STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1669

EDF-RE US Development, LLC,
Appellant,

vs.

RES America Construction, Inc.,
Respondent.

Filed December 12, 2022
Affirmed
Connolly, Judge

Murray County District Court
File No. 51-CV-19-54

Dean B. Thomson, Hugh D. Brown, Alexander B. Athmann, Fabyanske, Westra, Hart & Thomsom, P.A., Minneapolis, Minnesota (for appellant)

James J. Hartnett, Joshua T. Peterson, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant, the developer of a wind energy project, challenges the district court's findings after a bench trial that, under the parties' contract, appellant was not entitled to liquidated damages that it did not invoice for, it was not entitled to off-site demurrage, and it was not entitled to additional delay and delivery costs. In its cross-appeal, respondent,

the contractor for the project, challenges the district court's finding that it was not entitled to its mechanic's liens. Because the district court did not err, we affirm.

FACTS

In March 2018, appellant EDF-RE US Development, LLC and respondent RES America Construction, Inc. entered into the Engineering, Procurement and Construction Services Agreement (the Agreement). Under the Agreement, respondent agreed to engineer and construct the Stoneray Wind Project (the Project), a one-hundred-megawatt wind energy project, for approximately $32 million. The Project was located in Murray and Pipestone counties and was comprised of 39 wind turbine generators (WTGs) and their supporting electrical and civil infrastructure.

Under the Agreement, appellant agreed to purchase the WTGs from Siemens, the supplier of the WTGs, and respondent was responsible for "offloading, assembling, erecting, and installing [the] WTGs." The district court found that, upon substantial completion of the project, in the normal course of their business operations, appellant had assigned ownership of the WTGs to Stoneray Power Partners, LLC (SPP). Appellant is an affiliate of SPP.

The parties agreed to specific date milestones for (1) mechanical completion of the WTGs; (2) individual circuit completion; and (3) connection of each circuit with Xcel Energy's transmission system. The parties also agreed to a "Guaranteed Project Substantial Completion Date." The Agreement provided for liquidated damages for delays in meeting each milestone.

Timely completion of the project and each guaranteed completion date was important to appellant. Delay could have led to lost revenue from selling energy on the open market and could have delayed the date on which appellant could obtain tax benefits. Tax benefits were crucial because "[r]oughly half of the project [was] financed through tax credits." To obtain the tax credits, appellant needed to meet deadlines imposed by the IRS.

In May 2018, respondent began to work on the Project. Soon after construction began, the area experienced periods of heavy rain. In late June and early July, respondent submitted two notices to appellant, requesting a time extension and claiming that force majeure events, as defined by the Agreement, had occurred on June 30-July 3. Appellant denied respondent's requests for June 30-July 2, asserting that the Agreement's force majeure event requirement was not met. Appellant extended the deadline one day for the July 3rd force majeure event.

Respondent was behind schedule and having problems before the claimed force majeure events. Respondent built the laydown yard in a low spot that had poor drainage; its entrance and parking lot were mud pits. On the access roads, respondent did not strip the soil to the subgrades and used only partial aggregate, which resulted in failed roads.

By July 12, 2018, respondent was behind schedule, and the parties met to discuss the schedule delays. Respondent asserted that rainfall and high ground water were impacting the project but confirmed that they would be ready to accept deliveries of the WTGs as scheduled.

Siemens scheduled the delivery of the WTGs for July 30, 2018. But on July 25, 2018, respondent notified appellant that the site was not ready for the delivery because of

the alleged force majeure events and differing site conditions due to high groundwater. Because respondent notified appellant of the delay only a couple of days before the scheduled delivery, the delivery trucks could not be redirected, and Siemens incurred standby costs to keep the trucks available to deliver the WTGs.

Siemens invoiced appellant for the standby costs. Appellant paid Siemens because appellant's investors required that appellant obtain an "estoppel certificate" from Siemens, which Siemens would not sign until appellant paid the delay damages. Appellant paid for the standby costs without receiving records from Siemens to confirm the demurrage or investigating whether the WTGs were ready to ship and on stand-by when Siemens said they were.[1]

[1] Demurrage generally means the compensation paid for the "[d]etention of a ship, freight car, or other cargo conveyance during loading or unloading beyond the scheduled time of departure." *The American Heritage Dictionary of the English Language* 484 (4th ed. 2006). Under the Agreement, here, demurrage is specifically defined as and means,

> the charges required as compensation to [appellant] for equipment (including but not limited to WTG Special Tools materials, and/or trucks arriving to the Project Site that [respondent] is responsible for unloading and receiving on behalf of [appellant], that are not unloaded in accordance with the Requirements of this Agreement, and that cannot access the Designated Delivery Location. Demurrage also applies to the charge required as compensation to [appellant] for equipment (including but not limited to WTG Special Tools) and materials leaving the Project Site that [respondent] is responsible for packing, loading, and making available for pick-up on behalf of [appellant], that is not packed, loaded, and made available in accordance with the Requirements of this Agreement.

The Agreement has an opening parenthesis before the first "including" in the definition of "demurrage" but does not have a closing parenthesis.

