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Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A10-750

S.R. Wiedema, Inc.,
Plaintiff,

vs.

Sienna Corporation, et al.,
Defendants,

Village Bank,
Respondent,

Pioneer Engineering, P.A., defendant and third party plaintiff,
Appellant,

vs.

Leonard Lampert Architects, P.A.,
Third Party Defendant,

and

Great Northern Landscapes, Inc.,
Plaintiff,

vs.

Sienna Corporation, et al.,
Defendants,

Village Bank,
Respondent,

Pioneer Engineering, P.A., defendant and third party plaintiff,
Appellant,

Pioneer Engineering, P.A., defendant and third party plaintiff,
Respondent,

vs.

Leonard Lampert Architects, P.A., et al.,
Third Party Defendants.

Filed June 6, 2011
Affirmed
Wright, Judge

Anoka County District Court
File No. 02-CV-08-8101

Bradley N. Beisel, David J. Krco, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondent Village Bank)

Vincent J. Fahnlander, Mohrman & Kaardal, P.A., Minneapolis, Minnesota (for appellant Pioneer Engineering, P.A.)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

WRIGHT, Judge

Appellant challenges the district court's summary-judgment determination that respondent's mortgage takes priority over appellant's mechanic's lien. Appellant argues that the undisputed evidence establishes that respondent had actual notice of appellant's lien or that the actual and visible beginning of the improvement to the land preceded the mortgage. We affirm.

FACTS

Appellant Pioneer Engineering, P.A. (Pioneer) provided engineering and land-surveying services to developer Sienna Corporation in connection with a residential development project known as Gardenwood. These services included a "preliminary sketch, topographic and boundary survey, tree survey, preliminary plat, engineering design, engineering construction services and contract administration, surveying, erosion control and inspection." Pioneer provided the services between May 26, 2004 and October 29, 2008, both before and after Sienna purchased the land for the Gardenwood project.

Sienna obtained a loan from respondent Village Bank to finance the purchase of the Gardenwood property. On August 15, 2005, Sienna closed on the property and gave a promissory note and mortgage to Village Bank. Village Bank recorded the mortgage in Anoka County on August 22, 2005.[1]

At the time of the mortgage, Village Bank was aware that engineering services had been provided to Sienna in connection with the Gardenwood project. A commercial-loan summary dated August 2005 provides that "Sienna has already expended $383M towards engineering, plat development, & other soft costs for this project."[2] With respect to Pioneer specifically, Village Bank President Larry Schminski testified during his

[1] On April 26, 2006, Sienna and Village Bank executed a modification agreement, increasing the mortgage amount to $12,590,000. The modification was recorded on May 1, 2006.

[2] "Soft costs" are funds expended by a developer to determine whether a project is legally and economically feasible and to set the general parameters of the project.

deposition that he was aware that Pioneer had provided engineering services, but he never asked to see a copy of Pioneer's contract or its invoices.

The Gardenwood project ultimately proved unsuccessful; and Village Bank commenced foreclosure proceedings in January 2008. Pioneer filed a mechanic's lien statement on March 25, 2008, but continued to perform work under its contract through October 29, 2008, and filed an amended mechanic's lien statement on November 10, 2008.

In a separate action on October 14, 2008, the district court entered an order of foreclosure of the mortgage. Several contractors on the Gardenwood project subsequently commenced proceedings to foreclose their mechanic's liens. The district court consolidated those actions and, on cross summary-judgment motions, ruled, as relevant here, that Pioneer's mechanic's lien was subordinate to the Village Bank mortgage. Pioneer appeals.

D E C I S I O N

On appeal from summary judgment, we review de novo "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, "[w]e view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). To defeat a summary-judgment motion, the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case

to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). When determining whether a genuine issue of material fact exists, "the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *Id.* at 70.

"Mechanic[']s liens are purely creatures of statutes and the rights of the parties are governed by the language of the statutes." *Riverview*, 790 N.W.2d at 170 (quotation omitted). "Whoever performs engineering or land surveying services with respect to real estate . . . shall have a lien upon the improvement, and upon the land on which it is situated." Minn. Stat. § 514.01 (2010). That the services performed by Pioneer are lienable is undisputed. Rather, the issue before us is at what point in time that lien attached, vis à vis the mortgage.

