This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1505

K&S Heating, Air Conditioning & Plumbing, LLC,
Respondent,

vs.

Jeremiah J. Kramer a/k/a Jeremy Kramer,
Appellant,

XYZ Corporation, et al.,
Defendants.

Filed May 22, 2017
Affirmed
Bratvold, Judge

Rice County District Court
File No. 66-CV-15-196

John D. Scott, Hoffman, Hamer & Associates, PLLC, Faribault, Minnesota (for respondent)

Timothy L. Morisette, Lampe Law Group, L.L.P, Northfield, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant hired respondent to install a heating, ventilation, and air-conditioning system in his new home. After respondent installed the furnace but before completion of

the home, the furnace became inoperable. Appellant signed a change order for a replacement furnace and the necessary labor costs, but later refused to pay. Respondent brought a mechanic's lien action. After a court trial, the district court entered judgment for respondent. On appeal, appellant raises numerous issues, several of which overlap. Appellant argues that the district court erred because: (1) its factual findings regarding the furnace failure were clearly erroneous; (2) the change order was unenforceable; and (3) respondent did not provide adequate pre-lien notice. Additionally, appellant contends that the district court abused its discretion in awarding attorney fees and denying his motion for sanctions. Because the district court's factual findings are supported by the record and its legal conclusions contain no errors of law, we affirm.

FACTS

In August 2013 appellant Jeremy Kramer applied for and received a permit to build a house in Rice County. Kramer signed the permit and indicated that he was the owner and general contractor. While Kramer was finalizing house plans, he became acquainted with his mother's friend, John Colangelo, who works for both Arthur Construction, Inc. (Arthur) and Fabricated Wood Products (Fabricated Wood). Kramer hired Fabricated Wood to do the framing, construction, and other woodwork in the house. In addition, Colangelo helped Kramer solicit bids from other contractors.

Respondent K&S Heating, Air Conditioning & Plumbing, LLC (K&S) submitted three bids to Colangelo including one for a heating, ventilation, and air conditioning (HVAC) system. Along with its bids, K&S sent a document entitled "Property Owner's Pre-Lien Notice" which tracked the language of Minn. Stat. § 514.011, subd. 2(a), but

contained several blanks where specific information about the improvements could be inserted. Colangelo gave K&S's bids to Kramer, who accepted only the HVAC bid, estimated at $17,040. Colangelo informed K&S that Kramer had accepted the bid.

K&S installed the furnace in Kramer's home in November and December 2013 and attached it to a liquid propane gas line. On December 11, 2013, Kramer stopped by the home to check on progress and called K&S because the house was cold. That evening, and over the next several days, K&S employees tried to figure out what had caused the furnace to fail. Ultimately, the K&S employees determined that the line running between the liquid propane tank and the furnace had become restricted, and soot had built up in the furnace as a result of the low gas pressure, rendering the furnace inoperable.

K&S informed Kramer that the furnace needed to be replaced, and submitted a change order for an additional $3,610.76 to cover the cost. Kramer admitted that he read, signed, scanned, and emailed the change order to K&S on December 23, 2013. Kramer also asked K&S to revise the change order to include the findings about the restricted gas line. K&S made the requested revision before Kramer signed the change order.

K&S installed a second furnace the next day. Later, Kramer paid the original contract price of $17,040, but refused to pay the $3,610.76 for the change order. K&S recorded a mechanic's lien, sent it to Kramer, and sued Kramer when he refused to pay. Kramer moved for summary judgment, which the district court denied because "there are unresolved factual issues in this matter."

A court trial was held in December 2015. Four K&S employees testified, along with Colangelo, Kramer, and a technician who had inspected the damaged furnace. Testimony

at trial focused on three issues: whether Colangelo was Kramer's general contractor, the change order, and the cause of the furnace's damage.

In its initial decision, the district court found that a contract existed between Kramer and K&S, and Colangelo was not Kramer's general contractor; instead, Colangelo acted as Kramer's agent in communicating K&S's bid and Kramer's acceptance. The district court also found that the contract between Kramer and K&S was modified by the change order, which was valid and supported by consideration in the form of additional parts and labor from K&S and additional money from Kramer. Additionally, the court found that Kramer breached the change order by not paying.