On August 20, 2018, the first deliveries of WTGs arrived, but mud continued to cause issues for the delivery process. Respondent had four hours to unload the trucks but was often behind schedule. Siemens billed appellant for the delayed unloading of the trucks and for additional work and equipment provided for the Project, which included expenses for additional Siemens' staff and tool-rental costs for the additional days.

In October 2018, appellant informed respondent that it was responsible for the demurrage from the delayed delivery pursuant to the demurrage provision in the Agreement. Respondent again claimed it was not responsible due to force majeure and differing site conditions.

Along with the delayed delivery, respondent was late in completing all the milestones in the Agreement.[2] The guaranteed completion date for the Xcel circuit feeders was September 16, 2018, but they were not completed until September 29, 2018. The guaranteed completion date for the first WTG was September 26, 2018, but it was not completed until October 18, 2018. The guaranteed completion date for the first circuit was October 20, 2018, but it was not completed until November 20, 2018. The guaranteed substantial completion date was November 17, 2018, but the Substantial Completion Certificate was not executed by respondent until December 22, 2018, 35 days late.

Appellant sent respondent two liquidated-damages invoices for the delays. On September 21, 2018, appellant invoiced respondent for the missed guaranteed completion date for circuit feeders to Xcel for the dates of September 17-21, 2018, in the amount of

[2] The four initial Guaranteed Completion Dates were moved one day forward by Change Order No. 2.

$10,000. On October 24, 2018, appellant invoiced respondent for the missed circuit feeders to Xcel deadline for September 22-30, 2018, in the amount of $45,000. Appellant continued to send respondent missed milestone letters but notably did not send any more invoices for the duration of the project.

In late October 2018, the parties met. Respondent believed that the parties reached an agreement at the meeting that appellant would waive liquidated damages if respondent achieved substantial completion in 2018. Appellant's representative testified that it did not reach such an agreement, but around this time, appellant stopped sending invoices for liquidated damages.

In March 2019, appellant filed suit against respondent, seeking damages based on the delayed project completion and failure to timely receive the shipments of WTGs. In April 2019, respondent filed its answer and asserted counterclaims. Respondent pleaded a breach-of-contract claim based on appellant's refusal to pay. Around the same time, respondent filed mechanic's liens without providing appellant with statutory pre-lien notices. Respondent filed a line lien on the WTGs under Minn. Stat. § 514.04 (2020), and a land lien on the real property under Minn. Stat. § 514.01 (2020).[3] In respondent's

[3] A line lien under Minn. Stat. § 514.04 attaches to contributions made

> for the construction, alteration, or repair of any line of railway, or any structure or appurtenance of such railway, or of any telegraph, telephone, or electric light line, or of any line of pipe, conduit, or subway, or any appliance or fixture pertaining to either, the person performing such labor, or furnishing such skill, material, or machinery.

A land lien under Minn. Stat. § 514.01 attaches to "the improvement, and upon the land on which it is situated."

counterclaims, it requested an order adjudging the validity, enforceability, and superiority of its mechanic's liens.

The parties moved for summary judgment. Appellant argued that respondent was not entitled to a line lien on the WTGs under Minn. Stat. § 514.04. The district court denied appellant's motion on the mechanic's-lien issue, determining that respondent could file a line lien on the WTGs under Minn. Stat. § 514.04. Respondent argued that it was entitled to relief under the Agreement's force majeure provision. The district court also denied respondent's motion on the force-majeure issue, concluding that the rain events were not force majeure events under the Agreement.

In October 2020, the district court held a two-week bench trial. On October 20, at the start of the trial, appellant filed a request for judicial notice of county property record filings as evidence of SPP's ownership interest. The filings were the assignment of land contracts and easement agreements from appellant to SPP. Appellant assigned eight contracts to SPP from July 31, 2018, to October 23, 2018, and recorded the same with the county. On October 29, 2020, respondent moved to amend the pleadings to add SPP as a party.

After the bench trial, the district court awarded appellant its final completion damages, its invoiced liquidated damages, and its on-site demurrage. It concluded that respondent had missed milestones that would have entitled appellant to recover $5,766,500 in liquidated damages. But the district court determined that the Agreement required appellant to invoice respondent for liquidated damages and that appellant was only entitled to the $55,000 in liquidated damages that it invoiced.

The district court further concluded that the Agreement did not permit appellant to recover its off-site demurrage because equipment had to arrive at the project site before appellant was entitled to recover demurrage. Appellant also claimed that it was entitled to damages for additional tool-rental costs, but the district court determined that there was "no testimony presented that [appellant's] claim for the additional tool[] rental was invoiced or based on the daily rental rates of [e]xhibit D.2.3." The district court also determined that appellant was not entitled to damages for other costs that appellant paid to Siemens because delay liquidated damages were the exclusive remedy for delay in reaching the milestones.

The district court awarded respondent damages for final contract completion and offset this amount against appellant's claims. The district court determined that respondent was not entitled to the mechanic's liens. The district court found that respondent did not perfect its line lien under Minn. Stat. § 514.04 because there was no evidence in the record that respondent filed the line lien with the Minnesota Secretary of State or that it served the line lien on appellant. The district court found that respondent could not foreclose on its land lien under Minn. Stat. § 514.01 because appellant did not have a property interest in the Project's real property when the land lien was filed.

