STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1767

Timberwall Landscape & Masonry Products, Inc.,
Appellant,

vs.

DRMP Concrete Limited Liability Company,
Defendant,

Anton Klochko, et al.,
Respondents,

Associated Bank National Association,
Respondent.

Filed June 22, 2020
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-18-15931

David S. Holman, The Law Office of David S. Holman, Ltd., Burnsville, Minnesota (for appellant)

Courtney J. Ernston, Minnesota Construction Law Services PLLC, Vadnais Heights, Minnesota (for respondent Anton Klochko, et al.)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

REILLY, Judge

This is an appeal from a partial summary judgment, entered pursuant to Minn. R. Civ. P. 54.02, invalidating appellant-materials-subcontractor's mechanic's lien and dismissing appellant's lien-foreclosure claim against respondent-homeowners. Appellant argues that the district court erred by (1) concluding that respondents were entitled to pre-lien notice under Minn. Stat. § 514.011 (2018) because no exception to the pre-lien notice statute applied; (2) concluding that even if pre-lien notice were required, appellant satisfied the good-faith exception to the pre-lien notice statute; and (3) improperly relying on facts alleged in respondents' reply memorandum and affidavit. We affirm.

FACTS

The parties do not dispute the facts in this case. In November 2016, the City of Rogers issued a building permit to DLM Construction (DLM) to construct a single-family home on real property owned by respondents Anton and Evialina Klochko. On March 12, 2018, the permit, listing DLM as the builder, was "transfer[red]" to Anton,[1] reflecting that he would be "taking over the project." About two weeks later, on March 27, 2018, Anton contracted with DRMP Concrete Limited Liability Company (DRMP) to install a retaining wall and driveway on the property. The itemized costs under the contract included $43,600 for the retaining wall, and $58,500 for the driveway and sidewalks, for a total contract price of $102,100.

[1] We refer to Anton Klochko by his first name for clarity.

DRMP hired appellant Timberwall Landscape & Masonry Products Inc. (Timberwall) to provide materials for the Klochkos' retaining wall. There is no evidence in the record that Anton had any dealings with Timberwall or knew that Timberwall was providing materials for the retaining wall. Timberwall began supplying materials for the project on April 26, 2018. Meanwhile, between March 2018, and May 2018, the Klochkos wrote three checks to DRMP totaling $57,500. Although DRMP tendered checks to pay Timberwall on its account for materials supplied for the Klochkos' retaining wall, the checks were returned, "Not Sufficient Funds."

Timberwall mailed a notice to the Klochkos via certified mail on July 7, 2018, informing them that DRMP hired Timberwall to provide landscape materials for the Klochkos' retaining wall, and stated that "[t]o the best of [Timberwall's] knowledge, [Timberwall] estimate[s] our charges will be $1 plus other good and valuable consideration." Ten days later, on July 17, 2018, Timberwall filed a mechanic's lien against the Klochkos' property for $26,161.30.

Timberwall brought a mechanic's-lien-foreclosure action against the Klochkos in September 2018. The Klochkos answered, alleging that Timberwall's mechanic's lien was invalid under Minn. Stat. § 514.011, because Timberwall failed to provide timely pre-lien notice, and because the Klochkos "paid in full for the work prior to receiving the pre-lien notice." The Klochkos also brought a counterclaim against Timberwall for slander of title and to award quiet title in favor of the Klochkos, by removing the mechanic's lien filed by Timberwall.

The Klochkos next moved for summary judgment to invalidate Timberwall's mechanic's lien for failure to comply with the pre-lien notice statute. The motion also sought a "declaratory judgment to quiet title in favor" of the Klochkos, as well as an award of attorney fees. Three days before the summary-judgment hearing, the Klochkos filed an affidavit in which Anton stated for the first time that the Klochkos did not pay DRMP in full because of quality issues. Timberwall opposed the motion for summary judgment, but did not object to the affidavit before, or at, the summary-judgment hearing.

