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STATE OF MICHIGAN

COURT OF APPEALS

SMITH'S DESIGNER CONSTRUCTION, INC.,

Plaintiff/Counterdefendant-Appellee,

v

BRYAN R. ELLIS and NICOLE TANYA BRANCH-ELLIS,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

LIBERTY BANK AND TRUST COMPANY,

Defendant,

and

READY ROOTER, LLC, EXPERT MASTER PLUMBERS, LLC, VICTOR VIOREL PINTICAN, and STRICKLY HEATING AND COOLING, LLC,

Third-Party Defendants-Appellees.

UNPUBLISHED
August 13, 2026
9:12 AM

No. 374581
Wayne Circuit Court
LC No. 22-006097-CH

Before: ACKERMAN, P.J., and BAZZI and LIEVENSE, JJ.

LIEVENSE, J., (*concurring in part, dissenting in part*).

I agree with the majority opinion to affirm the trial court's decision to set aside the default the Ellises had secured against Strickly. I also agree with the majority opinion to affirm the trial court's dismissal of the Ellises' negligence claim against Strickly. I disagree, however, that the trial court's decision should be affirmed completely.

Smith's Designer sued the Ellises in 2022 alleging they failed to pay for contracted work done at their home. The Ellises filed a counterclaim against Smith's Designer and, later, filed a

third party complaint alleging negligence and unjust enrichment claims against some of Smith's Designer's subcontractors, including Strickly Heating and Cooling, LLC.

In late 2023, the Ellises secured a default against Strickly because it did not answer the complaint. On April 2, 2024, the trial court issued an order denying the Ellises' motion for a default judgment and granting Strickly's motion to set aside the default the Ellis's had secured against Strickly. On April 6, Strickly answered the Ellises' complaint. Then, on April 22, Strickly received the scheduling order in the case setting trial for May 13, 2024, which prompted Strickly to file an emergency motion for summary disposition under MCR 2.116(C)(10) that same day.[1] In its motion, Strickly sought to dismiss the Ellis's complaint because there was no contract between them (instead the Ellises only had a contract with Smith's Designer) and sought to adjourn the trial because Strickly had not had an opportunity to engage in discovery. The trial court granted Strickly's motion for summary disposition under MCR 2.116(C)(10) on May 30, 2024, and dismissed the Ellises' complaint against Strickly.

I believe that order contained two errors. First, the trial court's May 2024 order only addressed the negligence claim despite the Ellises also having pleaded an unjust enrichment claim. The trial court, however, did not address it, and only held that the Ellises' claim "is not a tort action, but rather a breach of contract," and they had "no contract with [Strickly] and have shown nothing in their contract with Smith's [Designer] that would show a third-party obligation on the part of Strickly."

Second, the trial court did not give the Ellises an opportunity to amend their complaint under MCR 2.116(I)(5), despite functionally being at the beginning of the case against Strickly, and it made no finding that an amendment would be futile. The court set aside the default and Strickly filed an answer the month prior. Strickly had not yet participated in discovery. And importantly, as they argue in their brief on appeal, the Ellises may have an additional claim: for breach of contract as a third-party beneficiary of Smith's Designer's contract with Strickly under MCL 600.1405. The trial court's conclusion in its order granting summary disposition that a breach of contract claim "was not and could not be alleged" by the Ellises was imprecise. I therefore respectfully dissent from part of Part III of the majority's opinion.

None of this is to say, however, that the Ellises would be entitled to relief had we reversed. The Ellises continued to litigate against Smith's Designer, which included a breach of contract claim based in part on Strickly's alleged faulty HVAC system. After a bench trial, the trial judge found that the Ellises owed Smith's Designer about $16,000 and made findings that Smith's Designer performed its obligations under the contract, including that the HVAC system passed

[1] Strickly later also sought relief under MCR 2.116(C)(8) in the alternative, but there is no need to address this argument since the trial court relied on MCR 2.116(C)(10).

inspection. Thus, had we remanded in part, it would have been up to the trial court to determine whether the Ellises still had any avenue for relief considering the trial court's findings posttrial.

/s/ Andrew J. Lievense