This appeal follows.

DECISION

1. Liquidated Damages

Appellant contends that the district's court's interpretation of the liquidated damages provision was against the plain language of the Agreement. We disagree.

"When the intent of the parties can be determined from the writing of the contract, the construction of the instrument is a question of law for the court to resolve, and this court need not defer to the district court's findings." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 221 (Minn. App. 2003) (quotation omitted), *rev. denied* (Minn. Jan. 20, 2004). "Whether language in a contract is plain or ambiguous is a question of law that we review de novo." *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016); *see also Glacial Plains Coop. v. Chippewa Valley Ethanol Co.*, 912 N.W.2d 233, 236 (Minn. 2018). "If a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003) (quotation omitted).

At issue is whether an invoice is a condition precedent under the Agreement to payment of liquidated damages. A condition precedent is a contract provision that "calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which the promisor's obligation is made to depend." *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23, 27 (Minn. 2018) (quotation omitted). The contract language must unambiguously create a condition precedent. *Mrozik Constr., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49, 52 (Minn. App. 1990). To create a condition in a contract, "[p]arties typically use terms such as 'unless,' 'contingent upon,' 'subject to,' 'provided that,' 'as soon as,' and '*after*,' among others."

Trooien v. Talon OP, L.P., A19-1541, 2020 WL 2840230, at *4 (Minn. App. June 1, 2020) (emphasis added), *rev. denied* (Minn. Aug. 25, 2020).[4]

Appellant contends that the district court's interpretation of the Agreement, requiring appellant to invoice respondent for liquidated damages, was against the plain language of the Agreement. We disagree. Section 7.6(a) of the Agreement provides:

> [I]f [respondent] has not achieved WTG Mechanical Completion, for each WTG, by the Guaranteed WTG Mechanical Completion Dates, then [respondent] will be liable for, and will pay to [appellant], the liquidated damages as set forth in Exhibit A.2 per Day until the WTG Mechanical Completion Date, for each WTG, has been achieved.

Exhibit A.2 provides:

> Any Delay Liquidated Damages [respondent] is obligated to pay to [appellant] will be due and payable within seven (7) Days after [appellant] has invoiced [respondent] for such amounts. [Respondent] will continue to pay any Delay Liquidated Damages payable under this Exhibit A.2 and ARTICLE 7 until the achievement of the applicable Guaranteed Completion Date, at which time [respondent] will pay all previously accrued and unpaid applicable Delay Liquidated Damages. Any Delay Liquidated Damages not paid when due will bear interest at a rate calculated in accordance with Section 3.7.

Under exhibit A.2 of the Agreement, liquidated damages "will be due and payable within seven (7) Days *after* [appellant] has invoiced [respondent] for such amounts." (Emphasis added.) Here, the Agreement uses the term "after" to make invoices a condition precedent to payment of liquidated damages. *See Trooien*, 2020 WL 2840230, at *4

[4] We recognize that nonprecedential cases are not binding, but they may be persuasive. *City of St. Paul v. Eldredge*, 788 N.W.2d 522, 526-27 (Minn. App. 2010), *aff'd*, 800 N.W.2d 643 (Minn. 2011).

(stating parties typically use terms such as, "'unless,' 'until,' 'contingent upon,' 'subject to,' 'provided that,' 'as soon as,' and 'after'" to create a condition precedent). The plain language of the Agreement creates a condition precedent. Thus, appellant must satisfy the invoice condition precedent before payment of liquidated damages is due.

Appellant contends that the second sentence of the provision at issue and other provisions in the Agreement do not mention an invoice. We disagree because the other provisions reference exhibit A.2. The second sentence of the liquidated damages provision does not explicitly refer to the invoice requirement, but it provides that liquidated damages are payable under the provision at issue: "[Respondent] will continue to pay any Delay Liquidated Damages *payable under this Exhibit A.2* and ARTICLE 7." (Emphasis added.) Moreover, other provisions in the Agreement reference exhibit A.2: sections 7.6(a)-(b), (d)-(e) provide, "[respondent] will be liable for, and will pay to [appellant], the liquidated damages *as set forth in Exhibit A.2*." (Emphasis added.) Thus, the other provisions reference exhibit A.2 as laying out how liquidated damages can be obtained: appellant must send respondent an invoice, and only then must respondent pay liquidated damages.

Appellant also contends that this interpretation would render the second sentence of this provision superfluous. Appellant's argument is not persuasive. The second sentence provides that, on the guaranteed completion date, respondent "will pay all previously accrued and unpaid applicable Delay Liquidated Damages." The dictionary defines "accrue" as "[t]o increase, accumulate, or come about as a result of growth." *American Heritage*, *supra*, at 12. It defines "unpaid" as "[n]ot yet paid." *Id.* at 1885. Under the plain language of the Agreement, liquidated damages will "accumulate" when appellant

invoices respondent and respondent does not pay within the seven-day period. The damages not paid within the period will go "unpaid." Thus, the first sentence creates the invoice condition precedent, and the second sentence provides that, on the guaranteed completion date, respondent will pay all liquidated damages that have been invoiced but not paid.

