

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07-13-2010
PHILIP G. URRY, CLERK
BY: GH

SCHWAB SALES, INC., a foreign) 1 CA-CV 09-0449
corporation,) 1 CA-CV 09-0450
)
Plaintiff/Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SHEA HILLS DEVELOPMENT, LTD., an) Rule 28, Arizona Rules
Arizona corporation,) of Civil Appellate
) Procedure)
Defendant/Appellant.)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2006-051770; CV2007-050198 (Consolidated)

The Honorable Brian R. Hauser, Judge

AFFIRMED

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by Paul S. Harter
and Alicia Mykyta
Attorneys for Plaintiff/Appellee

Spiess & Bell, PC Phoenix
by G. Peter Spiess
and James O. Bell
Attorneys for Defendant/Appellant

I R V I N E, Judge

¶1 In this consolidated appeal, we consider whether mechanic's and materialman's liens held by a subcontractor, who

was not in contractual privity with the owner of the project, could be enforced for the value of the supplies and services rendered. The trial court found that the reasonable value of the subcontractor's supplies and services was not measured by the amount the owner's property was enhanced where, as here, the supplies and services were undisputedly provided to and used by the contractor in the project and the fact that the supplies and services provided no value to the owner's property was a consequence of the poor performance of the contractor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant/Appellant Shea Hills Development, Ltd. ("Shea Hills") is the developer of a construction project in Fountain Hills, Arizona. Shea Hills entered into contracts with two contractors, both of which entered into contracts with Plaintiff/Appellee Schwab Sales, Inc. ("Schwab") to lease equipment to perform the work required by the contractors' respective contracts with Shea Hills.

¶3 3-F Contracting, Inc. ("3-F") was hired to excavate, grade and perform fill work in constructing streets and curbs. Schwab charged 3-F \$55,647.89 for the rental equipment on the project. Schwab received \$22,000 as an advance deposit from Shea Hills. 3-F was removed from the project for allegedly failing to perform in accordance with the plans and specifications. As a

result, Shea Hills hired other subcontractors to correct the work. Although Shea Hills had paid 3-F in full, including all amounts billed by Schwab, Schwab received no payments other than the original \$22,000 advance. Schwab filed a notice of claim of mechanic's and materialman's lien in the amount of \$33,932.17, and in June 2006 filed a complaint, CV2006-051770, against Shea Hills for foreclosure of the lien. Shea Hills deposited funds into a trust in lieu of recording a bond to secure discharge of the lien under Arizona Revised Statutes ("A.R.S.") section 33-1004 (2007),¹ and Schwab released the lien. The parties agreed that if the lien was found to have been valid, Shea Hills would be liable to Schwab in lieu of foreclosure of the mechanic's and materialman's lien.

¶4 GW Grading Contractors, LLC ("GW"), was hired to install a complete storm water drainage system. Schwab leased equipment to GW on the project for a total of \$23,733.46. GW failed to perform its obligations in a timely and workmanlike manner, repeatedly failed inspections by the town, and frequently had to re-do work already completed because it was performed improperly. The town inspector ultimately shut down GW, requiring Shea Hills to remove all the work installed by GW, obtain supplies, and hire other companies to perform the work

¹ We cite the version of the statute in effect at the time the act was committed that formed the basis of the complaint.

originally tasked to GW.² Schwab recorded a notice of claim of mechanics and materialman's lien in the amount of \$23,733.46. Shea Hills deposited \$31,000 into escrow in lieu of a lien discharge bond. Schwab filed a complaint, CV2007-050198, against Shea Hills to recover the deposit in lieu of the lien discharge bond.

¶15 Both matters were assigned to the Honorable Brian R. Hauser. In each case, Schwab moved for summary judgment. Schwab argued that under A.R.S. § 33-981 (2007),³ it was entitled to payment in the amount of the value of the equipment furnished to the contractors and not in the amount of the value that Shea Hills' property was enhanced.

¶16 Shea Hills responded and filed cross-motions for summary judgment. Shea Hills argued that case law interpreted "reasonable value of the labor or materials furnished" as entitling Schwab to only the amount by which the equipment and services provided enhanced the value of the property. Concerning 3-F, Shea Hills argued that once the initial \$22,000 payment, the stand-by time, overhead, and equipment used for corrective

² The Registrar of Contractors suspended GW's license.

³ Section 33-981 provides, in part, that "the owner shall be liable for the reasonable value of labor or materials furnished to his agent." A.R.S. § 33-981(B).

work were credited, Schwab had no remaining lien rights in the property. Concerning GW, Shea Hills argued that Schwab had no lien rights in the property because Schwab's equipment provided no value to the project.⁴

¶17 The oral arguments on the motions were heard together before Judge Hauser, and the court issued a single minute entry ruling. The court disagreed with the interpretation of case law advocated by Shea Hills. The court noted that the purpose of the lien statutes was remedial and stated:

It is undisputed that plaintiff's equipment was used by the contractors 3-F and GW in the construction of defendant's project. The degree to which the value of defendant's project was enhanced by the use of plaintiff's equipment is a result solely of the skill or lack of skill of 3-F and GW, a factor completely out of plaintiff's control. Defendant's satisfaction with either 3-F's or GW's work is an issue between them and if defendant is dissatisfied, it may seek appropriate relief from those entities. The court does not read the many cases cited by defendant as standing for the result it suggests should occur.

