STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0274

Landform Professional Services, LLC,
Appellant,

vs.

Kevin Lefebvre, et al.,
Respondents,
The Bank of Elk River, et al., Defendants.

Filed August 22, 2022
Affirmed
Reyes, Judge

Wright County District Court
File No. 86-CV-20-5020

Robert J. Shainess, Capstone Law, L.L.C., Edina, Minnesota (for appellant)

Richard L. Leighton, Steven T. Hetland, Leighton Hetland, P.L.L.P., Bloomington, Minnesota (for respondents)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this action to foreclose a mechanic's lien, appellant contractor challenges the district court's grant of summary judgment to respondent property owners and argues that a second declaration created a genuine issue of material fact as to when lienable work began. We affirm.

FACTS

We construe these facts in the light most favorable to appellant Landform Professional Services, LLC, as the party against whom the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Purchase of Property and Development by WH Diversified

Respondents Kevin and Benita Lefebvre, who own farmland in Otsego, Minnesota, listed part of it for sale in December 2018. WH Diversified Investment Group agreed to purchase the land for new mixed-use development. A representative from WH Diversified signed the purchase agreement on December 12, 2018. The Lefebvres signed the purchase agreement on December 21, 2018, a key date in this dispute.

The purchase agreement included a clause informing the Lefebvres that the sale was "subject to land survey" and required WH Diversified to provide a certificate of survey and pay to have a final plat prepared. If WH Diversified failed to complete this work by a specific date, the purchase agreement terminated.

To meet the deadline, WH Diversified hired several companies to conduct soil testing, prepare surveys and plats, and perform other preliminary work. WH Diversified contracted with Landform to conduct survey and civil-engineering services under a work order dated December 18, 2018. The work order did not include the prelien-notice language required by Minn. Stat. § 514.011 (2020), and the Lefebvres received no other prelien notice. WH Diversified and Landform later contracted for more work through a second work order in March 2019. The second work order also did not include the proper prelien notice.

The sale of the property never closed. And neither WH Diversified nor the Lefebvres paid Landform for the work they performed.

Landform Records a Mechanic's Lien Statement and Begins a Foreclosure Action

Following the nonpayment, Landform recorded a mechanic's lien statement against all of the Lefebvres' property. The lien claimed $356,524.26 in unpaid work. The mechanic's lien statement declared that the lienable work "was performed or furnished from December 18, 2018."

In October 2020, Landform began this foreclosure action against the Lefebvres and the bank holding a mortgage on the property. The complaint alleged that the Lefebvres were the owners of the property at the time of the improvements and that WH Diversified acted as the Lefebvres' agent.[1] The complaint also alleged that Landform "performed work towards the improvement of the Property from December 18, 2018 through December 23, 2019." Darren Lazan, Landform's Chief Manager, similarly asserted in his first declaration that "[b]eginning on or around December 18, 2018, Landform began performing civil engineering work, which included surveying the Property and drafting civil plans for the development of the Property." The Lefebvres filed an answer, counterclaim, and third-party complaint alleging slander of title and requesting, in part, that WH Diversified indemnify them.[2]

[1] Landform later abandoned their principal/agent theory of the case.

[2] Under the procedure in Minn. Stat. § 514.10 (2020), the district court released the lien after the Lefebvres deposited adequate security. Following a stipulation, the district court returned the deposit to the Lefebvres after granting their motion for summary judgment.

In April 2021, the Lefebvres moved for summary judgment based on Landform's failure to provide them with prelien notice. Opposing the motion, Landform argued that it was exempt from providing a prelien notice because it contracted with WH Diversified, who Landform believed held an equitable ownership interest in the property at the time of the contract. *See* Minn. Stat. § 514.011, subd. 2 (stating that "party under direct contract with the owner" who will not engage any subcontractors need not provide prelien notice). Following briefing on the motion, Landform submitted a surreply which included a second declaration by Lazan. In that declaration, Lazan now claimed that "to be more precise," WH Diversified did not direct Landform to begin work on the project until "after December 21, 2018." Lazan stated that his first declaration and the mechanic's lien statement were "based on time records," which included four entries for mostly administrative and research work related to WH Diversified's development project around that date. Lazan stated that Landform performed much of the surveying and engineering work in January 2019 and did only "de minimis" work before that.

