STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1472

Consolidated Lumber Company
d/b/a Arrow Building Center,
Respondent,

vs.

Northern Lakes Construction of MN, Inc., et al.,
Defendants,

Assured Financial, LLC, et al.,
Appellants,

Jensen-Andersen Co.,
Respondent.

Filed April 26, 2011
Affirmed
Shumaker, Judge

Mille Lacs County District Court
File No. 48-CV-08-2012

Gerald W. Von Korff, Ryan J. Hatton, Rinke Noonan, St. Cloud, MN (for respondent Consolidated Lumber Company)

Brian M. Sund, Eric G. Nasstrom, Ryan R. Dreyer, Morrison Fenske & Sund, P.A., Minnetonka, MN (for appellants)

Justice Ericson Lindell, Sudha A. Rajan, Winthrop & Weinstine, P.A., Minneapolis, MN (for respondent Jensen-Andersen Co.)

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Randall, Judge.*

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

SHUMAKER, Judge

Appellants challenge the district court's determination that the respondents' mechanics' liens have priority over their mortgage, arguing that (a) the record does not support the district court's finding that respondents' work was a visible improvement on the property when appellants recorded their mortgage; and (b) the work done by respondents before appellants recorded their mortgage was general site-preparatory work and cannot be considered part of a single, continuous improvement to give the mechanics' liens priority over the mortgage. Because the respondents' work falls under the statutory definition of an improvement and was part of a single, continuous improvement to the property, we affirm.

FACTS

Northern Lakes-Mille Lacs Lake, LLC (Northern Lakes Mille Lacs) purchased several lots located in the Port Mille Lacs Golf Acres North Plat in Garrison, Minnesota. One subdivision of the lots includes a plat known as the Highland Green Estate (HGE lots). Northern Lakes Mille Lacs built townhomes and cabins on the HGE lots, including a five-plex on HGE lots 14 – 18. Northern Lakes Construction of MN, Inc. (Northern Lakes Construction) and Northern Lakes Mille Lacs hired several contractors, including

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Hjort Excavating, Inc., respondent Consolidated Lumber Company d/b/a/ Arrow Building Center, and respondent Jensen-Andersen Co., to construct the buildings on its lots, including the HGE lots. Appellants Assured Financial, LLC, and Assured Funding Trust II conferred purchase and construction financing on Northern Lakes Mille Lacs, and one of appellants' mortgages encumbers the five-plex.

Northern Lakes Mille Lacs failed to pay some of the contractors who helped construct the buildings. Respondents sued Northern Lakes Construction to establish and foreclose mechanics' liens against the five-plex. They claimed that their mechanics' liens are superior to appellants' mortgage, based on contributions made by Hjort, Inc., to the construction of the five-plex prior to the recording of appellants' mortgage. Appellants stipulated to the amount and validity of the mechanics' liens asserted by respondents, but disputed the priority of the mechanics' liens over their mortgage. A one-day bench trial was held on December 21, 2009.

Dean Hjort is self-employed and owns Hjort Excavating, Inc., a trucking, landscaping, and excavating business. Northern Lakes Construction hired Hjort to perform the excavation work for the HGE lots. Hjort agreed that he would clear and grub the wooded area and excavate for cabins, and then later build a road and install a sewer system. Hjort dug footings, which involved digging below the frost depth, installing footings, and then backfilling at the end.

Hjort worked on the HGE lots from November 6 or 7, 2006, through November 10, 2006. He performed approximately 20 hours of work on HGE lots 14 – 18 from November 7 through November 10. Using a skid steer, dump truck, and chainsaw, Hjort

trimmed and cut down trees, roughly staked building corners, and cleared debris every night from the work area. He testified that such work was directly related to excavating the land and making the foundation for the buildings. Hjort began excavation work in February of 2007.

On November 13, 2006, appellants recorded the mortgage securing financing to Northern Lakes Mille Lacs for the purchase of nine of the HGE lots, including the lots containing the five-plex. Appellants hired Columbia Title, LLC, to conduct the closing, and Columbia retained Metro Legal Services, Inc., to record the mortgage and inspect the HGE lots. Jody Fjelstad, an employee of Metro, inspected the HGE lots for about an hour and a half on the day the mortgage was recorded. Fjelstad testified that when he performs the inspections for Metro, he looks for "excavation [materials], machinery on the property, any kind of bundles of lumber or any other kind of building supplies that may have been laying on some of the land," and that he did not observe any of those things on the HGE lots. But Fjelstad also testified that he saw evidence of clearing of trees and freshly cut wood on the lots of the five-plex, and he acknowledged that there may have been clearing and grubbing on HGE lots 14 and 15. He also admitted that it was his practice to call the title company if he saw heavy equipment on the property to ask whether the title company wanted him to take pictures of the heavy equipment or just of the land without the heavy equipment, although he testified that he did not know the purpose of this practice.