The district court determined that Timberwall's pre-lien notice was untimely under section 514.011, and rejected Timberwall's arguments that (1) Timberwall's pre-lien notice satisfied the good-faith exception set forth in Minn. Stat. § 514.011, subd. 2(b), and (2) pre-lien notice was not required because Anton acted as the general contractor for the project. The district court also determined that "even if [Timberwall] had made a good-faith effort in providing pre-lien notice, the work had already been paid in full prior to the Klochkos receiving the notice," and therefore the amount of the lien would have been $0. As a result, the district court granted the Klochkos' summary-judgment motion in part, concluding that Timberwall's mechanic's lien was invalid, and Timberwall is "divested of any and all right, title, interest, estate, claim, or lien, existing now or formerly" on the Klochkos' property. But the district court denied the Klochkos' request for attorney fees, concluding that it could not "grant or deny summary judgment on that claim" because, "while a slander of title counterclaim was filed and served by [the Klochkos], the elements of that claim have not been briefed or argued on this motion."

Timberwall requested leave to move for reconsideration of the summary-judgment order under Minn. R. Gen. Prac. 115.11. The district court denied the request. The parties then requested that the summary-judgment order "be certified as a final partial judgment pursuant to Minn. R. Civ. P. 54.02." The district court granted the request. This appeal follows.

D E C I S I O N

Summary judgment is appropriate if the moving party shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. "When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo." *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 638 (Minn. 2006).

I. The district court did not err by concluding that the Klochkos were entitled to pre-lien notice.

Timberwall challenges the district court's decision that the Klochkos were entitled to pre-lien notice. "A mechanic's lien is a statutory remedy available to those who furnish labor or materials in the improvement of real property." *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236, 243 (Minn. 2016). Chapter 514 governs the rights and liabilities of the parties to a mechanic's lien. *See* Minn. Stat. §§ 514.01-.17 (2018). A mechanic's lien provides the claimant with a non-consensual lien or security interest in the improved property. Minn. Stat. § 514.01. "But a lien claimant must follow the statutory procedures to perfect a mechanic's lien." *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010). "To the extent there is ambiguity, mechanic's lien laws are strictly

construed as to the question of whether a lien attaches, but are liberally construed after the lien is created with respect to the enforcement of the lien." *Ryan Contracting*, 883 N.W.2d at 243.

Minnesota's pre-lien notice statute requires subcontractors who provide labor, skill, or materials for the improvement of real property, to provide pre-lien notice to the owner. Minn. Stat. § 514.011, subd. 2(a). 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. *Id.*

There are, however, exceptions to the pre-lien notice requirement. *Ryan Contracting*, 883 N.W.2d at 243. The exception relevant here does not require pre-lien notice 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." Minn. Stat. § 514.011, subd. 4a. This pre-lien notice exception recognizes cases in which "the owner is not unsuspecting" because lien notice requirements seek "to remedy the unfairness arising from the foreclosure of mechanics liens on property of *unsuspecting* owners." *See Nor–Son, Inc. v. Nordell*, 369 N.W.2d 575, 578 (Minn. App. 1985) (quotation omitted) (analyzing the general contractor pre-lien notice requirement in Minn. Stat. § 514.011, subd. 1), *review denied* (Minn. Sept. 13, 1985).

Timberwall concedes that its pre-lien notice was untimely under Minn. Stat. § 514.011, subd. 2(a), because it was mailed to the Klochkos on July 7, 2018, more than

45 days after the April 26, 2018 date they first supplied materials. But Timberwall argues that the exception set forth in section 514.011, subdivision 4a, applies because Anton "was, at all relevant times, the owner of the real estate and the contractor." Timberwall contends that "[a]s the owner and contractor, [the Klochkos were] not unsuspecting and [were] not entitled the pre-lien notice." (Emphasis omitted.)

