

No. 1-13-1345

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MACIEJ LESNIAK and MICHAEL)	Appeal from the Circuit Court
VIRGLIONE,)	of Cook County.
)	
)	
Plaintiffs-Appellees and)	
Cross-Appellants,)	
)	
v.)	No. 11 CH 10934
)	
WESLEY'S FLOORING, INC.,)	
)	Honorable
Defendant-Appellant and)	Lewis Nixon,
Cross-Appellee.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred, as a matter of law, in awarding the plaintiffs \$2,500 pursuant to the provisions of the Mechanics Lien Act (770 ILCS 60/0.01, *et seq.* (West 2012)), but its award of costs was affirmed.

¶ 2 The defendant, Wesley's Flooring, Inc. (Wesley's), appeals from an order of the Circuit Court of Cook County, awarding the plaintiffs, Maciej Lesniak and Michael Virglione, the sum of \$2,500 plus costs pursuant to sections "12 & 35" of the Mechanics Lien Act (Act) (770 ILCS

60/12, 35 (West 2012)). The plaintiffs cross-appeal from the circuit court's failure to enter an award of attorney fees pursuant to section 17 or section 35 of the Act (770 ILCS 60/12, 35 (West 2012)). For the reasons which follow, we dismiss the plaintiffs' cross-appeal, reverse that portion of the circuit court's order which awarded the plaintiffs \$2,500, and affirm that portion of the order which awarded the plaintiffs their costs.

¶ 3 This action was instituted by the plaintiffs against Wesley's, a subcontractor that performed work on a townhouse owned by them, seeking a declaration that the mechanic's lien which Wesley's recorded against the title of their townhouse on October 20, 2010, is invalid and damages for an alleged violation of sections 34 and 35 of the Act (770 ILCS 60/34, 35 (West 2010)). On June 26 and 27, 2012, the circuit court entered orders in favor of the plaintiffs, granting their motion for summary judgment and quashing and releasing Wesley's mechanic's lien. Wesley's appealed pursuant to Supreme Court Rule 304(a) (Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010)). On August 26, 2013, this court affirmed the June 26 and 27, 2012, orders of the circuit court. *Lesniak v. Wesley's Flooring, Inc. (Lesniak I)*, 2013 IL App (1st) 122146-U. However, in affirming the circuit court's orders in *Lesniak I*, this court found that Wesley's had not violated sections 34 and 35 of the Act. *Lesniak I*, 2013 IL App (1st) 122146-U, ¶22. Rather, we affirmed on the basis that the plaintiffs had received lien waivers from the general contractor before issuing any payments. *Lesniak I*, 2013 IL App (1st) 122146-U, ¶¶ 23-26. Wesley's filed a timely petition for leave to appeal to the supreme court which was denied on January 29, 2014. *Lesniak I*, No. 116820.

¶ 4 Left pending and unresolved in the circuit court was a motion filed by the plaintiffs on June 24, 2012, seeking an award of attorney fees and costs pursuant to sections 17 and 35 of the Act. On April 2, 2013, the circuit court granted the plaintiffs' motion and awarded them

\$2,500.00 plus costs. Thereafter, Wesley's filed the instant appeal, and the plaintiffs filed their notice of cross-appeal.

¶ 5 We first address the plaintiffs' cross-appeal. The plaintiffs argue that the circuit court erred in failing to award them attorney fees pursuant to either section 17 or section 35 of the Act. We note, however, that the plaintiffs failed to cite a single case in their brief in support of either argument. Therefore, the only arguments raised by the plaintiffs on cross-appeal have been forfeited. See Ill. S.Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). For this reason, the plaintiffs' cross-appeal is dismissed.

¶ 6 Next, we address Wesley's appeal. In urging reversal of the April 2, 2013 order, Wesley's argues first that, based upon this court's decision in *Lesniak I*, no basis exists for an award of fees or costs under section 35 of the Act. As to this issue, the plaintiffs have quite candidly admitted in their brief that "[t]he decision in *Lesniak I* *** forecloses any recovery under Section 35."

¶ 7 Section 35 of the Act states, in relevant part, that:

"Whenever a claim for lien has been filed with the recorder of deeds, either by the contractor or sub-contractor, and is paid with cost of filing same, or where there is a failure to institute suit to enforce the same after demand as provided in the preceding section within the time by this Act limited the person filing the same or some one by him duly authorized in writing so to do, shall acknowledge satisfaction or release thereof, in writing, on written demand of the owner, lienor, or any person interested in the real estate, or his or her agent or attorney, and on neglect to do so for 10 days after such written demand he or she shall be liable to the owner for the sum of \$2,500, which may be recovered in a civil action together with the costs and reasonable attorney's fees of the

owner, lienor, or other person interested in the real estate, or his or her agent or attorney incurred in bringing such action." 770 ILCS 60/35 (West 2012).

¶ 8 Based upon our finding in *Lesniak I* that Wesley's had not violated section 35 of the Act, the circuit court's order of April 2, 2013, cannot stand based upon any alleged violation of that section.

¶ 9 Although the circuit court's order of April 2, 2013, states that it was entered pursuant to a motion brought under sections "12 and 35" of the Act, it is clear from the plaintiffs' motion that they sought relief pursuant to sections 17 and 35, and not section 12 of the Act. The question remaining, therefore, is whether the circuit court's award of \$2,500 plus costs is also erroneous if it was made pursuant to section 17 of the Act.