Therefore, the plain language of the Agreement provides that an invoice is a condition precedent to the payment of liquidated damages. The invoice requirement also makes sense because the parties agreed on different milestones for the completion of different components of the Project, and the Agreement provided for different liquidated damages amounts based on which milestone respondent missed. Thus, the requirement of separate invoices for liquidated damages served to put respondent on notice as to which milestone was not being met and what its exposure was under the Agreement.

In the alternative, appellant contends that it was excused from performing because sending invoices to respondent would have been futile. In support of its argument, appellant cites *Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 251 (Minn. 1953). In *Lee*, the supreme court excused the tender of the purchase price for the purchase of property, concluding that it would have been "futile and useless" because the property owner had repudiated the contract, refused to go through with the transaction, and sold the property to another person. 58 N.W.2d at 251.

Appellant's argument is not persuasive because, even if sending respondent an invoice would have been futile, appellant was still required to do so. Futility does not excuse performance of the invoice requirement. *See Nat'l City Bank of Minneapolis v. St.*

Paul Fire & Marine Ins. Co., 447 N.W.2d 171, 178 (Minn. 1989) (stating that "no legal principle permits violation of a contract condition to be completely ignored[;] [a] precedent condition must be performed or happen before a duty of immediate performance arises" (quotation and emphasis omitted)). The general rule under Minnesota law is that conditions precedent "must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition." *Capistrant*, 916 N.W.2d at 27-28 (quotation omitted). Sending an invoice that might go unpaid is not like tendering payment for property already owned by another. *See Lee*, 58 N.W.2d at 251. The Agreement required appellant to send respondent an invoice before it was entitled to liquidated damages, and appellant was not excused from this requirement even if it would have been futile.

Appellant also contends that it satisfied the invoice requirement when it filed its complaint and when it sent respondent the "demand letter" dated February 8, 2019. We disagree. The Agreement does not define "invoice." When interpreting a provision of a contract, appellate courts must give the terms "their plain, ordinary and popular meaning." *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979) (quotation omitted). The dictionary defines "invoice" as, "[a] detailed list of goods shipped or services rendered, with an account of all costs; an itemized bill." *American Heritage*, *supra*, at 921.

Neither the demand letter, that appellant sent to respondent, nor appellant's complaint satisfy the invoice requirement. The complaint alleges, "[appellant] has been damaged in an amount in excess of $11.4 million, the exact amount to be proven at trial."

The complaint was not an invoice because it did not specify the amount due or itemize liquidated damages.

Moreover, the letter from appellant's counsel to respondent was not an invoice. In one sentence buried in the second page of a two-page letter with a heading that stated, "Stoneray Wind Project-Payment Application Number 10" and that otherwise describes disputed change orders and punch lists, appellant wrote, "[respondent] currently owes [appellant] at least $4,490,135 in demurrage charges, and another $5,583,000 in liquidated damages." While the letter does specify an amount, the amount is not the amount that appellant is now claiming, and the letter does not itemize liquidated damages as required by the Agreement. Without an itemized account of the charges, respondent could not have determined if they agreed with the amount claimed or what specific milestone they were missing. Thus, the complaint and demand letter do not satisfy the Agreement's invoice requirement.

In a footnote, appellant asks this court to clarify that, if an invoice is required to obtain liquidated damages, it should be permitted to now invoice respondent for liquidated damages. However, appellant did not make this argument below, and therefore it is not properly before us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that "[a] reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it" (quotation omitted)).

The district court did not err in concluding that appellant was only entitled to liquidated damages that it invoiced because, under the Agreement, an invoice is a condition precedent to payment.

Alternatively, appellant contends that it is entitled to recover its actual damages. This argument fails because the parties agreed that liquidated damages were the only remedy for respondent's failure to meet the guaranteed completion dates. Section 7.6(f) of the Agreement provides that "payment of the Delay Liquidated Damages will constitute . . . the sole and exclusive remedy for the [respondent's] failure to meet the Guaranteed Completion Dates." The Agreement unambiguously provides that liquidated damages are appellant's only remedy for the failure to meet the guaranteed completion dates. *See Denelsbeck*, 666 N.W.2d at 346–47 (stating "[i]f a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh" (quotation omitted)). Therefore, the Agreement provides that appellant is not entitled to actual damages.

Appellant also contends that it is entitled to its actual damages because the district court's interpretation of the Agreement rendered the liquidated damages provision unenforceable. Appellant cites *Meuwissen v. H.E. Westerman Lumber Co.*, 16 N.W.2d 546, 549 (Minn. 1944). In *Meuwissen*, the supreme court determined that if liquidated damages are found to be an unenforceable penalty, a party is entitled to their actual damages. 16 N.W.2d at 549.

Appellant's argument fails because the district court did not find that the liquidated damages provision was unenforceable. Unlike *Meuwissen*, here, appellant did not receive

its full liquidated damages because it did not comply with the Agreement's invoice requirement, not because the district court found the that the provision was unenforceable. The district court did award appellant liquidated damages for liquidated damages that it invoiced respondent for. Therefore, actual damages are not available.