Generally, whether an owner acted as a general contractor is a question of fact. *Nw. Wholesale Lumber, Inc. v. Citadel Co.*, 415 N.W.2d 399, 404 (Minn. App. 1987), *review denied* (Minn. Feb. 12, 1988). But Timberwall does not argue that summary judgment was inappropriate because there is a genuine issue of material fact whether the Klochkos acted as the general contractor. Instead, Timberwall argues that the undisputed facts show that the Klochkos did, in fact, act as the general contractor.

To support its position, Timberwall relies on *Pelletier Corp. v. Chas. M. Freidheim Co.*, 383 N.W.2d 318 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). In that case, Gerald Pelletier (Gerald) was the president and sole shareholder of Pelletier Corporation (Pelletier), "a real estate development and investment business" that separately contracted with builders to provide necessary services. *Pelletier*, 383 N.W.2d at 319. Pelletier owned three lots that it intended to develop into housing units, and Gerald characterized his role in these projects as "coordinating" rather than "supervisory." *Id.* Pelletier applied for the building permits to construct three housing units, and the permits identified Pelletier as both the owner and the general contractor. *Id.* Pelletier then contracted with a masonry company, who in turn purchased materials from a supplier. *Id.* After the masonry contractor failed to pay the supplier for the materials, the supplier filed

mechanic's liens on Pelletier's properties. *Id.* Pelletier sought to remove the mechanic's liens from the properties because the supplier failed to provide the statutorily required pre-lien notice. *Id.* at 319-20. Following a bench trial, the district court found that Pelletier was the general contractor because "(1) Pelletier entered into separate contracts for the different jobs necessary to complete the projects, (2) Pelletier supervised and controlled the work at the project sites, and (3) Pelletier applied for building permits and indicated it was the contractor." *Id.* at 320-22. The district court determined that the mechanic's liens were valid because, as a general contractor, Pelletier had no right to pre-lien notice under Minn. Stat. § 514.011, subd. 4a. *Id*. at 320.

On appeal, this court recognized that "[a] 'contractor' is commonly defined as a party who undertakes to make specific improvements under a contract with an owner." *Id.* at 322. We then determined that the owner did not fall into the ordinary definition of a contractor. *Id.* But we stated that there is

> nothing unusual . . . about a property owner acting as his or her own contractor. Gerald . . . was not simply an owner building his own house. He obtained building permits indicating Pelletier . . . was the contractor, and began to build three different housing units for resale at a profit. As an officer of Pelletier, he contracted with numerous suppliers such as [the masonry contractor]. These are duties and obligations a contractor would ordinarily undertake.

Id. (citations omitted). Thus, we concluded that the district court did not err in finding that Pelletier was a contractor. *Id.*

Pelletier is distinguishable from the facts and circumstances here. Unlike in *Pelletier*, the Klochkos were simply owners finishing the building of their own home. The

Klochkos were not building multiple housing units for resale at a profit, and there is no evidence in the record revealing that the Klochkos had any experience acting as contractors, or were directly supervising the building project. And the building permit issued to Anton in March 2018 listed him as the point of contact, it did not state that he was the general contractor.

Based on the undisputed facts in the record, a conclusion that the Klochkos acted as the general contractor would be inconsistent with the purpose of pre-lien notice, which is "to protect an owner from hidden liens arising from labor or materials supplied to the contractor by subcontractors or materialmen who extended credit to the contractor on the security of the owner's property and whose identities were unknown and often unascertainable by the owner." *Nasseff v. Schoenecker*, 253 N.W.2d 374, 377 (Minn. 1977); *see also Nordell*, 369 N.W.2d at 578 (recognizing the purpose of the mechanic's lien statutes is to seek "to remedy the unfairness arising from the foreclosure of mechanics liens on property of *unsuspecting* owners" (quotation omitted)). And our supreme court has recognized that the pre-lien notice requirement should be interpreted liberally to uphold notice requirements for property owners. *See Ryan Contracting*, 883 N.W.2d at 245 (recognizing that the pre-lien notice requirement should be interpreted liberally to uphold notice requirements for property owners). Timberwall, therefore, has not met its burden to show that the district court erred by concluding that the Klochkos did not act as the general contractors.