"Section 514.05 governs when a mechanic's lien attaches . . . ." *Id.* at 171. As relevant here, the statute provides: "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 . . . ." Minn. Stat. § 514.05, subd. 1 (2010). Thus, Pioneer's mechanic's lien takes priority over Village Bank's mortgage only if (A) Village Bank had actual notice[3] of Pioneer's lien when the mortgage was

[3] Record notice is not at issue in this case.

recorded,[4] or (B) the mortgage was given after the "actual and visible beginning of the improvement on the ground." We address each in turn.

A.

The Minnesota Supreme Court recently addressed the concept of actual notice under the mechanic's-lien statute, holding that "'without actual notice' in section 514.05, subdivision 1, means without actual notice of an existing lien," which "contemplates past, lienable services for which a lien claimant has not been paid." *Riverview*, 790 N.W.2d at 172-73.[5] Village Bank argues that it did not have actual notice of Pioneer's liens as a matter of law because, although it was aware that Pioneer had provided lienable services, it was not aware that Pioneer had not been paid for those services.

Pioneer counters that Village Bank had actual notice of unpaid lienable work because Village Bank received and paid invoices from Pioneer. In support of its contention, Pioneer cites Schminski's deposition testimony that Village Bank requested Pioneer's invoices *after the land acquisition* "so that they could be paid." But Pioneer ignores Schminski's unrefuted testimony that he had not seen any of Pioneer's invoices *before* the acquisition and mortgage, which is the relevant time period under the statute.

[4] Although *Riverview* did not directly address the issue, both the underlying facts and the language employed by the Minnesota Supreme Court suggest that we focus on the date the mortgage was recorded when determining a mortgagee's knowledge. *See Riverview*, 790 N.W.2d at 173-74 (holding that mortgagees had priority because they paid the lien claimant for all known, lienable services "at the time they *recorded* their mortgages" (emphasis added)).

[5] The *Riverview* court concluded that "the Legislature carved out a rule of priority in Minn. Stat. § 514.05, subd. 1, which protects the interests of . . . mortgagees . . . and encumbrancers without record notice and without actual notice of an existing, unpaid lien for services performed before the actual and visible beginning of an improvement on the ground." *Id.* at 175.

See id. at 173 (requiring knowledge of "past, lienable services for which a lien claimant has not been paid"). And although former Sienna employee John Vogelbacher testified regarding the process through which Pioneer's bills were submitted to Village Bank for payment, Vogelbacher did not testify that this process was employed before the mortgage.

Because Pioneer has not rasied a genuine issue of fact as to whether, when the mortgage was recorded, Village Bank had knowledge of lienable services for which Pioneer had not been paid, we conclude that Village Bank did not have "actual notice" of Pioneer's lien as a matter of law.

B.

Section 514.05 does not define "the actual and visible beginning of the improvement on the ground." Minnesota courts have defined this provision as the point at which "'the person performing the duty of examining the premises to ascertain whether an improvement has begun is able in the exercise of reasonable diligence to see it.'" *Nw. Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 249 (Minn. App. 1990) (quoting *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975)). Moreover, since a 1987 amendment, section 514.05 has expressly excluded certain types of services—including engineering and soil-testing services—from being the actual and visible beginning of the improvement to the ground:

> Visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section. This subdivision does not affect the validity of the liens of a person or the notice provision provided in this chapter and

> affects only the determination of when the actual and visible beginning of the improvement on the ground . . . has commenced.

Minn. Stat. § 514.05, subd. 2 (2010). "Whether the beginning of improvement is visible or not is a question of fact." *Nw. Wholesale*, 457 N.W.2d at 249.

Pioneer asserts that several of the services provided by Pioneer and/or other contractors prior to the mortgage constituted the actual and visible beginning of the improvement to the ground. Specifically, Pioneer identifies the digging of test pits, the installation of monitoring wells, and the tagging of trees. These services, however, were all in the nature of "engineering, land surveying, and soil testing services" and, thus, fall squarely within those services that section 514.05, subdivision 2, excludes from the actual and visible beginning of the improvement on the ground.

