STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1174

Tonna Mechanical, Inc.,
Respondent,

vs.

Double Al, LLC, et al.,
Appellants,

John Doe, et al.,
Defendants.

Filed June 20, 2011
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CV-08-8804

Daniel P. Doda, Doda & McGeeney, P.A., Rochester, Minnesota (for respondent)

George L. May, May & O'Brien, LLP, Hastings, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

WORKE, Judge

Appellants challenge the district court's: (1) finding that an agency relationship existed giving rise to apparent authority; (2) finding that an oral agreement existed; (3) failure to dismiss respondent's lien for containing material misrepresentations;

(4) failure to dismiss respondent's lien for lack of a pre-lien notice; and (5) award of attorney's fees. We affirm.

D E C I S I O N

Appellant Double Al, LLC., owner Dr. Alaa Elkharwily, and appellant Abu Serrieh Ali Intonuo Ali sought to develop a grocery market in 2007. Appellants hired respondent Tonna Mechanical, Inc. to provide ventilation installation, plumbing, gas-piping, and refrigeration work at the grocery market. Appellants now challenge the district court's order foreclosing respondent's mechanic's lien against the property. "When reviewing a decision reached by a court sitting without a jury, this court's scope of review is limited to determining whether the [district] court's findings are clearly erroneous, either without substantial evidentiary support or based on an erroneous conclusion of law." *C. Kowalski, Inc. v. Davis*, 472 N.W.2d 872, 875 (Minn. App. 1991) (quotation omitted), *review denied* (Minn. Sept. 13, 1991). We review questions of law de novo. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001).

Apparent Authority

Appellants challenge the district court's finding that Ali was an agent of Double Al with the apparent authority to enter into binding contracts on behalf of Double Al and Elkharwily, the registered owner and CEO of Double Al. "Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). An agent can bind its principal it if has actual or apparent authority. *Duluth Herald & News*

Tribune v. Plymouth Optical Co., 286 Minn. 495, 499, 176 N.W.2d 552, 555 (1970). "Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). "[T]he party dealing with the agent must have actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf." *Id.* (quotation omitted). Proof of the agent's apparent authority is established by the "statements, conduct, lack of ordinary care, or other manifestations of the principal's consent, whereby third persons are justified in believing that the agent is acting within his authority." *McGee v. Breezy Point Estates*, 283 Minn. 10, 22, 166 N.W.2d 81, 89 (1969). "Whether an agent is clothed with apparent authority is a question of fact." *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 1991).

Appellants first claim that Ali was never an agent of Double Al and, therefore, Double Al and Elkharwily should not be bound to the contract Ali entered into with respondent for gas-piping and refrigeration work. Appellants argue that respondent predominantly dealt with Elkharwily during the majority of the parties' relationship, and that the testimony of respondent's employee illustrated that respondent never considered Ali to be an agent of the company:

> Q: Who did [Ali] direct you to [in order to] help obtain payment?
> A: [Elkharwily.]
> Q: And can you tell me why you contacted Mr. [Elkharwily]?
> A: Ali informed us that he was having some financial difficulties and that [Elkharwily] was his business partner and

> we should contact him to start discussing payment and financing and arranging some of the financing for his project.
> Q: So [Ali] told you . . . that [Elkharwily] was his business partner? Is that correct?
> A: Correct. Yes.
> Q: And did you contact [Elkharwily]?
> A: Yes.

Appellants argue that Elkharwily then clarified to respondent's employee that he and Ali were not business partners, and that Ali's responsibilities comprised simply of opening and closing the property for respondent's workers, cleaning, and performing "odd jobs." Alternatively, appellants contend that even if Ali is considered an agent, he clearly did not have the apparent authority to enter into the contract for the gas-piping and refrigeration work because he never participated in any financial negotiation.

