STATE OF MINNESOTA
IN COURT OF APPEALS
A11-959

The Gopher Company, Inc.,
Respondent,

vs.

Carolyn Reuben,
Appellant,

Mortgage Electronic Registration Systems, Inc., et al.,
Defendants.

Filed March 5, 2012
Reversed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-10-4178

Jack E. Pierce, Pierce Law Firm, P.A., Minneapolis, Minnesota (for respondent)

Scott G. Johnson, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's orders granting summary judgment to respondent in its mechanic's lien foreclosure action and on appellant's counterclaim for an offset against the amount of the mechanic's lien. We reverse and remand.

FACTS

Appellant Carolyn Reuben owns a single-family residence in south Minneapolis. On August 19, 2009, a tornado damaged Reuben's home and garage. Reuben's insurer estimated the damage repair cost to be $11,891.23. To repair the damage, Reuben entered into two contracts with respondent The Gopher Company Inc. on August 28. A roofing contract provided that Gopher would remove and replace the roofs on the house and garage. A siding contract provided that Gopher would remove and replace the soffit and fascia on the house and trim wrap the windows on the house. Reuben also planned to replace some windows, and Gopher agreed to wrap the windows with aluminum when they were installed. For the work covered by the contracts, Reuben agreed to pay Gopher the amount of her insurance proceeds and made a down payment of $6,000.

Gopher began its work in late September. During Gopher's work, Reuben "repeatedly complained . . . about the appearance of the work and the quality of the workmanship." On October 16, Gopher sent Reuben an invoice in the amount of $11,550.73 for the completed work. The invoice credited Reuben with $828 because Gopher did not trim wrap the windows because they had not yet been installed. Reuben

informed Gopher that she would not pay the remaining balance "until the job was done correctly."

On January 13, 2010, Gopher filed a mechanic's lien against Reuben's home in the amount of $5,550.73, and commenced an action to foreclose the lien, alleging three claims for relief: (1) foreclosure of its mechanic's lien; (2) breach of contract; and (3) quantum meruit. Reuben answered and counterclaimed, alleging breach of contract.

Reuben hired an expert, a professional civil engineer employed by Roof Spec Inc., which is an "independent engineering firm specializing in the evaluation, design, management and construction observation services of the building envelope which includes roofing and waterproofing," to review Gopher's work. The expert found "the shingle roof assembly . . . to be in acceptable condition," "[a] similar shingle roof assembly . . . on the garage . . . to be in acceptable condition," and "the gutters, fascia, and soffit appeared to be in acceptable condition."

The expert noted the following deficiencies: some areas required additional sealant, the fit and finish of the new flashing installed at the chimney "was poor as the two pieces of counterflashing did not intersect at the top of the cricket," the fit and finish of the new flashing installed at the entry canopy "was poor as the two pieces of metal did not meet at the ridge," "[r]oofing nails and other debris were found scattered at isolated locations on the roof surface," "[s]hingle debris was found at various locations," "unpainted nails had been used to attach the fascia at various locations" and many were underdriven, "[l]aps in the fascia were noticeable at some locations," "sealant had not been applied over the laps," "[a] loose piece of soffit was present at the northwest of the

residence," downspout "straps were fastened to the structure behind the downspout and did not cover the original strap locations," "[t]he stucco at the original strap locations was noticeably different in color than the rest of the house," "the holes for the fasteners at the original gutter straps had not been sealed," "[a]n opening in the stucco wall was present at the gutter end over the front entryway of the home," and "[t]he attachment method for the downspout extensions was insufficient and the downspout extensions were not securely held in place." The expert observed that "the sheet metal installation is of marginal quality and incomplete according to the contract" and no new trim wrap was installed on any of the windows as contemplated by the siding contract. He recommended that trim wrap be installed according to the siding contract; that changes in the installed downspouts, soffit, and fascia be made; and that the debris be removed.