Regarding the cause of the furnace's failure, the district court considered evidence supporting two conflicting theories. The K&S employee who installed the furnace testified that he removed the natural gas orifices on the manifold, replaced them with liquid propane orifices, connected the furnace to the ducts, gas, and electricity, and then ignited the furnace. He testified that he assessed the furnace's operation by checking the flame, gas flows, and pressures for at least ten minutes, and that the furnace was running when he left and on the following day. A different K&S employee later investigated the faulty furnace and testified that he determined that the gas line was restricted and not delivering sufficient gas to the furnace.

Kramer offered evidence that the installing employee failed to change all eight orifices. A furnace technician who examined the failed furnace testified that the first orifice was not attached, the cell missing an orifice was filled with soot, and other cells were clean and unaffected. He also testified that he detected no wrench marks near the missing orifice,

and he found an orifice inside the furnace. He acknowledged that soot in a furnace can be created in many ways, including an improper air to fuel ratio, low gas pressure, or a cracked manifold.

In response, K&S offered testimony that all eight orifices were present when the furnace was installed and that the investigating K&S employee removed an orifice from the furnace when he was attempting to figure out what had caused the failure. The district court found that the original furnace functioned when installed and the gas line became restricted, causing the furnace to fail. While the court found Kramer's technician testified credibly, it also rejected his conclusion and specifically determined that K&S's evidence was credible.

Finally, the district court determined that K&S complied with the statutory requirements for pre-lien notice and mechanic's lien statements, and accordingly was entitled to recover $3,610.76 from Kramer. The district court awarded K&S attorney fees in the amount of $18,000, denying some of the requested amount of $22,999; the court noted that "it is reasonable in this case that the attorney's fees far exceed the value of the mechanic's lien." It also denied Kramer's motions for sanctions and attorney fees.

Following the district court's order, Kramer filed a motion to amend the findings. The district court denied the motion but granted Kramer's motion to stay enforcement of the judgment pending appeal. Kramer appeals.

D E C I S I O N

We review a district court's findings of fact for clear error. *Gellert v. Eginton*, 770 N.W.2d 190, 194 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009); Minn. R. Civ.

P. 52.01. If there is "reasonable evidence to support the district court's findings," we will not find clear error. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). A factual finding is not supported only where the finding is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* We review the district court's conclusions of law de novo. *Osgood v. Med., Inc.*, 415 N.W.2d 896, 901 (Minn. App. 1987), *review denied* (Minn. Feb. 12, 1988).

I. The district court did not clearly err when it found that the furnace was installed properly and failed for reasons not attributable to K&S.

Kramer contends that the district court clearly erred when it concluded that the furnace was installed properly. He argues that the district court should have found that K&S failed to install one of the eight orifices, and that this failure caused the soot to build up and the furnace to fail.

To convince this court that the district court's finding of fact must be reversed, Kramer must demonstrate that the finding is contrary to the evidence as a whole, or not supported by reasonable evidence. *Rogers*, 603 N.W.2d at 656. Kramer argues that the district court's finding is contrary to the weight of the evidence and points to evidence that supports his improper-installation theory.[1] Kramer's theory is supported by record evidence. Because K&S's theory of causation is also supported by record evidence, we

[1] Kramer also argues that the gas line could not have been restricted. Before the furnace was installed, the house temporarily used "pot heaters" supplied through a liquid propane tank. Because the two pot heaters were functioning and required 400,000 BTU of gas as compared to the 90,000 BTU for the furnace, Kramer contests the district court's finding. The record, however, is devoid of evidence that would support this claim, which was not submitted to the district court; consequently, we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

reject Kramer's argument. It is the district court's province to weigh the evidence and find facts; we will not reverse the district court's factual findings when they are supported by record evidence. *Landeen v. DeJung*, 219 Minn. 287, 292–93, 17 N.W.2d 648, 651–52 (1945) (rejecting the argument that the adverse party's version of the facts was not credible where the trier of fact accepted the adverse party's version); *Kelly v. Hopkins*, 105 Minn. 155, 158, 117 N.W. 396, 397 (1908) (concluding that "where the evidence was radically conflicting" so as "to make the question one of fact" and the evidence sustains the verdict, it should not be overturned on appeal).