Because Timberwall has not met its burden to show that the Klochkos acted as general contractors, and has not argued that a fact issue exists in this regard, the exception

set forth in Minn. Stat. § 514.011, subd. 4a, does not apply. Thus, the district court did not err by concluding that the Klochkos were entitled to pre-lien notice under section 514.011.

II. The district court did not err by concluding that Timberwall did not satisfy the good-faith exception set forth in Minn. Stat. § 541.011, subd. 2(b).

Timberwall argues that even if pre-lien notice were required, its pre-lien notice was valid because the good-faith exception set forth in Minn. Stat. § 514.011, subd. 2(b), was satisfied. That statute provides: "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). Thus, under the statute, the good-faith exception applies if the lien-claimant first shows that a good-faith effort to comply with the pre-lien notice requirements was made, and the owner or another lien claimant fails to establish damages based on the failure to comply. *See id.*

In *Carolina Holdings Midwest, LLC v. Copouls*, this court held that the good-faith exception set out in Minn. Stat. § 514.011, subd. 2(b), was satisfied where the property owners acknowledged receipt of pre-lien notices sent to their current residence by certified mail, but signed for by a mail carrier. 658 N.W.2d 236, 238 (Minn. App. 2003). This court determined that the property owners did not prove "damages as a direct result of the fact that the certified mail was signed for by [the property owner's] mail carrier rather than" themselves and thus "that fact does not void [the] liens." *Id.* at 240.

Timberwall argues that it made a good-faith effort to comply with the statutory pre-lien notice requirements by providing pre-lien notice "via certified mail 72 days after its

first delivery," and "estimating its charges will be $1 plus other good and valuable consideration." Timberwall also contends that because the Klochkos did not pay DRMP in full, they cannot show damages as a result of Timberwall's failure to provide timely pre-lien notice. Thus, Timberwall argues that it has satisfied the good-faith exception set forth in Minn. Stat. § 514.011, subd. 2(b).[2] We disagree.

Timberwall provided its notice 72 days after its first delivery of materials, and Timberwall does not claim that it tried to provide pre-lien notice within the statutorily mandated 45-day period. Nor does the record reflect any effort on the part of Timberwall to comply with this mandate. The lack of any record evidence reflecting that Timberwall sought to provide pre-lien notice within the statutorily mandated 45-day period supports the district court's determination that Timberwall failed to make a good-faith effort to comply with the statutory pre-lien notice requirements. And because Timberwall failed to make a good-faith effort to comply with the statutory pre-lien notice requirements, we need not reach the question of damages. *See* Minn. Stat. § 514.011, subd. 2(b). The district court thus did not err by concluding that Timberwall failed to satisfy the good-faith exception set forth in Minn. Stat. § 514.011, subd. 2(b).

[2] Timberwall cites unpublished decisions from this court to support its argument. But unpublished decisions are not precedential. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (stating that "unpublished opinions are not precedential").

III. Timberwall's argument that the district court improperly relied on facts asserted in the Klochkos' reply memorandum and affidavit filed three days before the summary-judgment hearing is not properly before this court.

Finally, Timberwall argues that the district court improperly relied on facts asserted in the Klochkos' reply memorandum and affidavit because they were submitted only three days before the summary-judgment hearing. But Timberwall failed to object to the affidavit when it was filed or at the summary-judgment hearing. And although Timberwall mentioned the information in the affidavit in its request to move for reconsideration, Timberwall did not specifically argue that the district court improperly relied on the affidavit in making its decision. This court will not consider issues not presented to, or decided by, the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). For that reason, Timberwall's argument is not properly before us.

Affirmed.