies from them. The Plaintiffs also claim that they are entitled to sanctions pursuant to MCR 2.114.

The Defendant did not respond to the motion. The motion was heard on Monday, May 8, 2000. The Plaintiffs and the Defendant appeared for the hearing. The Court gave the Defendant seven (7) days from the date of the hearing to answer the motion or retain counsel to represent him. By letter dated May 11, 2000, the Defendant attempted to respond to the motion.

The Court dispenses with any further oral argument in this matter. MCR 2.119(E)(3). Having considered the motion, the hearing, and the Defendant’s letter, and otherwise being fully advised in the premises, this Court issues this written Decision and Order granting the Plaintiffs’ motion for summary disposition.

STANDARD OF REVIEW

MCR 2.116(C)(7)

Our Supreme Court recently reviewed the standard of review applicable to a motion for summary disposition brought pursuant to MCR 2.116(C)(7) in *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), saying:

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. See part III. Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by

documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

MCR 2.116(C)(9)

A motion for summary disposition pursuant to MCR 2.116(C)(9), for failure to state a valid defense, tests the legal sufficiency of the pled defense. Such a motion is tested by reference to the pleadings alone, with all well-pled allegations accepted as true. The proper test is whether defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. Further, summary disposition is improper under this rule where a material allegation of plaintiff's complaint is categorically denied. *Hazel Park v Potter*, 169 Mich App 714, 718; 426 NW2d 789 (1988). See also, *Kincaid v Dept of Corrections*, 180 Mich App 176, 182; 446 NW2d 604 (1989).

ISSUES PRESENTED

The issues presented by the Plaintiffs' motion are:

1. Whether the Defendant breached the Mutual Release and slandered Plaintiffs' title by recording the second Claim of Lien; and
2. Whether the Defendant's failed to state a valid defense.

Pursuant to MCR 2.116(C)(7), a claim may be barred because of a release. MCR 2.507(H) provides that "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." This rule "indicates that agreements are not binding unless in writing subscribed by the party against whom the agreement is asserted or that party's attorney or unless the agreement has been made in open court." *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 109; 343 NW2d 249 (1983); see also, *Rossi v Transamerica Car Leasing Co*, 138 Mich App 807; 360 NW2d 307 (1984); *Kline v Kline*, 92 Mich App 62, 71-72; 284 NW2d 488 (1979). In the instant case, there was a written release signed

by Tim Nieboer, Stephanie Nieboer and John Paxson, individually and as President of Welcome Home Builders, Inc.

The scope of a release is governed by the intent of the parties as it is expressed in the release. An agreement to settle a pending lawsuit is a contract which is to be governed by the legal principles which are generally applicable to the interpretation and construction of contracts. *Scholnick's, supra* at 109. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Wyrembelski v St. Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996); *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).

Here, the specific language of the Mutual Release states:

The Undersigned, JOHN A. PAXSON, SR., INDIVIDUALLY AND AS PRESIDENT OF WELCOME HOME BUILDERS, INC., of P.O. Box 4661, Traverse City MI 49685, and TIM NIEBOER AND STEPHANIE NIEBOER, HUSBAND AND WIFE, of 1886 South Long Lake Road, Interlochen, MI 49684, for and in consideration of valuable consideration, receipt of which is hereby acknowledged, hereby release each other from any and all claims arising out of labor and/or material furnished for an improvement to 1589 Cedar Street, Long Lake Peninsula and from all claims arising out of a New Home Construction Agreement dated July 27, 1999, which, byt[sic] the terms of this Mutual Release, is declared terminated and of no further force or effect.

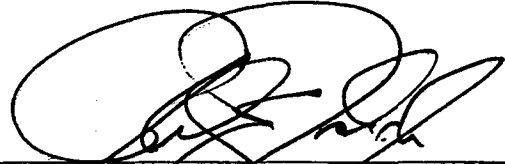
The Mutual Release is unambiguous. It very clearly states that the parties are releasing each other from "any and all claims arising out of labor and/or material furnished" and from "all claims arising out of a New Home Construction Agreement dated July 27, 1999 . . ." As a matter of law, the Defendant had no justifiable legal basis for filing the second Claim of Lien for monies he claims are due under the July 27, 1999 agreement. In addition, the Defendant's answer fails to state a valid defense, MCR 2.116(C)(9), and is frivolous. MCL 600.2591; MSA 27A.2591.¹

¹A defense is frivolous if at least one of the following conditions is met:

- (i) The party's primary purpose in asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.

The Plaintiffs are entitled to judgment as a matter of law. Within seven(7) days of the date of this Decision and Order, the Defendant shall file a release of the second Claim of Lien. Within fourteen (14) days of the date of this Decision and Order, the Plaintiffs shall file an affidavit setting forth their damages, including reasonable attorney fees and costs. MCL 565.108; MSA 26.1278.² The Defendant shall have twenty-one (21) days from the date of this Decision and Order to respond to the Plaintiffs' affidavit.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

5/19/00

²MCL 565.108; MSA § 26.1278, which is part of the marketable record title act, MCL 565.101 et seq.; MSA 26.1271 et seq., provides: No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.