2. Demurrage

Appellant contends that the district court erred by concluding that appellant was not entitled to the off-site demurrage that it incurred as a result of the delayed shipment of WTGs pursuant to the plain language of the Agreement.

The language in an unambiguous contract "must be given its plain and ordinary meaning." *Denelsbeck*, 666 N.W.2d at 346-47. The interpretation of the demurrage provision in the Agreement is a question of contract interpretation that this court reviews de novo. *See Alpha Real Estate*, 671 N.W.2d at 221.

The Agreement defines demurrage as:

> [C]harges required as compensation to [appellant] for equipment (including but not limited to WTG Special Tools materials, *and/or trucks arriving to the Project Site* that [respondent] is responsible for unloading and receiving on behalf of [appellant], that are not unloaded in accordance with the Requirements of this Agreement, and *that cannot access the Designated Delivery Location.*

(Emphasis added.)

Under section 4.10(b) of the Agreement, a WTG is delivered

> [W]hen the *[appellant] or its designated subcontractor, as applicable, makes the WTGs available in accordance* with Exhibit D.3, and the Requirements of this Agreement on the delivery dates specified in the Critical Path Project Schedule *at*

> *the WTG Foundation locations designated by [respondent] (the "Designated Delivery Locations").* . . .

(Emphasis added.)

If delivery of the WTGs to the designated delivery location is impossible due to respondent's acts or omissions, section 4.10(b) provides that

> the *WTGs will be deemed Delivered at the Project Site Entry Laydown Area or at such other accessible location on the Project Site as mutually agreed upon by the Parties*. In such case, [respondent] will be responsible for and will assume all costs and delays to the Project Schedule related to the transportation, stand-by, unloading, storage and transport from the Project Site Entry Laydown Area or other Project Site location to the Designated Delivery Location of the subject WTG.

(Emphasis added.)

Under section 4.10(e), respondent is responsible for demurrage "*if [respondent] fails to timely unload the WTGs delivered as described above or trucks cannot access the Designated Delivery Location.* These charges include waiting time, delays, double handling . . . , storage and security." (Emphasis added.)

Appellant contends that "demurrage" includes trucks that cannot access the designated delivery location even if the truck is detained somewhere off site, citing the definition of demurrage. We disagree because when the "Designated Delivery Location" and "demurrage" provisions are read together, the plain language of the Agreement provides that only on-site demurrage is available. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990) (stating that appellate courts "construe a contract as a whole and attempt to harmonize all clauses of the contract"). The definition of demurrage

applies to trucks that are *arriving* to the Project site. Further, if trucks cannot access the delivery location, section 4.10(b) provides that the WTGs will be deemed delivered at an alternative *on-site* location, which the Agreement describes as the "Project Site Entry Laydown Area or at such other accessible location *on the Project*." (Emphasis added.) Section 4.10(b) provides that respondent is responsible for the costs associated with the transportation, stand-by, unloading, storage and transport of the WTGs from the "Project Site Entry Laydown Area *or other Project Site location* to the Designated Delivery Location." (Emphasis added.) Therefore, appellant can only recover on-site demurrage because the Agreement specifies that, if trucks cannot access the site, the WTGs will be deemed delivered at an alternative on-site location.

Appellant further contends that section 4.10(e) supports its position; section 4.10(e) provides that demurrage "charges include waiting time, delays, double handling, (loading, unloading, and extra manipulation), storage and security." Appellant contends that it does not make sense that storage costs or double handling could be incurred if demurrage only applied to on-site demurrage.

We disagree because the Agreement contemplates on-site storage and double handling costs. Section 4.10(e) provides that, if delivery to the designated delivery location is not possible, respondent will be responsible for costs and delays relating to the "transportation, stand-by, unloading, storage and transport from the Project Site Entry Laydown Area or other Project Site location to the Designated Delivery Location of the subject WTG." It also provides that respondent will be responsible for "providing transportation (including unloading and re-loading of WTG components if required) from

the Project Site Entry Laydown Area to the Designated Delivery Location." Thus, the fact that the Agreement makes respondent liable for storage and double handling costs does not necessarily mean that it provides for off-site demurrage.

Appellant also contends that the district court's decision was economically irrational. But the district court's interpretation of the Agreement was not irrational because it applied the plain language of the Agreement. Appellant is a sophisticated party with access to legal counsel. The parties negotiated the Agreement and agreed that demurrage applied to delivered WTGs. "If a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Denelsbeck*, 666 N.W.2d at 346-47 (quotation omitted).

3. Additional Costs

Additional Tool Rental

Appellant contends that the district court erred in finding that appellant failed to offer evidence that the additional tool rental was invoiced because it did not cite a provision in the Agreement that requires invoicing. Appellant's argument is not persuasive because, as we have already discussed, the plain language of the Agreement demonstrates that an invoice is a condition precedent to payment.