Once the inspection was completed, Fjelstad's supervisor, Jim Stewart, uploaded the pictures Fjelstad had taken to a computer and sent them to Columbia. Stewart

testified that property inspectors from Metro typically look for "first breaking of the ground," and that clearing and grubbing of trees and brush, if confirmed, would be reported to the title company, but that it is "not something [Metro is] concerned with." If it looked like trees had been cut for the purpose of clearing out a wooded lot, Stewart stated that he "would definitely tell the title company."

The president of Columbia, Tim Netzell, testified that after the inspection, Metro did not inform Columbia of any improvements that had been started at the project site, which meant that Columbia had "good priority for the project." Columbia reviewed the pictures for evidence of "construction activity, excavation being completed for the foundations, for footings being put in, those kinds of things." Netzell did not observe any such activity in the pictures from Metro, so he did not contact appellants or anyone else regarding improvements to the property. But Netzell also acknowledged that he was familiar with the mechanic's-lien statute in Minnesota under which "clearing" and "grubbing" are expressly included as signs of improvement.

In its findings of fact, conclusions of law, order for judgment, and judgment and decree, the district court found that "Hjort performed grubbing, clearing of brush and staked a pad area for a five-plex on property platted as Highland Green Estate . . . between November 7, 2006 and November 10, 2006." The district court determined that "Hjort testified credibly that he had cleared brush and grubbed the sites and removed debris," and that Fjelstad "testified he saw evidence of trees having been cut, brush cleared, grubbing and staking"; therefore, "[t]here was some agreement in the testimony that some tree cutting was evident and that some staking had occurred." The

district court further found that "[t]he work provided by Hjort is among the specified contributions set out in Minnesota Statute Section 514.01 and are a visible improvement to the property."

Additionally, the district court found that "[t]he work performed by Hjort constitutes a first improvement . . . and . . . was not performed as a separate project distinct from the later performed excavation work," and concluded that "[t]he initial work by Hjort on [the HGE lots] was part of the construction of the dwelling . . . and therefore all valid lien holders' claims established priority prior to November 13, 2006," when appellants' mortgage was recorded.

The district court ruled that respondents have mechanics' liens against the HGE lots superior to appellants' mortgage. This appeal followed.

D E C I S I O N

I.

Establishing lien priority involves interpretation of the mechanics'-lien statutes, which is a legal issue reviewed de novo. *Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). The relative priority of mechanics' liens and mortgages is governed by Minn. Stat. § 514.05 (2010), which states:

> **Subdivision 1. Generally.** All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without actual or

> record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground.

Determining when a mechanic's lien attaches under this statute involves a two-step analysis: first, the court must "identify the improvement to which the labor or material contributed," and second, the court must determine "what item of labor or material constituted the actual and visible beginning of that improvement." *Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992).

Whether the beginning of an improvement is visible is a question of fact. *Nw. Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 249 (Minn. App. 1990). An improvement is actual and visible only if a person exercising reasonable diligence is able to see it. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975). But whether the work, even if visible, can be considered the beginning of the improvement is a mixed question of law and fact. *Id.* at 63, 226 N.W.2d at 607.

Minn. Stat. § 514.05, subd. 2 (2010), states that "staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground." But Minn. Stat. § 514.01 (2010) lists "clearing" and "grubbing" as work that "contributes to the improvement of real estate," and gives the person who performs the work a "lien upon the improvement, and upon the land on which it is situated."

Appellants argue that the work Hjort performed from November 7 through November 10 did not constitute a visible improvement giving respondents' mechanics' liens priority over their mortgage. Appellants' argument is based almost entirely on the

fact that excavation did not occur until after appellants recorded their mortgage. They cite to various cases, including *Nat'l Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 104, 87 N.W.2d 32, 35 (1957), as authority for their argument. But appellants' characterization of the caselaw is inaccurate. Although caselaw supports the proposition that excavation is *generally* the first visible improvement under Minn. Stat. § 514.05, subd. 1, it does not support the contention that the first visible improvement *cannot* occur before excavation. *Nat'l Lumber* states that "where excavation is involved, it appears that the excavation itself *or something directly connected therewith*, rather than any prior activity, constitutes the beginning of the visible improvement." 251 Minn. at 104, 87 N.W.2d at 36 (emphasis added). Therefore, non-excavation work that is "directly connected" with excavation can be the first visible improvement of a property.

