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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-357**

Brothers Fire Protection Co.,  
Respondent,

vs.

Heffron Properties, LLC,  
Respondent,

Home State Bank,  
Appellant,

Westaff USA, Inc.,  
Respondent,

A & B Plumbing, Inc., et al.,  
Respondents,

Gatewood Electric, Inc., et al.,  
Defendants.

**Filed January 17, 2012  
Reversed and remanded  
Johnson, Chief Judge**

Kandiyohi County District Court  
File No. 34-CV-09-209

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Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Collins, Judge.\*

## **UNPUBLISHED OPINION**

**JOHNSON**, Chief Judge

This appeal presents a dispute about the relative priority of a lender's mortgage and several mechanic's liens asserted by contractors that did not receive full payment for work performed on the renovation of a commercial building. The district court granted summary judgment to the contractors on the ground that the beginning of their improvement to the building was visible one day before the lender recorded its mortgage. We conclude, however, that there are genuine issues of material fact as to whether the contractors began visible work on the improvement one day before the recording of the mortgage or the day of the recording of the mortgage. Because the evidence is in dispute on that material fact, we reverse and remand for trial.

## **FACTS**

Heffron Properties, LLC, undertook the renovation of a building in the city of Willmar after the Burlington Northern Santa Fe Railroad agreed to lease the building for use as a boarding facility for its employees. Heffron Properties hired a number of

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\*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

contractors to perform work at the building, including Brothers Fire Protection Co., Westaff (USA), Inc., A & B Plumbing, Inc., and Square Deal Construction, Inc., all of which are respondents in this appeal.

Home State Bank agreed to finance Heffron Properties' development of the project. On October 15, 2007, Heffron Properties gave Home State Bank a mortgage on the building in exchange for a loan of \$841,000. Home State Bank recorded its mortgage on October 18, 2007, at 2:34 p.m.

The railroad ultimately decided not to lease the building from Heffron Properties. Heffron Properties thereafter was unable to fully compensate the contractors for their work.

In March 2009, Brothers Fire commenced this action against Heffron Properties and others to foreclose on its mechanic's lien. Westaff, A & B Plumbing, and Square Deal Construction cross-claimed against Heffron Properties to foreclose on their respective mechanic's liens. Home State Bank, also a defendant in the action, alleged in its answer that its mortgage held priority over all mechanic's liens.

In April 2010, A & B Plumbing and Square Deal Construction moved for summary judgment based on evidence that A & B Plumbing capped off gas and water lines in preparation for demolition on October 17, 2007, one day before Home State Bank recorded its mortgage. Brothers Fire and Westaff joined in the motion. In July 2010, the district court granted the motion, concluding that the capping of gas and water lines constituted the actual and visible beginning of the renovation and that the work was performed on the afternoon of October 17, 2007. Because it was undisputed that all work

performed by the contractors constituted one continuous improvement, the district court concluded that all mechanic's liens were coordinate with the beginning of the renovation and, thus, have priority over Home State Bank's mortgage, which was recorded on October 18, 2007. Home State Bank appeals.

## D E C I S I O N

Home State Bank argues that the district court erred by granting summary judgment to the contractors on the ground that the contractors' mechanic's liens have priority over its mortgage. Home State Bank raises three main issues on appeal: (1) whether the capping of gas and water lines constituted the actual and visible beginning of the renovation, and whether that work was performed on October 17, 2007, as opposed to some later date, (2) whether Square Deal Construction established the validity of its mechanic's lien, and (3) whether Square Deal Construction and A & B Plumbing established the amounts of their respective mechanic's liens.

A district court must grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

We begin by analyzing Home State Bank’s challenge to the district court’s conclusion that there is no genuine issue of material fact that the actual and visible beginning of the improvement occurred on October 17, 2007. “A mechanic’s lien is a statutory remedy intended to protect those who furnish materials or services in the improvement of real property” by providing them with “a non-consensual lien or security interest in the improved property.” *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228, 230 (Minn. 2010); *see also* Minn. Stat. §§ 514.01-.17 (2010). The relative priority of a mechanic’s lien and a mortgage is governed by a statute that states, in relevant part:

All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, *no lien shall attach prior to the actual and visible beginning of the improvement on the ground . . . .*

Minn. Stat. § 514.05, subd. 1 (emphasis added). Pursuant to this statute:

If the labor or material that constituted the actual and visible beginning of an improvement was provided on the premises before a mortgage was recorded and a subsequent item of labor or material is a contribution to the improvement, the lien for the subsequent item of labor or material has priority over the mortgage.

*Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992).

Determining when a mechanic’s lien attaches is a two-step factual inquiry. *Id.* First, the court must “identify the improvement to which the labor or material contributed.” *Id.* Second, the court must “determine what item of labor or material constituted the actual

and visible beginning of that improvement.” *Id.* The beginning of an improvement is visible if a person exercising reasonable diligence would be able to see it. *Kloster-Madsen, Inc. v. Tafi’s, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975).

The district court identified the “improvement” at issue as the renovation of the building and asserted that the renovation consisted of one continuous improvement. *See Thompson Plumbing Co.*, 486 N.W.2d at 786. No party challenges this part of the district court’s analysis. The district court identified the “actual and visible beginning of that improvement” as the capping of gas and water lines on October 17, 2007. *See id.* Home State Bank contends that this determination is erroneous because the contractors’ evidence is in dispute as to, first, whether the capping of gas and water lines was visible and, second, whether the capping of gas and water lines was actually performed on October 17, 2007, as opposed to a later date.