The district court granted the Lefebvres' motion for summary judgment. In its order, the district court disregarded Lazan's second declaration, stating that it contradicted Landform's complaint, mechanic's lien statement, and work order. As a result, the district court determined that no genuine fact dispute existed and that the lienable work began on December 18, 2018. Because WH Diversified did not obtain an equitable ownership interest in the property until December 21, 2018, Landform needed to provide the Lefebvres prelien notice. This appeal follows.

DECISION

I. The district court properly granted summary judgment to the Lefebvres because Landform failed to provide the requisite prelien notice.

Landform argues that the district court erred by granting summary judgment because a genuine dispute of material fact exists based on Lazan's second declaration showing that Landform did not perform work on the project for WH Diversified until "after December 21, 2018." We disagree with Landform and find no factual dispute precluding summary judgment.

We review de novo a district court's summary judgment decision. *See Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio*, 504 N.W.2d at 761 (citing Minn. R. Civ. P. 56.03). We view the evidence in the light most favorable to the party against whom judgment was granted. *See id.* The moving party has the burden to show that summary judgment is appropriate. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

A mechanic's lien provides persons who contribute to improving any real estate "by performing labor, or furnishing skill, material or machinery . . . under contract with the owner of such real estate" to place a nonconsensual lien on the improved property if that

person is not compensated for the improvement. Minn. Stat. § 514.01 (2020). The lien attaches to the property when the lienable work begins on the property. Minn. Stat. § 514.05, subd. 1 (2020). As a prerequisite, a purported lienholder generally must provide the property owner prelien notice. Minn. Stat. § 514.011. If there is a written contract for the lienable work, as is the case here, the statutory notice language must be part of the contract. *Id.*, subd. 1. Failure to comply strictly with the prelien-notice requirements defeats a mechanic's lien claim. *Wong v. Interspace-W., Inc.*, 701 N.W.2d 301, 302-03 (Minn. App. 2005), *rev. denied* (Minn. Oct. 18, 2005).

One exception to the prelien-notice requirement is when the contractor is "a party under direct contract with the owner" and the contractor will not "contract with any subcontractors or material suppliers to provide labor, skill or materials for the improvement." Minn. Stat. § 514.011, subds. 1-2. "Owner" is defined to include "the owner of any legal or equitable interest in" the improved property. Minn. Stat. § 514.011, subd. 5. We "construe the pre-lien notice requirement liberally to uphold notice protections for property owners" and "construe exceptions narrowly to limit instances in which notice is not required." *See S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228, 232 (Minn. 2010).

Landform first argues that the district court failed to construe all facts in their favor as the nonmoving party by disregarding its second declaration and determining that it failed to create a fact dispute because it "contradict[ed] its Complaint, mechanic's lien, and work order." This is a question of law that we review de novo. *See STAR Ctrs., Inc. v. Faegre*

& Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). Whether the district court properly excluded Lazan's second declaration is dispositive.

It is undisputed that WH Diversified had an equitable interest in part of the property as of December 21, 2018. *See Dolder v. Griffin*, 323 N.W.2d 773, 779 (Minn. 1982) (holding that signatory to enforceable purchase agreement owns equitable interest in relevant property). The critical issue on appeal therefore is *when* Landform began its lienable work. If Landform began lienable work before December 21, 2018, then Landform, which did not directly contract with the Lefebvres, needed to give the Lefebvres prelien notice as the only property owners. Minn. Stat. § 514.011, subds. 1-2. However, if Landform did not begin lienable work before December 21, 2018, then its contract was with the equitable owner, WH Diversified, and the owner exception may apply. *Id.* Lazan's second declaration is the only evidence in the record that casts doubt on whether Landform began the lienable work before December 21, 2018.

Landform argues that the only way the district court could properly exclude the declaration is through the "sham affidavit" doctrine, which it argues does not apply. Generally, the district court "must not weigh facts or determine the credibility of affidavits and other evidence" when adjudicating a motion for summary judgment. *See Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). However, the sham-affidavit doctrine prevents a party from creating a material issue of fact at the last moment to avoid summary judgment. *Augustine v. Arizant Inc.*, 751 N.W.2d 95, 101 (Minn. 2008).

In particular, Landform argues that the sham-affidavit doctrine applies only to prior deposition testimony. Landform is correct that appellate courts have applied the sham-affidavit doctrine in cases involving deposition testimony. *See Hoover v. Norwest Priv. Mortg. Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001) (stating that "affidavits that contradict earlier deposition testimony generally may not be used to create a genuine issue of fact"). However, appellate courts have also applied this doctrine in situations with other inconsistencies. *See, e.g.*, *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 172 (Minn. 2021) (disregarding "self-serving affidavit" that contradicts employment offer); *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 75 (Minn. 2010) (evaluating purported contradiction between affidavit and attached letters in context of sham-affidavit doctrine); *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009) (applying sham-affidavit doctrine in securities-fraud case involving affidavit conflicting with private-placement memorandum), *rev. denied* (Minn. Mar. 17, 2009). Thus, the sham-affidavit doctrine applies to Lazan's first written sworn declaration.