Appellants' arguments are unconvincing. First, appellants' contention that Ali was not an agent of Double Al is undermined by appellants' acknowledgment that Ali was authorized to open and close the facility for the workers each day; this alone is sufficient to support the district court's finding that Ali was acting on behalf of Double Al. Second, appellants minimize the evidence presented at trial pertaining to Ali's authority. Elkharwily acknowledged that Ali "help[s] [with] labor, finding me cheap labor." Elkharwily further testified that Ali was "opening up the store, closing the store[,] [doing] what I [told] him to do there." Considering this testimony in light of Ali's explanation during trial that he told Elkharwily that "whatever [] needs to be done here, I'll do it until you open up," the district court reasonably found that Elkharwily vested Ali with the authority to enter into the contracts needed to open the store. But more importantly, Elkharwily never took any affirmative steps to dispel respondent's

belief that Ali was an agent authorized to enter into contracts; the market needed gas-piping and refrigeration work to be completed prior to opening up the store, and there is no evidence that Elkharwily objected to respondent accomplishing this work or that Elkharwily considered hiring another contractor to complete this work. Accordingly, it was reasonable for respondent to believe that Elkharwily authorized Ali to enter into contracts on behalf of Double Al; therefore, the district court's finding that apparent authority existed is not clearly erroneous.

Oral Agreements

Appellants also challenge the district court's determination that Elkharwily orally agreed to respondent billing its services on a time-and-materials basis rather than accepting a traditional bid based on fixed prices. Whether an oral agreement exists is a question of fact. *Husbyn v. Lunde*, 283 Minn. 74, 77, 166 N.W.2d 333, 335 (1969). Similarly, whether an oral representation is contradicted by a written agreement is also a question for the fact-finder. *Veit v. Anderson*, 428 N.W.2d 429, 433 (Minn. App. 1988).

Appellants argue that the evidence does not support the district court's finding that an oral argument was created to allow respondent to bill on a time-and-materials basis. Appellants assert that Elkharwily's email hiring respondent fixed the price for the project between $14,000-$18,000, and any billing above this figure breached the agreement of the parties.

Appellants' argument is contrary to the evidence submitted at trial. Respondent's employee testified that each project was agreed to on a time-and-materials basis, often after appellants first rejected respondent's bids as too expensive. Elkharwily's testimony

regarding the initial agreement between the parties supports this position: "then [respondent] said ['] well, how about we could do it as labor and materials. That would save you a lot of money. . . . If we do it [for] a bid, then you have to pay that amount. But if we can do it for less, then that will save you a lot of money on the labor.['] I said that's fine." The district court's finding that the parties reached an oral agreement to bill on a time-and-materials basis is not clearly erroneous.

Material Misrepresentations

Appellants argue that the district court erred by failing to dismiss respondent's complaint because the lien statement contained several material misrepresentations. Minn. Stat. § 514.08, subd. 2 (2010) governs the filing of mechanic's liens and requires the claimant to identify several facts, including: the property in question, the particular improvement made, the dates of the first and last improvement, the person for whom the improvements were made, and proof of personal service. The laws governing mechanic's liens are to be strictly construed when determining whether a lien attaches. *See Dolder v. Griffin*, 323 N.W.2d 773, 779-80 (Minn. 1982). But once a lien attaches, the laws are to be liberally construed to protect the rights of the lienholders. *Id.*

Appellants first argue that respondent grossly misstated the amount of its mechanic's lien and, thus, the lien is invalid because "[i]n no case shall a lien exist for a greater amount than the sum claimed in the lien statement . . . [if] claimant has knowingly demanded in the statement more than is justly due." Minn. Stat. § 514.74 (2010). Respondent testified and submitted documentation of the aggregate value of labor and materials provided to the property totaling $50,697.99. Respondent credited appellants

with payments totaling $23,366.56, resulting in an outstanding amount of $27,331.43—the exact amount sought in respondent's lien statement and the exact amount found to be outstanding by the district court. Appellants advance no evidence to counter this accounting presented by respondent at trial. Accordingly, respondent does not appear to have misstated appellants' outstanding debt in its lien statement, and the district court did not err in this respect.