The plain language of the Agreement provides that an invoice is required to receive payment for the additional tool-rental costs. In support of its finding, the district court cited exhibit D.3. Exhibit D.3 provides that if respondent fails to make the tools available for transport within the time specified, it must pay appellant within 30 days "*after* [respondent's] receipt of [appellant's] valid invoice therefor." (Emphasis added.) "After"

is a term typically used to create a condition precedent in a contract. Here, like the plain language of the liquidated damages provision, the term "after" creates a condition precedent. The additional tool-rental costs are not due until "after" respondent's receipt of an invoice. Appellant did not invoice respondent for the tool-rental costs; therefore, the district court did not err when it rejected appellant's claim for additional tool-rental costs.

Other Costs

Appellant also contends that it is entitled to damages for its other costs that arose out of its expenses for technical field hours, daily expenses related to field hours, generators for pre-commissioning WTGs, and site infrastructure costs. We disagree because the parties agreed that liquidated damages were the sole remedy for delay in meeting the guaranteed completion dates.

"When the intent of the parties can be determined from the writing of the contract, the construction of the instrument is a question of law for the court to resolve, and this court need not defer to the district court's findings." *Alpha Real Estate*, 671 N.W.2d at 221 (quotation omitted).

Section 7.6(f) of the Agreement provides that "payment of Delay Liquidated Damages will constitute the sole and exclusive . . . remedy for the [respondent's] failure to meet the Guaranteed Completion Dates." Appellant contends that respondent did not establish that the delays related to the guaranteed completion dates. But appellant concedes that it "incurred extra costs under its [contract] with Siemens because [respondent's] delays required it to rent special equipment used for installation of the WTGs for a longer period and to use more Siemens commissioning staff time." The extra costs that appellant

incurred from Siemens arose out of the delayed installation of the WTGs. Appellant agreed in the Agreement that liquidated damages were its only remedy for delays related to the guaranteed completion dates, and it may not receive damages for the tool rental and other costs it paid Siemens.

Therefore, because the parties agreed that liquidated damages were the exclusive remedy for failure to meet the guaranteed completion dates, appellant is not entitled to recover its other costs. And because we hold that appellant is not entitled to its additional costs, we need not address appellant's alternative arguments.[5]

4. Mechanic's Liens

Line Lien

In its cross appeal, respondent contends that the district court erred by invalidating its line lien. We disagree because there is no evidence in the trial record that respondent filed the lien statement with the Minnesota Secretary of State and served it on appellant.

"[M]echanics' liens exist only by statute, which must be strictly followed with regard to all requirements upon which the right to a lien depends." *Pella Prods., Inc. v. Arvig Tel. Co.*, 488 N.W.2d 316, 318 (Minn. App. 1992), *rev. denied* (Minn. Sept. 30, 1992). Contractors must file a statement of the claim "for record with the county recorder or, if registered land, with the registrar of titles of the county in which the improved premises are situated, or, if the claim is made under section 514.04, with the secretary of

[5] In its cross appeal, respondent requests review of the district court's force majeure, differing site conditions, and owner delay rulings only if we reverse the district court's finding on liquidated damages. Because we affirm the district court's finding regarding liquidated damages, we will not address these arguments on appeal.

state" and serve real property owners personally or by certified mail. Minn. Stat. § 514.08, subd. 1 (2020).

On appeal from a bench trial, "[w]e give the district court's factual findings great deference and do not set them aside unless clearly erroneous." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *rev. denied* (Minn. June 26, 2002). We view the evidence in the light most favorable to the verdict and "examine the record to see if there is reasonable evidence in the record to support the court's findings." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotations and citations omitted). "To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made." *Id.* (quotations and citations omitted).

The district court found that respondent did not perfect its line lien because there was "no evidence in the record that [respondent] filed that lien for record with the Minnesota Secretary of State as required by Minn. Stat. § 514.08, subd. 1(1) or that it served that lien on [appellant]." Respondent contends that it filed its lien statement with the secretary of state and served it on appellant by attaching evidence of the filing to its counterclaim. However, a pleading is not evidence. *See NY Properties, LLC v. Schuette*, 977 N.W.2d 862, 866 (Minn. App. 2022) (refusing to consider documents attached to the complaint that were not offered or received into evidence during the hearing); *see also Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) ("It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.").

Respondent had to offer evidence into the record at trial that it filed the lien statement with the Minnesota Secretary of State and served it on appellant. It did not. Thus, because the trial record did not include evidence of filing and service, the district court did not clearly err.

Respondent contends that whether the lien statement was properly filed and served was not disputed by the parties because the district court decided the issue on summary judgment, and the issue was therefore settled by trial. In support of its argument, respondent cites a heading in the district court's 38-page order on plaintiff's second motion for partial summary judgment: "[respondent] has a valid mechanic's lien under Minn. Stat. § 514.04, provided no pre-lien notice was required." It also refers to the district court's first statement under that heading: "[respondent] filed a mechanic's lien under Minn. Stat. § 514.04." Respondent also points to appellant's first motion for partial summary judgment, to which appellant attached a declaration that included the lien filings as an exhibit. We are not persuaded. A heading does not constitute a finding. Moreover, the district court's discussion following the heading did not mention whether the lien was properly filed and served. Instead, it discussed whether the line lien could be asserted on the WTGs.

