STATE OF MINNESOTA
IN COURT OF APPEALS
A10-158

Voigt Consultants, LLC,
Respondent,

vs.

Plymouth Crossroads Station, LLC, et al.,
Defendants,

Minnwest Bank Metro,
Appellant.

Filed March 29, 2011
Reversed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-08-24405

Dudley R. Younkin, St. Paul, Minnesota (for respondent)

Michael J. Orme, Dana K. Nyquist, Orme & Associates, Ltd., Eagan, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

KALITOWSKI, Judge

In this action to foreclose a mechanic's lien, appellant Minnwest Bank Metro argues that the district court erred in determining that its mortgage did not have priority

over respondent Voigt Consultants LLC's mechanic's lien, because at the time the mortgage was recorded, appellant did not have actual notice that the lien had not been paid. We reverse.

D E C I S I O N

"The standard of review on appeal from judgment only is whether the evidence is sufficient to support the [district] court's findings, and whether the findings support the [district] court's conclusions of law." *Comstock & Davis, Inc. v. G.D.S. & Assocs.*, 481 N.W.2d 82, 84 (Minn. App. 1992).

Starting in July 2006, respondent Voigt Consultants LLC and another company assisting respondent performed engineering services for the improvement of property in Hennepin County owned by Plymouth Crossroads Station LLC (Plymouth). Plymouth gave a mortgage on the property to the predecessor of appellant Minnwest Bank Metro. The mortgage was filed with the county in July 2007. Respondent continued to perform engineering services through February 2008. In March 2008, respondent filed a mechanic's lien on the property.

Plymouth defaulted on the mortgage, which appellant foreclosed. At the sheriff's sale in August 2008, appellant purchased the property and became the fee owner after the expiration of the redemption period. In September 2008, respondent commenced this action to foreclose its lien. After a court trial, the district court concluded that respondent's lien had priority over appellant's mortgage because appellant had actual notice of the lien when the mortgage was recorded.

This appeal followed. This court stayed the appeal pending the supreme court's decision in *Riverview Muir Doran, LLC v. Jadt Dev. Group, LLC*, 790 N.W.2d 167 (Minn. 2010). Upon release of the opinion, we dissolved the stay.

Minnesota law provides that an engineer has a lien upon the land when it performs engineering services with respect to the land. Minn. Stat. § 514.01 (2010); *Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 513 N.W.2d 241, 244 (Minn. 1994). If a bona fide mortgagee has "actual or record notice" of past, lienable services for which a lien claimant has not been paid, the mortgagee's interest is subordinated to the engineer's lien. Minn. Stat. § 514.05, subd. 1 (2010); *Riverview*, 790 N.W.2d at 172-73. Because respondent did not file "a brief statement of the nature of the contract" as described in section 514.05 and did not record its lien until several months after appellant recorded its mortgage, record notice is not at issue here. We therefore will refer to the statutory requirement of "actual or record notice" simply as "actual notice."

The parties here do not dispute that, at the time the mortgage was recorded, appellant knew that respondent had performed lienable work on the property. But the parties disagree as to whether the supreme court's recent decision in *Riverview* requires (1) actual notice of lienable work or (2) actual notice of *unpaid* lienable work. Appellant contends that *Riverview* stands for the latter proposition. As such, appellant argues that the district court applied an incorrect legal standard of implied notice and that, as a matter of law, appellant did not have actual notice that respondent had not been paid in full for its lienable work. We agree.

Under *Riverview*, anything less than actual knowledge that a lien claimant has not been paid for lienable services it has performed does not satisfy section 514.05's requirement of "actual notice." 790 N.W.2d at 173 n.13 (rejecting interpretation that "actual notice" means "knew or should have known"); *see also Imperial Developers, Inc. v. Calhoun Dev., LLC*, 775 N.W.2d 895, 905 (Minn. App. 2009) (stating that "anything less than actual knowledge" is not sufficient to establish actual notice); *Black's Law Dictionary* 1164 (9th ed. 2009) (equating actual notice with express notice, which is defined as "[a]ctual knowledge or notice given to a party directly, not arising from any inference, duty, or inquiry"). Actual notice is different from implied notice, which is "inferred from facts that a person had a means of knowing" or is "actual notice of facts or circumstances that, if properly followed up, would have led to a knowledge of the particular fact in question." *Black's Law Dictionary*, *supra*, at 1164; *see also Comstock*, 481 N.W.2d at 85 ("Implied notice occurs where one has actual knowledge of facts which would put one on further inquiry." (emphasis omitted) (quotation omitted)). And under section 514.05, a mortgagee has no duty to inquire about whether a lien claimant has been paid in full. *Riverview*, 790 N.W.2d at 174 n.14.

Here, the district court concluded that appellant had actual notice because it "should have known" that respondent had not been paid for its lienable work. The district court based this conclusion on its findings that appellant, at the time the mortgage was recorded, had in its possession (1) a development agreement containing an estimate of $356,919 for civil-engineering services to be performed before a final plat could be

approved and (2) a document showing that Plymouth had paid $80,919.52 to respondent and another company for civil-engineering services.

Appellant agrees that at the time its mortgage was recorded, it knew that respondent had performed lienable work on the property. And the district court concluded that appellant, based on documents in its possession, knew that the total amount of civil-engineering fees for the project would be approximately $350,000 and that less than one-quarter of that amount had been paid for civil-engineering services. But the district court made no finding, and the evidence would not support such a finding, that appellant knew that respondent's lienable work exceeded the $80,919.52 it had been paid.

We note that appellant could have made the inference that respondent had not been paid in full for its lienable work, based on (1) the disparity between the total estimate for civil-engineering fees and the amount of fees that had been paid at the time the mortgage was recorded and (2) appellant's knowledge that respondent had performed lienable work on the property. Thus, the record supports the district court's conclusion that appellant "should have known" that respondent had not been paid in full for its lienable work. And the district court's use of "should have known" follows language used in *Kirkwold*, in which the Minnesota Supreme Court held that mortgagees "had actual knowledge and, therefore, 'actual notice' of the possibility that a mechanics lien would attach" where the mortgagees knew that lien claimants had performed lienable work and "knew or should have known that they had not been paid." 513 N.W.2d at 244. But in *Riverview*, decided after the district court's decision in this case, the supreme court

stated that the statutory requirement of "actual notice" does not mean "knew or should have known" and that it had used this language in *Kirkwold* "merely [to] convey[] the findings of the district court." 790 N.W.2d at 173 n.13.

In sum, although the record supports a conclusion that appellant had implied notice, section 514.05 requires actual notice. And there is no evidence that appellant actually knew that the $80,919.52 expended for civil-engineering services did not constitute payment in full for respondent's lienable work. Moreover, appellant had no duty to inquire about whether respondent had been paid in full. *See id.* at 174 n.14 (holding that mortgagees did not have a duty to inquire about the amount of money owed to lien claimant). We are thus compelled by the holding in *Riverview* to conclude that the evidence is insufficient to sustain a determination that appellant had actual notice that respondent had not been paid in full for its past, lienable services. Consequently, appellant's mortgage has priority over respondent's mechanic's lien.

Reversed.