Alternatively, Kramer argues that the district court erred in finding that K&S's poor workmanship did not cause the damage to the furnace. He argues, "K&S hooked into [the gas line] and obviously did nothing to determine whether the gas line was large enough to support K&S's furnace," and that the installing employee failed to check the carbon monoxide levels. But the K&S employee who installed the furnace testified that he observed and measured the gas pressure at the time of installation, and that he performed all necessary installation tests, including checking the carbon monoxide levels. The record supports the district court's determination that K&S did not cause the furnace's failure through poor workmanship.

Moreover, we note that Kramer's arguments assume that the gas line was restricted at the time of installation. The district court did not make this finding, nor is the assertion supported by record evidence. We conclude that the district court did not clearly err when it determined that the furnace was properly installed and a restricted gas line caused the furnace's failure.

II. The change order was valid and enforceable.

Kramer makes several arguments regarding the enforceability of the change order. Preliminarily, we note that each of his arguments relies on the factual assertion that K&S did not install a functioning furnace. Because the district court did not err in rejecting the factual assertion underlying Kramer's arguments, we do not further analyze this aspect of Kramer's arguments. We consider each of Kramer's contentions in turn.

First, Kramer argues that the district court erred when it denied his motion for summary judgment, including his contention that the change order was unenforceable. The district court orally denied the motion, stating in part that there were "unresolved factual issues."

> Specifically I go right to that issue, who was the general contractor. With whom was there a contract? Who had the contract with K&S. What was the role of Arthur Construction. What was the role of Mr. Colangelo vis-à-vis Mr. Kramer vis-à-vis Arthur Construction vis-à-vis K&S.

Generally, we do not review a denial of a summary judgment upon an appeal from a judgment entered after trial. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918–19 (Minn. 2009). The supreme court has stated that "[w]here a trial has been held and the parties have been given a full and fair opportunity to litigate their claims, it makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not." *Id.* at 918 (citations omitted). Accordingly, we decline to consider the district court's decision to deny summary judgment.

Second, Kramer argues that the change order was unenforceable because it is not supported by adequate consideration. A contract must be supported by consideration. *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–39, 104 N.W.2d 661, 665 (1960). Consideration means the agreement is the result of a "negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other." *Id.* at 539, 104 N.W.2d at 665. If a party promises to do something he is already legally obligated to do, that promise does not constitute consideration. *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985). Modifications to contracts, however, do not always require additional consideration. The supreme court "has consistently held . . . that 'Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new." *Olson v. Penkert*, 252 Minn. 334, 347, 90 N.W.2d 193, 203 (1958) (citing *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 549 (1938). A contract modification does not require new consideration if the original contract is executory and not breached. *Mitchell v. Rende*, 225 Minn. 145, 149, 30 N.W.2d 27, 30 (1947).

Here, the trial court concluded that the furnace change order was a valid modification of the HVAC contract. The district court also noted that K&S "promised to provide additional parts and labor," and Kramer "promised to pay an additional amount of money." Kramer argues that the HVAC contract could not be modified because K&S breached the contract by failing to install a functioning furnace. This claim was fully

addressed above.[2] Accordingly, we determine that no new consideration was needed for the change order, and even if it were, the additional furnace and labor sufficed as consideration.

Third, Kramer claims that the change order was unconscionable. "A contract is unconscionable if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. App. 1999) (quotation omitted). Whether a contract is unconscionable is a question of law that we review de novo. *Osgood*, 415 N.W.2d at 901.

The district court found that the change order was not unconscionable, noting that Kramer offered to pay the change order, negotiated the language in the change order, and testified that he understood at the time he signed that he may have to pay the amount listed in the change order. Kramer relies on his testimony that, when he signed the change order, he "felt like I had no choice" because "I wasn't sure how I was going to get heat in the house." He also testified, however, that he had time to review the change order before signing it.