Here, the district court noted, and we agree, that Landform consistently claimed that the lienable work began on December 18, 2018. Landform included that date in its mechanic's lien statement, in its complaint, and in Lazan's first declaration. Only after the Lefebvres argued to the district court that Landform's lienable work began before WH Diversified possessed an equitable interest in the property did Lazan submit his second declaration calling the accuracy of that date into doubt. On these facts, it appears that Lazan's section declaration seeks to muddy the record to survive summary judgment and, therefore, the sham-affidavit doctrine applies.

Landform next argues that, even if the sham-affidavit doctrine applies, the two declarations do not contradict each other. *See Banbury v. Omnitrition Intern, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). Landform asserts that, because the first declaration states that lienable work began "on or shortly after December 18, 2018," and the second declaration claims that no lienable work began "until after December 21, 2018," the two declarations do not conflict. But the second declaration conflicts with the first. The first declaration, which states that lienable work began on "or slightly after" December 18, leaves open the possibility that the lienable work began *on* December 18 or *between* December 18 and December 21. By stating that lienable work began "after December 21," the second declaration forecloses those possibilities. Even viewing the declarations in the light most favorable to Landform, we reject Landform's argument that the second declaration is "clarificatory."

Landform argues that no lienable work began before December 21, 2018. Landform argues that, because it only performed "de minimis" work before January 2019, notice was not required. *See* Minn. Stat. § 514.01; *Phillips-Klein Cos. v. Tiffany P'ship*, 474 N.W.2d 370, 374 (Minn. App. 1991) (concluding that obtaining "financing, zoning variances, and coordinated leasing arrangements" was not lienable work). But this argument relies primarily on Lazan's second declaration. Because we conclude that the district court properly excluded Lazan's second declaration, the record does not support this argument.

Finally, Landform focuses on the date of contract formation to argue that the date on the work order does not determine when the contract was formed. But this argument both ignores Landform's admissions stating that the lienable work began on December 18

and overstates the importance of the date WH Diversified contracted with Landform. First, *Landform's* complaint lists December 18, 2018, as the date lienable work began on the property. While the complaint standing alone may not be conclusive, the complaint is admissible "as an admission or for impeachment." *Carpenter v. Tri-State Tel. & Tel. Co.*, 211 N.W. 463, 464 (Minn. 1926). In addition, *Landform's* mechanic's lien statement and Lazan's first declaration also state that the lienable work began on December 18, 2018. Thus, Landform's own admissions provide sufficient evidentiary bases to conclude that Lazan's second declaration may be excluded under the sham-affidavit doctrine and therefore no genuine issue of material fact exists about the date that WH Diversified entered into its contract with Landform.

As explained above, when excluding Lazan's second declaration, summary judgment is appropriate in this case. Based on the complaint, mechanic's lien statement, and Lazan's first declaration, lienable work began on December 18, 2018. At that time, WH Diversified did not have any ownership interest in the property. Thus, the owner exception to the prelien-notice statute does not apply. Minn. Stat. § 514.011, subds. 1-2. Landform was therefore required to provide prelien notice to the Lefebvres because they were the only owners of the property on December 18. *Id.* Because Landform failed to provide that prelien notice, its mechanic's lien is invalid and summary judgment is appropriate. *Wong*, 701 N.W.2d at 302-03.[3]

[3] Because we affirm summary judgment based on the district court's analysis, we need not analyze the Lefebvres' alternative basis to affirm summary judgment.

II. Landform forfeited its argument that it is entitled to a mechanic's lien based on the work it performed under the second work order.

On the last page of its principal brief, Landform argues that, because no party contests that WH Diversified held an equitable interest in the property in March 2019 when it approved the second work order with Landform, Landform should be entitled to a mechanic's lien for work completed under that work order. Landform's argument consists of one paragraph with no citation to legal authority. It does not expand upon its argument in its reply brief. It is Landform's burden to prove that the district court erred by not finding a mechanic's lien under the second work order. *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944) ("[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it."); *see also State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating that appellate courts decline to reach inadequately briefed issues). For that reason, we conclude that Landform forfeited this issue.

Affirmed.