¶ 10 From the outset, we note that sections 17(b) and 17(c) of the Act (770 ILCS 60/17(b), (c)(West 2012)) have nothing to do with the instant action, as it is not a suit brought by a lien claimant. We are left then with the provisions of section 17(a) (770 ILCS 60/17(a) (West 2012)). Wesley's argues that, although, the circuit court quashed and released its lien in response to the plaintiffs' suit, it did not do so as a result of any violation of the Act and, as a consequence, no basis exists for an award pursuant to section 17(a). However, Wesley's cites no authority in support of its argument in this regard, only the language of the Act itself. Failure to support an argument with supporting authority results in a forfeiture of the issue. Ill. S.Ct. R. 341(h)(7)(eff. Feb. 6, 2013); *Vancura*, 238 Ill. 2d at 369; *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶29. For their part, the plaintiffs' brief also fails to cite any authority in support of their position on the issue. However, because the issue is one of simple statutory construction which can easily be decided without the aid of authority cited by the parties, and mindful as we are that the principles of waiver and forfeiture are binding on the parties but do

not limit this court's jurisdiction (*Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 948 (2010)), we elect to address the issue on the merits.

¶ 11 Section 17(a) of the Act provides, in relevant part, that: "[t]he costs of proceedings as between all parties to the suit shall be taxed equitably against the losing party." 770 ILCS 60/17(a) (West 2012). The interpretation of a statute is a question of law. *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254 (1995). If, as in this case, the language of the statute is clear and unambiguous, we must interpret the statute according to its terms without resorting to aids of construction (*Branson*, 168 Ill. 2d at 254), and we may not add provisions that are not found in the statute (*Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 38 (2009)).

¶ 12 By its plain language, section 17(a) authorizes the trial court to tax costs against a losing party, but there is no provision in the statute for an award of fees. Consequently, to the extent that the circuit court's order of April 2, 2013, might be interpreted as an award of \$2,500 in attorney fees pursuant to section 17(a) of the Act, it is erroneous as a matter of law.

¶ 13 We are left then with the question of the propriety of that portion of the circuit court's order which awarded the plaintiffs their costs. Wesley's argues both that: 1) it was not a "losing party" as required under section 17(a) for an award of costs; and 2) as a consequence of the plaintiffs' inability to join their general contractor as a party defendant due to its pending bankruptcy, this action was not brought under the Act and, therefore, section 17(a) cannot be the basis for an award of costs. We will address each contention separately.

¶ 14 The plaintiffs instituted this action with the filing of a two-count complaint. Count I sought an order declaring, *inter alia*, that Wesley's lien was invalid and striking it from the record of the title to their townhouse. Count II was an action seeking a judgment in favor of the plaintiffs for their attorney fees and costs by reason of Wesley's alleged violation of section 35 of

the Act. It is clear from the relief granted by the circuit court in its orders of June 26 and 27, 2012, and this court's decision in *Lesniak I*, 2013 IL App (1st) 122146-U, that the plaintiffs were the prevailing parties on Count I of their complaint. We believe, therefore, that the "losing party" requirement of section 17(a) has thus been satisfied.

¶ 15 As to Wesley's assertion that the portion of the complaint upon which the plaintiffs prevailed did not constitute a suit under the Act, we also disagree. The quashing of Wesley's lien rested upon an interpretation of section 5 of the Act (770 ILCS 60/5 (West 2010)) which requires a general contractor to provide information to the property owner which is within its knowledge and which may be unknown to the owner. The finding that resulted in the quashing of Wesley's lien was the fact that the plaintiffs paid their general contractor in reliance upon the lien waivers it had tendered before the plaintiffs knew of any outstanding sums due Wesley's. *Lesniak I*, 2013 IL App (1st) 122146-U, ¶26. Count I of the plaintiffs' complaint in this action was very much a claim brought because of the requirements of section 5 of the Act and the protections that it affords to an owner that makes payment under the circumstances present in this case. Although the count upon which the plaintiffs prevailed was not brought pursuant to section 35 of the Act, it was, nonetheless, an action brought against Wesley's by reason of the provisions of the Act; namely section 5. For this reason, we believe that the cost-shifting provisions of section 17(a) of the Act are applicable to Count I of the plaintiffs' complaint.

¶ 16 We find two other reasons to affirm that portion of the circuit court's order of April 2, 2013, which awarded the plaintiffs their costs. First, section 5-110 of the Code of Civil Procedure (735 ILCS 5/5-110 (West 2012)), provides that, if, as in this case, a judgment upon a motion directed to the complaint is entered in favor of the plaintiff, the plaintiff shall recover costs against the defendant, and we can affirm the trial court on any ground apparent from the

record, regardless of whether that ground was relied on by the trial court in rendering the judgment. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). Second, our examination of the record reveals that, although Wesley's argued to the trial court that section 17 of the Act did not apply to the award of \$2,500 in fees, it made no argument as to the section's applicability to an award of costs. Arguments not raised in the trial court are forfeited and cannot be raised for the first time on appeal. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶¶15, 24.

¶ 17 Based upon the foregoing analysis, we reverse that portion of the circuit court's order of April 2, 2013, which awarded the plaintiffs the sum of \$2,500; we affirm that portion of the order awarding the plaintiffs their costs; and we dismiss the plaintiffs' cross-appeal.

¶ 18 Affirmed in part and reversed in part; cross-appeal dismissed.