[2] Kramer's claim that K&S breached the implied warranty of merchantability and fitness also fails because the district court found K&S installed a functioning furnace. *See* Minn. Stat. § 325G.18, subd. 1 (noting that consumer goods sales carry a warranty that the goods are merchantable); *see also Dougall v. Brown Bay Boat Works & Sales, Inc.*, 287 Minn. 290, 294, 178 N.W.2d 217, 220 (1970) (noting that "merchantable quality" means a product is "reasonably fit for the general purpose for which it is manufactured and sold").

Both parties received a benefit from the change order: Kramer received a replacement furnace installation after the original furnace failed, and K&S received additional money to cover its additional expenses in installing a new furnace. Where "[b]oth parties obtained real and tangible benefits from the execution of [a] contract," we generally conclude that a contract is not unconscionable. *Overholt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 702 (Minn. App. 1989) (holding an employment contract was not unconscionable where the employee received "substantial income" and other benefits and the employer received the employee's work product and the business generated by the employee). We conclude that the change order was not unconscionable. The district court did not err in its determination that the change order was an enforceable modification of the parties' contract.

III. The district court did not clearly err in finding that Kramer was his own general contractor, and did not err in determining no pre-lien notice was necessary.

Kramer argues that the district court erred in concluding that K&S was entitled to a mechanic's lien, asserting that K&S did not comply with the pre-lien notice requirement. To be entitled to a lien, a subcontractor must generally "cause to be given to the owner or the owner's authorized agent, either by personal delivery or by certified mail, not later than 45 days after . . . first furnish[ing] labor . . . a written notice" which states the party's statutory right to file a claim against the property for the price of the services furnished if payment is not made. Minn. Stat. § 514.011, subd. 2(a).

Because lien notice requirements seek "to remedy the unfairness arising from the foreclosure of mechanic's liens on property of *unsuspecting* owners," Minnesota has

recognized exceptions for cases where "the owner is not unsuspecting." *Nor-Son Inc. v. Nordell*, 369 N.W.2d 575, 578 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Sept. 13, 1985) (analyzing the general contractor pre-lien notice requirement in Minn. Stat. § 514.011, subd. 1). The applicable subdivision contains an exception for parties "under direct contract with the owner," who are not required to provide pre-lien notices. Minn. Stat. § 514.011, subd. 2(a); *see also* Minn. Stat. § 514.011, subd. 4a ("The notice required by this subsection shall not be required to be given where the contractor is managed or controlled by substantially the same persons who manage or control the owner of the improved real estate.").

The district court found that K&S contracted directly with Kramer, and accordingly did not need to provide him with a pre-lien notice. Kramer argues that this finding is not supported by the record because Colangelo solicited the bid and communicated acceptance to K&S. Accordingly, Kramer argues that "either [K&S was] contracted to Arthur, or if Colangelo 'was acting as Kramer's agent,' as the trial court concluded, it was contracted to Kramer indirectly through Colangelo or Arthur." K&S argues that the district court's finding is supported by the record.

"Generally, the existence of a contract, as well as the terms of that contract, are questions of fact to be determined by the fact-finder." *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 101 (Minn. App. 2004). "But where the relevant facts are undisputed, the existence of a contract is a question of law, which this court reviews de novo." *Id.*

The record supports the district court's factual finding that Kramer was his own general contractor and contracted directly with K&S. Kramer signed the permit to build his own home indicating he was the general contractor. Kramer testified that he did not hire Colangelo as the general contractor. Colangelo testified that neither he nor his company were Kramer's general contractor. K&S's bid is addressed to Colangelo but bears a subject line reading "Jeremy Kramer HVAC estimate." Colangelo testified that he received K&S's bids, "printed them and [gave] them to [Kramer]," and Kramer determined which bids to accept. Kramer accepted only one of K&S's three bids. After K&S's bid was accepted, Colangelo introduced Kramer to K&S and told employees that Kramer was the general contractor. Indeed, one K&S employee testified that he knew he was working for Kramer. Accordingly, we conclude that the record supports the district court's determination that K&S contracted directly with Kramer and under Minn. Stat. § 514.011, subd. 2(a), no pre-lien notice was necessary.