The court entered two judgments against Shea Hills and in favor of Schwab. With respect to the matter involving 3-F, the judgment awarded Schwab \$54,853.93 (the principal amount of \$33,647.89, prejudgment interest, costs, and attorneys' fees).

⁴ Shea Hills explained that it had to remove the work GW had performed and had not used Schwab's equipment in correcting the work.

With respect to the matter involving GW, the judgment awarded Schwab \$35,814.65 (the principal amount of \$23,733.46, prejudgment interest, costs, and attorneys' fees). Both defendants timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶18 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶19 The purpose of the lien statutes is to protect laborers and materialmen and to ensure the payment of their accounts. *United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, 484, ¶ 26, 4 P.3d 1022, 1027 (App. 2000). The statutes are remedial and are to be construed liberally to effect their purpose. *Id.*

¶10 Arizona Revised Statutes § 33-981 provides in pertinent part:

A. [E]very person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or the articles were furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, . . . or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

A.R.S. § 33-981(A), (B). The recovery of a subcontractor not in privity with the owner of the property is limited to the reasonable value of the labor and materials furnished whereas one in privity with the owner is not so limited. *Lenslite Co. v. Zocher*, 95 Ariz. 208, 212-14, 388 P.2d 421, 424-25 (1964).

¶11 Shea Hills argues that "reasonable value" has been interpreted to mean the amount by which the labor and materials actually incorporated into the project have enhanced the value of the property.

¶12 In interpreting a statute, our goal is to find and give effect to the intent of the legislature. *Mail Boxes, etc.*

U.S.A. v. Indus. Comm'n, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). We look first to the plain language of the statute; if the language is unambiguous we give effect to that language and do not employ other rules of statutory construction in determining the statute's meaning. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Statutory construction presents a question of law we consider de novo. *State Comp. Fund v. Superior Court*, 190 Ariz. 371, 374-75, 948 P.2d 499, 502-03 (App. 1997).

¶13 The language of the statute here does not support Shea Hills' interpretation. The statute authorizes a lien for materials and machinery furnished in the construction of improvements, makes the contractor the owner's agent, and declares the owner liable for the reasonable value of the materials and machinery provided by a subcontractor to the contractor. The language of the statute does not suggest that "reasonable value" is measured by the increase in value of the owner's property. Rather, under the statute, the measure of the amount of the lien is the reasonable value of the items furnished that were used in the construction of the improvement. "Furnish" has been defined as "[t]o supply, provide, or equip, for accomplishment of a particular purpose." Black's Law Dictionary 675 (6th ed. 1990). The focus of the statute is on the equipment provided, not on the increase in value of the

property achieved through the use of the equipment provided. That the statute also specifies that the owner is liable for the reasonable value of materials and machinery furnished to the owner's agent or contractor rather than furnished to the project or to the owner, suggests that, once the equipment is provided to the contractor, the subcontractor is entitled to the lien and is not responsible for how the contractor uses the items provided, so long as the items are used in the construction.

¶14 Here, Shea Hills does not dispute that the rental equipment was provided by Schwab to 3-F and GW and that it was used in Shea Hills' project. It also does not challenge that the price charged by Schwab (the value of the use of the equipment) was reasonable. Under the statute, Shea Hills is therefore liable for the reasonable value of the equipment provided by Schwab. Whether that equipment as used by Shea Hills' contractor increased the value of Shea Hills' property is not a factor under the statute.

¶15 Shea Hills contends case law has established that "reasonable value" is limited to "the actual value of any enhancement to the property received by the owner." The cases cited by Shea Hills, however, do not establish such a standard.

¶16 In *Spitalny v. Tanner Construction Co.*, a case concerning a quantum meruit claim between a contractor and property owner, the Arizona Supreme Court found "that the

measure of the value of the services rendered must be the value to the defendants, not the cost to the plaintiff in performing such services." 75 Ariz. 192, 200, 254 P.2d 440, 446 (1953) *overruled in part on other grounds by Schwartz v. Schwerin*, 85 Ariz. 242, 250, 336 P.2d 144, 149 (1959). The court concluded that no evidence showed that the reasonable value of the services rendered was different from the amount stated by the contract. *Spitalny*, 75 Ariz. at 200, 254 P.2d at 446. The court did not mention enhancement of the owner's property as a measure of the value of the contractor's services.