Appellants also argue that respondent misrepresented the date of first improvement. Respondent concedes that it mistakenly listed the incorrect date of first improvement, however, and the district court found that respondent's stated date of first improvement was an unintentional misrepresentation. Moreover, appellants fail to demonstrate how misrepresentation prejudiced them in any meaningful way. An unintentional inaccuracy is immaterial unless a prejudice from the error can be shown. *Coughlan v. Longini*, 77 Minn. 514, 515, 80 N.W. 695, 695 (1899). As such, appellants' argument is unavailing.

Appellants next contend that respondent failed to effect proper service upon Elkharwily and Ali. But evidence presented at trial demonstrated that respondent served Elkharwily's corporation, Double Al, at the same address listed on Double Al's tax statements. Service was, therefore, perfected on Double Al. *See Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 818 (Minn. 2004) (stating that service by certified mail of a mechanic's lien statement is effective upon mailing and not delivery). Likewise, respondent effectively served Ali at the worksite. *See Carolina Holdings Midwest, LLC v. Copouls*, 658 N.W.2d 236, 240 (Minn. App. 2003) (stating that lien statements served

to the worksite constitute proper service). Regardless of whether Elkharwily was properly served, both Double Al and Ali were served and, thus, respondent effectively served the corporation and an agent of the corporation as required by Minn. Stat. § 514.08, subd. 1(2) (2010). Accordingly, appellants fail to demonstrate a material misrepresentation and the district court did not err by refusing to dismiss respondent's lien statement on the basis of non-compliance with Minn. Stat. § 514.08.

Pre-Lien Statement

Appellants next argue that the district court erred by failing to dismiss respondent's lien statement for lack of a pre-lien notice. Minn. Stat. § 514.011, subd. 2 (2010) provides that a lien claimant must give notice to property owners as of the date of delivery of goods or commencement of services unless an exception is satisfied. A pre-lien notice exception exists for commercial property with more than 5,000 total usable square feet of floor space. *Id*, subd. 4c(b) (2010). Appellants do not challenge the district court's finding that the property was a commercial space in excess of 5,000 total square feet of floor space. Instead, appellants cite to *Wallboard, Inc. v. St. Cloud Mall, LLC*, in which this court held that a tenant was entitled to pre-lien notice when his rented property was less than 5,000 total square feet even though the total rental facility exceeded the 5,000-foot benchmark. 758 N.W.2d 356, 362 (Minn. App. 2008). But this case is distinguishable. Here, the property was owned by appellants, rather than rented, and the property exceeded 5,000 square feet; thus, *Wallboard* is inapplicable. The district court did not err in determining that appellants were not entitled to receive pre-lien notice; thus, respondent's failure to provide notice is immaterial.

Attorney's Fees

Finally, appellants challenge the attorney's fees awarded by the district court. Reasonable attorney's fees may be awarded to a successful mechanic's-lien claimant under Minn. Stat. § 514.10 (2010) as part of the foreclosure costs. A district court considers several factors in awarding attorney's fees, including the time and effort required and the customary charges for similar services. *See Kowalski*, 472 N.W.2d at 878 (listing the factors to be considered by the district court). We review such an award to determine if the district court abused its discretion. *Obraske v. Woody*, 294 Minn. 105, 108, 199 N.W.2d 429, 431 (1972).

Appellants broadly assert that the amount awarded by the district court was excessive, seemingly arguing that respondent's counsel inflated their billed hours. Respondent's counsel billed at a rate of $185.00 per hour. The billed statements include entries assessed by the tenth-of-the-hour, or six-minute increments. The entries are very detailed and seem reasonable considering the breadth of this case. The district court did not abuse its discretion by awarding attorney's fees.

Affirmed.