Even if K&S was required to provide a pre-lien notice to Kramer, we conclude that K&S's pre-lien notice was adequate. The lien notice must be "a written notice in at least 10-point bold type, if printed, or in capital letters, if typewritten," must use specific statutory language, and must be "given to the owner or the owner's authorized agent, either by personal delivery or by certified mail." Minn. Stat. § 514.011, subd. 2(a). Kramer argues K&S did not satisfy the statutory requirements because the pre-lien notices contained blanks and were sent by email.

Kramer's claim fails. The applicable subdivision states, "A person entitled to a lien does not lose the right to the lien for failure to strictly comply with this subdivision if a

good faith effort is made to comply, unless the owner or another lien claimant proves damage as a direct result of the failure to comply." Minn. Stat. § 514.011, subd. 2(b). The district court found that K&S made a good faith effort to comply with the statute and our review confirms that this finding is supported by the record. We note that the record does not establish how the notices were delivered to Kramer, so no analysis of email delivery is required. We conclude that the district court did not err when it determined that K&S met its pre-lien notice obligations.

IV. The district court did not abuse its discretion in awarding attorney fees to K&S.

Kramer also argues that the district court erred in awarding attorney fees. "The trial court has discretion to award to the prevailing party attorney fees in a mechanics' lien foreclosure action." *C. Kowalski, Inc. v. Davis*, 472 N.W.2d 872, 878 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991); *see also* Minn. Stat. § 514.02, subd. 1a. The award should "bear a reasonable relation to the amount of the judgment secured." *Davis*, 472 N.W.2d at 878 (quotation omitted). In making this determination the district court should consider the required time and effort, the case's difficulty, the attorney's skill, the value of the interest, the trial results, loss of other employment opportunity, ability to pay, customary charges, and certainty of payment. *Id.* This court "will not reverse the district court's decision on attorney fees absent an abuse of discretion." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

The trial court concluded that K&S was entitled to $18,000 of reasonable attorney fees after K&S requested $22,999. In making its determination, the district court considered all the required factors, and emphasized that this litigation included a two-day court trial and some post-trial work.

Kramer argues that the district court abused its discretion because the $18,000 attorney fees award is excessive in comparison with the $3,600 lien, pointing to a case in which we halved an attorney fees award that had been approximately equal to the judgment "[t]o bring the award into a reasonable relationship to the amount of the judgment." *Nw. Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 251 (Minn. App. 1990). However, "[a] large fee is not necessarily an unreasonable fee." *Obraske v. Woody*, 294 Minn. 105, 109, 199 N.W.2d 429, 432 (Minn. 1972). Accordingly, we are not inclined to reject a district court's award of attorney fees "merely because they may exceed the lien amounts." *Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 498 N.W.2d 465, 470 (Minn. App. 1993), *aff'd on other grounds*, 513 N.W.2d 241 (Minn. 1994). Although the amount awarded here was substantial, we conclude that it was not unreasonable in light of the work expended in litigation. We conclude that the district court did not abuse its discretion in awarding attorney fees to K&S.

V. The district court did not abuse its discretion when it denied Kramer's motion for sanctions.

Kramer's final argument is that the district court abused its discretion when it denied his motion for sanctions against K&S. Under Minn. R. Civ. P. 11.01 and 11.03, a district court may "impose an appropriate sanction" on an attorney or party that files a pleading

not warranted by existing law or a nonfrivolous argument for extension or reversal of existing law, or if the allegations lack factual support. Decisions regarding sanctions are reviewed for abuse of discretion. *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011). After ruling in favor of K&S, the district court denied Kramer's motion for sanctions. Because we affirm the district court's decision on the merits, we also conclude that the district court did not abuse its discretion when it found K&S brought a nonfrivolous and ultimately successful claim.

Affirmed.