Pioneer argues that, because the premortgage engineering and soil-testing services were lienable and visible, they must have been the "actual and visible beginning of improvement on the ground." We reject this assertion as contrary to the language and structure of the mechanic's-lien statute, which treats the existence of a mechanic's lien separately from its priority. *Compare* Minn. Stat. § 514.01 (governing existence of lien) *with* Minn. Stat. § 514.05 (2010) (governing priority of existing lien); *see also Carlson-Grefe Constr. v. Rosemount Condo. Grp. P'ship*, 474 N.W.2d 405, 409 (Minn. App. 1991) (distinguishing between the creation of a lien and its priority), *review denied* (Minn. Oct. 31, 1991). The appropriate focus for determining priority is not whether particular services are visible during or after they are performed, but whether they constitute the "actual and visible *beginning of the improvement* on the ground." Minn.

Stat. § 514.05, subd. 1 (emphasis added). The premortgage services at issue here—whether visible or not—are excluded from constituting the actual and visible beginning of the improvement on the ground. *Id.*, subd. 2.

Pioneer also asserts that the premortgage services went beyond soil testing, into what it refers to as "soil remediation"; that the remediation involved removing and replacing contaminated soil; and that this remediation constituted the actual and visible beginning to the improvement on the ground. Even if such services could constitute the actual and visible beginning of the improvement on the ground, the record does not support Pioneer's assertion that this work took place before the mortgage.

The only evidence in the record regarding the timing of the soil remediation that Pioneer describes is a February 8, 2006 report by American Engineering Testing (AET), a company hired by Sienna to work with Pioneer on soil testing and remediation. The AET report summarizes the soil testing that has been undertaken, describing the completed testing to include numerous test pits, soil borings, and monitoring wells, along with more than 6,200 lineal feet of test trenches. The report also proposes guidelines for the removal and replacement of contaminated soils, along with a plan to use some of the impacted soil under public roads. It is clear from the report that the soil remediation that Pioneer describes had not begun as of February 2006, which is nearly six months after the mortgage.

Pioneer relies on other portions of the record to support its assertion of premortgage remediation work, but none of the citations withstands scrutiny. Pioneer principally relies on Vogelbacher's deposition testimony regarding the nature of the

remediation work. Vogelbacher, however, did not testify that the remediation work took place before the mortgage. Moreover, contrary to Pioneer's assertion that the removal and/or replacement of soil was taking place simultaneously with testing, Vogelbacher testified that the testing pits were refilled with the same soil immediately after the soil samples were obtained.

Pioneer also relies on portions of the district court's summary of the undisputed facts, including the district court's statement that "[i]n fall of 2004, earth work began in furtherance of the soil remediation," and the district court's description of the remediation work to have "required the removal of some of the existing soil, other materials to be brought in, and some of the existing soil to be layered deeper or under the roads."[6] Given the absence of evidence in the record to support a determination that remediation work was performed before the mortgage, we construe the district court's reference to fall 2004 earth work in furtherance of remediation to refer to the soil testing that indisputably was taking place at that time. Indeed, the district court's description of the remediation work tracks Vogelbacher's deposition testimony. And, like Vogelbacher's testimony, the district court's summary of undisputed facts does not address when that remediation work took place.

Citing the purchase agreement and Schminski's deposition testimony, Pioneer finally asserts that soil remediation was required to be completed before the closing and, therefore, must have preceded the mortgage. But the purchase agreement merely

[6] At oral argument, Pioneer characterized these statements as "findings," thereby suggesting that we must defer to them. But a district court does not make findings on summary judgment, and we review a grant of summary judgment de novo.

provided a period of time during which Sienna was to satisfy itself that the property was suitable for residential development. And Schminski testified that, prior to closing, Village Bank had assurances from Sienna that, "yes, this is low level [soil] contamination, that [Sienna] would be able to deal with it."

Because the premortgage engineering and soil-testing services cannot constitute the actual and visible beginning of the improvement on the ground, and because Pioneer has not raised a genuine issue of material fact as to whether soil-remediation services were performed before the mortgage, we conclude that the actual and visible beginning of the improvement on the ground took place after the mortgage as a matter of law.

In the absence of any evidence that, prior to the mortgage, either Village Bank had actual notice of Pioneer's lien or there was an actual and visible beginning of the improvement on the ground, the district court properly granted summary judgment in favor of Village Bank.

Affirmed.