Even if the district court did err by finding that there was no evidence in the record, respondent's line lien fails because the district court found that appellant had transferred its ownership interest in the WTGs to SPP. *See Dunham Assocs., Inc. v. Grp. Invs., Inc.*, 223 N.W.2d 376, 384 (Minn. 1974) ("[I]t is incumbent upon plaintiff to show what interest the defendants own in the land in order that it can be ordered sold to satisfy the lien . . .").

In its findings of fact, the district court determined that "[appellant] purchased the [WTGs] from Siemens, but upon substantial completion of the Project, assigned the ownership of the [WTGs] to SPP, in the normal course of [appellant's] operations." At trial, the Vice President of Engineering for appellant testified that, after substantial completion of the project in December, appellant assigned ownership of the WTGs to SPP. The district court did not clearly err because the evidence at trial supports its finding. *See Rasmussen*, 832 N.W.2d at 797 (stating "[t]o conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made" (quotations omitted)).

Pre-Lien Notice

Respondent contends that appellant was not entitled to pre-lien notice based on the owner-contractor exception. But the district court did not address this argument in its findings of fact, so this court will not decide it on appeal. *See Great W. Cas. Co. v. Barnick*, 529 N.W.2d 504, 506 (Minn. App. 1995) ("This was not decided by the district court and will not be reviewed on appeal.").

Land Lien

Additional Compensation

Respondent first contends that the district court erred when it concluded that respondent did not have a valid lien because it did not prove entitlement to additional funds. The district court found that respondent was not entitled to additional compensation because it has received its full value for its work.

"To deprive the [lien] claimant of [the] right to a lien under [the] statute there must be a showing of fraud, bad faith, or an intentional demand for an amount in excess of that due." *Delyea v. Turner*, 118 N.W.2d 436, 440 (Minn. 1962). This is a fact question for the district court and the district court's determination will not be overturned unless clearly erroneous. *Cox v. First Nat'l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn. App. 1987), *rev. denied* (Minn. Jan. 20, 1988). "To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made." *Rasmussen*, 832 N.W.2d at 797 (quotations omitted).

The district court relied on *Hayle Floor Covering, Inc. v. First Minn. Constr. Co.*, 253 N.W.2d 809, 812 (Minn. 1977). In *Hayle Floor Covering*, the supreme court reversed the district court's finding of a lien because its lien was for extra materials that were not authorized by the contract. 253 N.W.2d at 812.

Hayle Floor Covering does not support the district court's conclusion that, if a party has received full value for its work, it may not maintain a lien on a property. There was no evidence presented that respondent acted fraudulently, in bad faith, or intentionally demanded more than that due. *See Delyea*, 118 N.W.2d at 440. Therefore, the district court's conclusion was error.

However, even though the district court erred by invalidating the lien based on its conclusion that respondent was not entitled to additional compensation, the land lien is invalid because appellant did not have a lienable property interest.

Lienable Interest

Respondent argues that the district court's findings that appellant did not have a lienable property interest in the Project's real property were clearly erroneous. We disagree.

"[W]e review the district court's factual findings for clear error." *Rasmussen*, 832 N.W.2d at 797. "To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made." *Id.* (quotations and citations omitted).

The district court found that appellant did not possess a lienable property interest in the Project's real property when the liens were filed, and it could not order foreclosure against an interest appellant did not have. The record supports the district court's finding. From July to October 2018, appellant assigned eight land and easement contracts to SPP and recorded the same with the relevant counties.

Respondent contends that its liens are valid because the district court could have foreclosed on the improvements owned by appellant, the WTGs. Respondent cites Minn. Stat. § 514.01, contending that, under the statute, its lien attached "upon the improvement, and upon the land on which it is situated."

However, as discussed above, the district court determined that appellant assigned its interest in the WTGs upon the substantial completion of the Project. Appellant thus did not have a lienable interest in the WTGs for the district court to foreclose upon.

Respondent also contends that its liens were valid based on appellant's representations in its pleadings that it was the owner. We disagree.

A plaintiff must establish that a defendant owns the land. In *Dunham*, the defendant admitted in its answer the plaintiff's allegations that it had a contract interest in the parcel of land at issue, and, during the contracting phrase, defendant represented that it owned the property. 223 N.W.2d at 379, 384. However, there was no evidence that defendant had an interest in the property. *Id.* at 384. The supreme court upheld the district court's invalidation of the lien, holding that "it is incumbent upon plaintiff to show what interest the defendants own in the land in order that it can be ordered sold to satisfy the lien." *Id.*

Respondent attempts to distinguish *Dunham* from this case, contending that (1) appellant does have a lienable interest in the [WTGs] unlike the defendants in *Dunham*; (2) in *Dunham*, the actual landowners did not have knowledge of or consent to the improvements, but here SPP knew of the Project; (3) the plaintiff in *Dunham* misidentified the fee owners, unlike here where respondent contends that it identified appellant as the owner because appellant claimed it was; and (4) the plaintiff in *Dunham* did not make "consistent misrepresentations about its ownership status" as respondent contends appellant did.