¶17 In *Parker v. Holmes*, a lien foreclosure case involving a contractor and owner who terminated the contract by mutual consent, the Arizona Supreme Court restated the above quoted language from *Spitalny* as the test for determining reasonable value in the context of a lien. 79 Ariz. 82, 86, 284 P.2d 455, 457 (1955). In applying the test, however, the court looked to testimony from experts as to the value of the services and materials furnished. *Id.* The court did not mention the enhanced value of the property in determining the value of the lien.

¶18 Contrary to Shea Hills' argument, neither of these cases supports the position that "reasonable value" is determined by the enhanced value of the owners' property. Although both cases state that the measure of the value of the services is based on the value to the owner rather than the cost

to the contractor, the cases are still concerned with the value of the materials and services *furnished* and not with the value of the enhancement to the owners' property. Applied to this case, the parties do not dispute that Schwab furnished rental equipment to 3-F and GW that was used on Shea Hills' project. The reasonable value of the materials and equipment furnished is the value of the use of that rental equipment.

¶19 Shea Hills cites *Kerr-McGee Oil Industries, Inc. v. McCray*, 89 Ariz. 307, 361 P.2d 734 (1961), *Wahl v. Southwest Savings and Loan Ass'n*, 106 Ariz. 381, 476 P.2d 836 (1970), and other cases for the proposition that a lien is available only for materials or services that actually enhance the value of the owner's property. Both *Kerr-McGee* and *Wahl* describe the theory of a materialmen's lien in the following language relied on by Shea Hills:

The very foundation of a lien claim under our statute is the performance of labor upon or the furnishing of materials for the construction or improvement of the property upon which the lien is claimed. The theory upon which a lien is given as a prior claim upon the property is that the party claiming the lien has, either by his labor or by the materials furnished, contributed to the construction or improvement of the property upon which the lien is claimed.

Kerr-McGee, 89 Ariz. at 312, 361 P.2d at 737 (citation omitted); *Wahl*, 106 Ariz. at 385, 476 P.2d at 840 (citation omitted).

¶120 In *Kerr-McGee*, the court considered whether the value of equipment left on stand-by after the contract had been completed could be included in a mechanic's lien. The court concluded that no lien could attach for the value of the equipment on stand-by because the equipment had not been a "necessary instrumentality in accomplishing the work" and had not "contribute[d] to the improvement of the property." *Kerr-McGee*, 89 Ariz. at 311-12, 361 P.2d 734, 736-37. The court noted that the purpose of the mechanic's lien was to protect those "laborers and materialmen *enhancing the value* of another's property." *Id.* at 311, 361 P.2d at 736 (emphasis in original).

¶121 Similarly, in *Wahl*, the court considered how to determine the amount of a lien and noted that the lien was based on "the equitable principle of giving a man a lien for the Actual [sic] labor or materials which he places into a building thereby enhancing the value of another's property." 106 Ariz. at 386, 476 P.2d at 841. The court noted that a materialman was not entitled to a lien for materials that were delivered to a construction site but not used in the building. *Id.* at 385-86, 476 P.2d at 840-41.

¶122 Although *Kerr-McGee* and *Wahl*, as well as other cases cited by Shea Hills, refer to a lien as protecting a materialman who "enhances" the value of another's property, we do not interpret these cases as advocated by Shea Hills. The theory of

the materialman's lien articulated in both *Kerr-McGee* and *Wahl* notes that underlying the lien claim is the fact that the claimant has "either by his labor or by the materials furnished, contributed to the construction or improvement of the property." In both *Kerr-McGee* and *Wahl* the court was concerned with including in the value of a lien equipment and materials that were not actually used on the property. That is not the case here. Schwab furnished its equipment to the contractors, and the equipment was used on the property. Therefore, Schwab contributed to the construction. Because the equipment was not used to good effect by a third party does not diminish that contribution. The lien statutes are to be liberally construed to protect laborers and materialmen. We do not interpret the cases as requiring the conclusion that a subcontractor that furnished materials or equipment used in the construction of a project loses the protection of the mechanic's lien statutes because the owner's contractor, through no fault of the subcontractor, performs deficiently. As stated in A.R.S. § 33-981(B), the owner is liable for the "reasonable value of labor or materials *furnished to his agent.*" (Emphasis added.)

CONCLUSION

¶123 For the foregoing reasons, we affirm the trial court's finding that Schwab is entitled to recover on its liens against Shea Hills.

¶124 Shea Hills has requested an award of attorneys' fees on appeal pursuant to A.R.S. §§ 12-349 (2003), 33-998 (2007), and 33-1004 (Supp. 2009).⁵ In our discretion we deny Shea Hills' request for fees, but we award reasonable attorneys' fees on appeal to Schwab upon Schwab's compliance with Rule 21(a) of the Arizona Rules of Civil Appellate Procedure.

_____/s/_____
PATRICK IRVINE, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
PHILIP HALL, Judge

⁵ Section 33-998, the only cited statute that applies, authorizes a discretionary award of reasonable attorneys' fees to the successful party in any action to enforce a lien under the statute.