With respect to the first of these contentions, the evidence is one-sided. Westaff introduced the affidavit of Robert Conners, one of its employees, who stated, in a rather conclusory fashion, that the capping of gas and water lines was visible. Home State Bank did not introduce any evidence to contradict Conners’s statement. “Whether the beginning of [the] improvement is visible or not is a question of fact.” *Northwest Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 249 (Minn. App. 1990) (citing *Kloster-Madsen*, 303 Minn. at 64, 226 N.W.2d at 607). For purposes of the contractors’ summary judgment motion, Home State Bank cannot establish that a genuine issue of material fact exists as to whether the capping of gas and water lines was visible.

With respect to Home State Bank's second contention, the evidentiary record is mixed. A & B Plumbing introduced the affidavits of Robert Boehme and John Jones, two of its employees, and Westaff introduced the affidavit of Conners. Boehme stated that he and Jones capped gas and water lines on October 17, 2007. Jones made essentially the same statement and referenced a timesheet documenting the work performed. Conners stated that he met with Boehme at the building on October 17, 2007, to shut off the water and secure other related plumbing prior to the demolition. The district court reasoned that these statements provided "clear and convincing evidence" that the capping of gas and water lines took place on October 17, 2007. The standard on summary judgment, however, is not whether one party's evidence is particularly strong but whether the moving party's evidence is uncontradicted such that there are no genuine issues of material fact. "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). A genuine issue of material fact exists if "reasonable persons might draw different conclusions from the evidence presented." *Id.* at 69.

Our review of the evidence in the summary judgment record leads to the conclusion that there is a genuine issue of material fact as to when the capping of the gas and water lines occurred, for at least three reasons. First, Jones's affidavit is inconclusive because it is based on a document that tends to contradict his sworn statement. Jones's affidavit states that he is "dead certain" that he performed the capping work on October 17, 2007. To support this statement, Jones relies on his timesheet from the week of

October 15-19, 2007, which is attached to the Boehme affidavit as an exhibit.<sup>1</sup> A review of the timesheet, however, does not clearly indicate that Jones worked at the building on October 17, 2007. In fact, Jones admits in his affidavit that the timesheet “may raise a question.” Our careful study of the exhibit indicates that Jones’s work at the building likely occurred on the afternoon of October 18, 2007, because that time entry is one of eight entries that are added together to arrive at the sum of ten and one-quarter hours for that day. Indeed, at oral argument, A & B Plumbing’s attorney conceded that Jones’s timesheet indicates that the capping of gas and water lines occurred on October 18, 2007, not October 17, 2007. Thus, the Jones affidavit does not establish that the capping work was performed on October 17, 2007.

Second, Boehme’s affidavit is inconclusive because it too purports to rely on Jones’s timesheet, which tends to contradict the affidavit. Boehme’s affidavit states that he is “*certain*” that he and Jones together performed the capping work on October 17, 2007. Boehme’s affidavit expressly refers to Jones’s timesheet, which is attached to his own affidavit but not to Jones’s affidavit. Because Boehme’s statement expressly links his work on the building to Jones’s work, and because Jones’s timesheet fails to establish

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<sup>1</sup>At oral argument, A & B Plumbing argued that Jones’s timesheet is inadmissible on the ground that it contains hearsay and does not satisfy the exception in rule 803(6) of the Minnesota Rules of Evidence. A & B Plumbing did not make such an argument in its responsive brief and also did not preserve an objection to the admission of the document in the district court. In fact, A & B Plumbing is the party that offered the document into evidence as an exhibit to the affidavit of Boehme, the owner and operator of A & B Plumbing. Thus, we will not consider the argument. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).



that their work was performed on October 17, 2007, Boehme's affidavit also fails to establish that date as an undisputed fact.

Third, the Jones and Boehme affidavits also are inconsistent with the Conners affidavit, which states that Conners met with Boehme at the building site in the "[e]arly Wednesday morning of October 17," that the purpose of their meeting "was to shut off the water and secure all other related plumbing," and that they "worked for an hour or so to complete the project." This statement is inconsistent with Jones's affidavit, which states that Jones performed the capping work "from 1:44 to 4:50 p.m. as shown on said time sheet," and inconsistent with Jones's timesheet, which indicates that Jones and Boehme worked at the building at those times on October 18, 2007.<sup>2</sup> Because Conners's statement expressly links his work on the building to Boehme's work, and because Boehme's statement expressly links his work on the building to Jones's work, and because Jones's timesheet does not establish that their work was performed on October 17, 2007, Conners's affidavit also fails to establish that date as an undisputed fact.

Thus, the evidence in the summary judgment record is in dispute as to whether the capping of the gas and water lines was performed on October 17, 2007, or October 18, 2007. This distinction is material because, depending on how the fact-finder views the evidence, the actual and visible beginning of the improvement may have occurred either

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<sup>2</sup>At oral argument, A & B Plumbing also argued, in the alternative, that the district court's entry of summary judgment may be affirmed because, even if the capping of the water and gas lines occurred on October 18, 2007, Jones's timesheet shows that Jones's work began at 1:44 p.m., 50 minutes before Home State Bank recorded its mortgage at 2:34 p.m. Again, this argument is beyond the scope of our review because A & B Plumbing did not include it in its responsive brief. *See Melina*, 327 N.W.2d at 20.

before or after Home State Bank recorded its mortgage. On a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Osborne*, 749 N.W.2d at 371. Accordingly, the district court erred by concluding that there is no genuine issue of material fact as to when the water and gas lines were capped. Therefore, we reverse and remand for trial. Because we have concluded that the contractors are not entitled to summary judgment, we need not address the other arguments asserted by Home State Bank, which concern factual issues that may be resolved at trial after the full development of an evidentiary record.

**Reversed and remanded.**