Dunham is not distinguishable from this case because ultimately it stands for the proposition that the plaintiff must show what interest the defendants own in the land so that it can be ordered sold to satisfy the lien. *Id.* Respondent attempted to foreclose against property that appellant did not have an ownership interest in. That SPP knew that respondent was doing work for appellant does not change appellant's lienable interest in this land. In fact, in its lien statements, respondent asserts that the "name of the present owner of the Property. . . is" attached in "[e]xhibit B" and SPP is named in exhibit B. Even

though appellant called itself the owner, if respondent had checked the county record filings, they would have revealed that appellant had assigned its interests to SPP. It is respondent's duty to show appellant's ownership interest in the land and it did not do so here.

In the alternative, respondent contends that appellant should be equitably and judicially estopped from arguing it was not the "owner" for purposes of respondent's lien action. We disagree.

"It is clear that mechanics liens are purely creatures of statute and that the lien exists only within the terms of the statute." *Id.* at 383. Mechanic's lien statutes "must be strictly followed with regard to all requirements upon which the right to a lien depends." *Pella Prods.*, 488 N.W.2d at 318. If a party has an adequate legal remedy, they may not seek equitable relief. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996). "Should a contractor elect not to seek the protection of the clear and effective method available under the statute, this court will not come to its aid, absent compelling circumstances . . . ." *Id.* at 306.

Equitable and judicial estoppel are unavailable because respondent had the legal remedy of mechanic's liens. Respondent did not file its foreclosure action against a party with a lienable interest despite naming SPP as a "present owner of the property" and having record notice that SPP had ownership interests in the property. In an answer to respondent's interrogatories questioning what entities had a financial interest in the Project, appellant answered that, after tax equity financing, the Project was transferred to its subsidiary. In its lien statements, respondent asserts that the "name of the present owner

of the Property. . . is" attached in "[e]xhibits A-1 through A-2 and [e]xhibit B." SPP is named in exhibit B. Moreover, appellant assigned land and easement contracts to SPP and recorded the same with the county. These circumstances are not sufficiently compelling to warrant this court's aid. *See ServiceMaster of St. Cloud*, 544 N.W.2d at 305.

Moreover, we will not apply judicial estoppel to this case. "Judicial estoppel is an equitable doctrine that prevents a party from assuming inconsistent positions in the course of litigation." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 800 (Minn. 2004). Generally, "when a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it prejudices the party who acquiesced in the position taken by him." *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236, 248 (Minn. 2016).

Our supreme court has not adopted judicial estoppel. *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999). In *Profit*, the state used evidence to obtain search warrants and then used the evidence in front of the grand jury but later claimed that the same evidence was irrelevant and inadmissible at trial. *Id.* The supreme court declined to apply judicial estoppel because there was no evidence that the state ever lied or tried to mislead a judicial body. *Id.* Further, the supreme court determined that judicial estoppel did not apply in *Ill. Farmers Ins.*, where at different points in the litigation, the parties both demanded and opposed arbitration. 683 N.W.2d at 801.

In a recent nonprecedential case, this court applied judicial estoppel when a party took a position directly contrary to a position they had taken in a different proceeding.

Parks v. Covidien Holding, Inc., No. A21-1396, 2022 WL 2124933, at *2 (Minn. App. June 13, 2022).[6] In *Parks*, the plaintiff filed for bankruptcy, asserting that he had no claims against third parties, but later filed a product-liability claim arising out of a surgery he had before filing for bankruptcy. *Id.* at *1. We determined that the district court did not err by applying judicial estoppel. *Id.* at *2.

Respondent contends that judicial estoppel applies here because appellant "took the position during the summary judgment stage that it was the owner and leaseholder to convince the district court that it was entitled to raise a pre-lien notice defense," and the district court ruled in appellant's favor. We disagree. The district court did not rule in appellant's favor on summary judgment, it only stated that it was "undisputed that [appellant] was the owner of a leasehold interest in real property." At that time, ownership was undisputed, and the district court was not deciding the issue. This case is unlike *Parks*, where the party took two contrary positions in different proceedings. This is more like the cases in which the supreme court determined that judicial estoppel did not apply, *Illinois Farmers Ins. Co.* and *Profit*, where the parties changed their positions throughout a single proceeding.

Thus, the district court did not err when it determined that respondent could not foreclose on the land lien because appellant did not have a lienable interest in the property.

[6] While nonprecedential cases are not binding, they may be persuasive. *Eldredge*, 788 N.W.2d at 526-27.

Motion to Amend the Pleadings

Respondent also contends that the district court abused its discretion by not permitting it to amend its pleadings to join SPP as a party. We disagree.

After a responsive pleading has been served, "a party may amend a pleading only by leave of court or by written consent of the adverse party." Minn. R. Civ. P. 15.01. "Leave to amend pleadings should be freely granted unless it results in prejudice to the other party." *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 915 (Minn. App. 2009), *rev. denied* (Minn. June 16, 2009). "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Here, respondent moved to amend its pleadings on the penultimate day of trial. The district court denied respondent's motion because it was untimely and prejudicial. The district court determined that it would prejudice appellant because it would cause substantial delay and because the action would likely be limited by the one-year limitation on mechanic's liens. Thus, the district court did not abuse its discretion by denying respondent's motion to amend its pleadings because the parties had fully litigated the matter and completed a two-week bench trial.

Affirmed.