On November 16, 2010, Gopher moved for summary judgment to foreclose its mechanic's lien. In support of its motion, Gopher submitted an affidavit from its president, characterizing the minor deficiencies in the work as "punch list" items that Gopher would have fixed at no additional cost, but Reuben denied it access to her property. Reuben opposed the summary-judgment motion, arguing that genuine issues of material fact existed regarding whether Gopher substantially completed the work contemplated in the contracts, whether she denied Gopher access to her property to complete the work, the propriety of Gopher's contract-price reduction for the unwrapped windows, and the cost to correct Gopher's work deficiencies. The district court granted summary judgment to Gopher, stating:

> Here Reuben raises issues regarding the work done by Gopher but provides no evidence, just mere assertions that reflect her beliefs about the work and the materials. Her own expert's report, the City of Minneapolis's approval and the contract and other extensive documentation provided by Gopher support a conclusion that there is no genuine issue of material fact regarding whether Gopher is entitled to be paid the amount remaining on the contract. That amount, with adjustment for the window wrapping and the "sign allowance" she received for permitting Gopher to place a sign on her property, is $5,550.73, the amount Gopher claims.
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> Reuben asserts in her answer that she is entitled to an offset or damages for any cost she will incur in "correcting" the work done by Gopher or in completing the items listed by her expert. As noted, the clean-up items reflected in her expert's report are items that Gopher would have done, and continues to be prepared to do upon full payment, if Reuben granted them access to her home. The work and materials were as agreed upon and do not require correcting. The "punch list" items were not done due to Reuben's own unilateral actions. The mechanic's lien amount will not be reduced.

(Emphasis omitted.)

Gopher later moved for summary judgment on Reuben's counterclaim for breach of contract, and the district court also granted the motion, noting that "[t]he basis for Reuben's claim is the same as her defense to the mechanic's lien."

This appeal follows.

D E C I S I O N

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. The district court's function on a

summary-judgment motion is not to decide issues of fact but to determine whether genuine factual issues exist. *J.E.B. v. Danks*, 785 N.W.2d 741, 747 (Minn. 2010). A genuine issue of fact exists if reasonable persons might draw different conclusions based on the evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments"; it must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *Id.* at 71. On appeal we determine whether genuine issues of material fact exist and "whether the [district] court erred in its application of the law." *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Substantial Performance

In building and construction contracts, the general rule is that a party fulfills its duty under the contract with "substantial performance." *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). Substantial performance is defined as

> performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price. Deviations or lack of performance which are either intentional or so material that the owner does not get substantially that for which he bargained are not permissible.

Id. (quoting *Ylijarvi v. Brockphaler*, 213 Minn. 385, 390, 7 N.W.2d 314, 318 (1942)). "Whether a contractor has substantially performed and the amount of damages

occasioned by omissions and defects are fact questions." *Knutson v. Lasher*, 219 Minn. 594, 603, 18 N.W.2d 688, 694 (1945). Here, the district court granted summary judgment to Gopher on the basis that Reuben's "own expert's report, the City of Minneapolis's approval and the contract and other extensive documentation provided by Gopher support a conclusion that there is no genuine issue of material fact regarding whether Gopher is entitled to be paid the amount remaining on the contract." (Emphasis omitted.) The district court stated that Reuben's expert's report indicated that the work "was properly done except some minor things."

Reuben argues that her affidavit, her expert's affidavit and report, and photographs of the work provide evidence "that Gopher failed to perform its work under the . . . [c]ontracts" and "demonstrate that there was, at a minimum, a genuine issue of material fact regarding whether Gopher substantially performed its contracts." We agree. Although Reuben's expert stated that the new roofs on the house, entry canopy, and garage and the new gutters, fascia, and soffit were in "acceptable condition," the expert noted numerous deficiencies in the work and estimated that the cost to correct the deficiencies was $4,700. Gopher also did not trim wrap the windows as contemplated by the contract. Viewing the evidence in the light most favorable to Reuben, an issue of material fact exists regarding whether Gopher substantially performed the contract by performing "all the essentials necessary to the full accomplishment of the purposes for which" the roofs and siding were constructed. *See Material Movers*, 316 N.W.2d at 18 (defining substantial performance). We conclude that the district court erred by granting summary judgment to Gopher on its mechanic's lien foreclosure action.

Offsetting the Amount of the Mechanic's Lien

Mechanics' liens are purely creatures of statute, existing only within the terms of the governing statutes. *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 828 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). The purpose of a mechanic's lien "is to reimburse laborers and material providers who improve real estate and are not paid for their services." *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004). When, as here, the improvement was provided pursuant to an agreed-upon contract price, the amount of the lien is the unpaid portion of that price. *Delyea v. Turner*, 264 Minn. 169, 174, 118 N.W.2d 436, 440 (1962) (construing Minn. Stat. § 514.03).