Hjort testified that the 20 hours of work he performed on the five-plex November 7-10, including clearing the land, was directly related to excavating the land and making the foundation for the buildings. Significantly, "clearing" and "grubbing," the types of work Hjort did, are listed in section 514.01 as work that results in a lien on the property. Hjort cut trees and cleared brush for the purpose of placing stakes and for the eventual excavation of the lots. The work Hjort performed was visible on the property. Fjelstad testified that he saw fresh-cut wood on the lots, and he admitted that he could not say that no clearing or grubbing had occurred on the five-plex.

The record contains sufficient evidence to support the district court's finding that Hjort performed grubbing and clearing of trees and brush, and because such work is

considered an improvement under Minn. Stat. § 514.01, the district court did not err in ruling that Hjort's contribution gave rise to respondents' superior mechanics' liens.

II.

Appellants also argue that the district court erred by finding that the work performed by Hjort November 7-10, 2006, was part of a single, continuous improvement to the property.

"[W]hether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). "[T]he line of distinction is whether or not the improvement bears directly on the construction of the building rather than whether it is a part of the overall project involved." *Nat'l Lumber*, 251 Minn. at 104, 87 N.W.2d at 36. A lien claimant is entitled to tack its lien onto the work performed on a construction project for priority purposes if the initial work performed is part of a continuous, unitary improvement to the property. *Witcher*, 465 N.W.2d at 406.

Citing to *E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc.*, 458 N.W.2d 177 (Minn. App. 1990), appellants argue that "contributors to the construction of a building may not tack their liens back to general site prepatory work." But *E.H. Renner* is distinguishable from this case. In *E.H. Renner*, this court concluded, as a matter of law, that "[t]he paving of streets, curbs and gutters does not directly relate to the construction of . . . two dwellings." *Id*. at 179. This court noted that the paving was done on the city right-of-ways, and it had no bearing on the construction of the two buildings at issue. *Id.*

Here, Hjort was not performing general site-prepatory work, but rather, as he testified, grubbing and clearing of trees were directly related to excavation, and he described his work as an ongoing project once it is begun.

In *Poured Concrete*, we concluded that the following factors should be considered when determining whether construction work is separate or part of a single, continuous improvement: "the parties' intent, what the contracts covered, the time lapse between projects, and financing." *Poured Concrete*, 529 N.W.2d at 510. Here, the factors weigh in favor of a determination that the work done by Hjort November 7-10 was part of a single, continuous improvement. The record shows that the parties intended Hjort's work for the project to be part of one continuous improvement. When Northern Lakes Construction contacted Hjort, the entire project was discussed; Hjort testified that "[i]t was all one project . . . proposed . . . [by] Northern Lakes." Hjort and Northern Lakes Construction agreed that Hjort would be hired to clear, grub, excavate, and dig the footings for the construction of buildings on the HGE lots.

Appellants argue that, because the clearing and grubbing of the HGE lots were billed on a time-and-materials basis but the excavation of each lot was paid on a per-lot basis, the clearing and grubbing were separate and not part of a single, continuous improvement. But this court held in *Witcher* that "[c]ontracting separately for different stages of a construction project does not, by itself, divide the project into separate improvements. Division occurs when the facts surrounding the work done under the separate contracts indicate that they were separate improvement projects." 465 N.W.2d

at 406. The record shows that the clearing and grubbing done by Hjort were necessary for the excavation work that followed.

Appellants also argue that Hjort's work was not part of a single and continuous improvement because the billing terms changed during the course of the project, requiring Hjort to send invoices to entities other than Northern Lakes Mille Lacs. But the record shows that, if Hjort sent invoices to different entities at different times, he did so only at the direction of Northern Lakes Mille Lacs.

Appellants argue that the lapse in time from the clearing and grubbing in November 2006 to the excavation in February 2007 shows that the improvement was not continuous. In *Poured Concrete*, this court determined that the time between excavation and preparation of the building pad that occurred in "summer and fall of 1988" and digging the basement and foundation for the home that began in December 1988, was not a significant time lapse. 529 N.W.2d at 510. Here, at most there was a three-and-a-half-month time lapse during the winter months. Similar to *Poured Concrete*, this is not so significant a time lapse to compel a conclusion that the clearing and grubbing in November 2006 were not a part of a single and continuous improvement, particularly given the nature of the project and Hjort's testimony that the clearing and grubbing work he did were necessary to begin excavation.

The record contains sufficient evidence to support the district court's finding of fact that Hjort's clearing and grubbing work were part of a single, continuous improvement to the lots. The district court did not err in determining that respondents' mechanics' liens attached to the five-plex on November 7, 2006, when Hjort's work

began, and therefore have priority over appellants' mortgage recorded on November 13, 2006.

Affirmed.