When a lienor's work is defective,

> the appropriate measure of damages . . . is to take either the cost of reconstruction in accordance with the contract, if this is possible without unreasonable economic waste, or the difference in the value of the building as contracted for and the value as actually built, if reconstruction would constitute unreasonable waste.

Johnson v. Garages, Etc., Inc., 367 N.W.2d 85, 86 (Minn. App. 1985) (quoting *N. Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 297 Minn. 118, 124, 211 N.W.2d 159, 165 (1973)) (quotation marks omitted). A property owner's right to deductions for defective improvements "is one of recoupment, not counterclaim." *Knutson*, 219 Minn. at 599, 18 N.W.2d at 692. The distinction between the two is important because, unlike a counterclaim, recoupment is purely defensive. *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 704 & n.5 (Minn. 1980). Recoupment is a common-law doctrine that allows

equitable adjustment of the lienor's recovery in light of the lienor's breach of contract in the transaction from which the lien arises. *Townsend v. Minneapolis Cold-Storage & Freezer Co.*, 46 Minn. 121, 124–25, 48 N.W. 682, 683 (1891). Recoupment can only reduce the amount of the lien, while a counterclaim can allow the property owner to recover more than the value of the lien. *See Household Fin.*, 288 N.W.2d at 704 & n.5 (noting that damages recovered under a counterclaim can exceed plaintiff's claim, but recoupment operates only to reduce plaintiff's damages). Essentially, the amount recouped represents the portion of the unpaid contract price for which the property owner did not receive the full value of the bargained-for improvements due to the lienor's breach. *Cf. Eischen Cabinet*, 683 N.W.2d at 816 (stating that the lien's purpose is to ensure that the lienor is paid for improving the property); *Delyea*, 264 Minn. at 174, 118 N.W.2d at 440 (holding that the amount of the lien is a function of the unpaid portion of the underlying contract to provide those improvements).

Gopher argues that Reuben waived any right to recoupment because she failed to plead recoupment as an affirmative defense. But Reuben's breach-of-contract counterclaim can constitute an affirmative defense of recoupment based on the damages caused by defects in the construction. *See Townsend*, 46 Minn. at 124, 48 N.W. at 683 (holding that a matter pleaded as a counterclaim may also constitute a recoupment defense).

Reuben argues that a material question of fact exists regarding whether Reuben is entitled to an offset for the cost of correcting the work done by Gopher. The district court concluded that no genuine issue of material fact exists regarding whether Reuben is

entitled to an offset because Gopher was willing to correct the deficiencies but Reuben denied Gopher access to her property. The president of Gopher stated in his affidavit that Gopher would have fixed the deficiencies, but Reuben "specifically instructed" Gopher "not to return to the property." Reuben stated in her affidavit that she "never told Gopher representatives that they were not allowed on my property to complete the work." We conclude that an issue of fact exists, and that it is material because if Reuben excluded Gopher from the property, Gopher's failure to remedy the defects would be justified. *See Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 379–80 (Minn. App. 1996) (noting that a first breaching party cannot escape liability if the other party subsequently breaches) (citing *Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (Minn. 1980)), *review denied* (Minn. Aug. 20, 1996). If Reuben did not deny Gopher access to her property, Reuben is entitled to an offset for the cost of correcting the deficiencies or for the difference in the value of the roofs, fascia, and soffit as contracted for and the value as actually built. *See Johnson*, 367 N.W.2d at 86.

The parties do not dispute the existence of deficiencies, although they characterize them differently. An issue of material fact exists regarding the proper damages for Gopher's failure to trim wrap the windows. The parties do not dispute that Reuben was going to contact Gopher when the new windows were installed so it could wrap the windows; that the contract does not provide a timeframe for the installation; that when Gopher did not hear from Reuben, it notified her that it would not be installing the trim wrap and credited her bill $828; and that Reuben did not contact Gopher when the windows were installed. But the parties do not agree on the amount that the contract price

should be reduced. Gopher deducted $828 from the contract price for the window wrap work. Reuben submitted evidence that the cost to trim wrap her windows was $3,200. A material question of fact therefore exists.

Because questions of material fact exist, the district court erred by granting summary judgment in favor of Gopher on Reuben's recoupment claim.

Reversed and remanded.