STATE OF MINNESOTA
IN COURT OF APPEALS
A10-873

Stafne Construction & Aggregate, LLC,
Respondent,

vs.

Jason Bambenek, et al.,
Appellants,

AffinityPlus Federal Credit Union, et al.,
Defendants,

and

Bridgewater Bank,
Appellant.

Filed April 19, 2011
Affirmed
Lansing, Judge

Pine County District Court
File Nos. 58-CV-08-644, 58-CV-07-751

D. Sherwood McKinnis, Trent L. Pepper, Lindberg & McKinnis, P.A., Cambridge, Minnesota (for respondent)

Jonathan Drewes, Drewes Law, PLLC, Minneapolis, Minnesota (for appellants Jason Bambenek, et al.)

Bradley N. Beisel, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for appellant Bridgewater Bank)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

LANSING, Judge

Following a three-day trial, the district court found that the owners of a campground property breached a construction contract and that the property owners' limited liability company, which now holds title to the property, was unjustly enriched by the construction contractor's work. Based on these findings, the district court granted the construction company a decree of foreclosure of its mechanics' lien. The property owners, their limited liability company, and the bank that provided the mortgage to finance the construction all appeal. Because the record supports the district court's findings and its conclusions accurately apply the law, we affirm.

F A C T S

This appeal involves sixty acres of property in Pine County. Joy Holt and her son Jason Bambenek purchased the land in early 2006 to develop as a family campground and recreational facility. The facts underlying this appeal are drawn from the district court's findings.

Holt and Bambenek retained John Gorman, a septic-system designer, to provide a septic-treatment plan for the campground; they also solicited a proposal from Stafne Construction & Aggregate, LLC, to prepare building sites, grade and level campsites, install the septic system, and provide the necessary roadwork. Because Holt and

Bambenek wanted to obtain financing and begin operation of the campsite in the summer of 2007, they requested Stafne's proposal before they received Gorman's septic-treatment plan.

Stafne submitted a one-page proposal in September 2006 on a form that contained mostly handwritten information but had a few type-written provisions. The handwritten portion lists several categories of labor including sewer lines, pool digging, parking areas, grade-level campsites, seeding and mulching, roadwork and gravel, septic mounds and tanks, and pole-barn preparation. Many of the listed categories contain a per-square-foot cost followed by a footage number—indicated as an estimate—for the work. In addition to designating the numbers as estimates, some of the listed services and associated costs are hard to read and are imprecise in description. The parking areas, for instance, state that they will be "as big or small as wanted," and another category that does not clearly state a cost is described as "buildings – store pool – rec. room, etc." The septic mounds are among the more specific provisions, indicating "septic mounds 2 tanks etc. ea. $12,000 - $24,000."

The proposal indicates a total cost of $289,523, but follows that with an amount due as a down payment, an amount due when the buildings are done and the building pads ready, and "Bal. at agreeable amounts later." The face of the one-page proposal includes a type-written provision that states "[a]ny alteration or deviation from above specifications involving extra costs will be executed only upon written order, and will become an extra charge over and above the estimate." Bambenek signed the proposal on October 2, 2006.

Gorman completed his septic-system plan in mid-October 2006 and delivered it to Holt and Bambenek. The plan was submitted to the municipal septic inspector, who ultimately determined that the site would require a total of eight septic mounds, not just the two septic mounds that were included in the signed October 2 proposal. Stafne continued to work on the project through the end of the 2006 construction season but did not receive a copy of the completed septic-system plan and did not learn about the requirement of the six additional septic mounds until May 2007, more than seven months after the proposal was signed.

To obtain financing for the project Bambenek provided Bridgewater Bank with a sworn construction statement in March 2007 that included the project's anticipated budget. On April 27, 2007, Bambenek conveyed the campsite property by quitclaim deed to Countryside Campground, LLC. Holt and Bambenek are equal owners and the only members of this limited liability company. The same day, Holt and Bambenek, acting as Countryside LLC's members, signed a mortgage to secure a $750,000 loan from Bridgewater Bank. The loan approval was based on the March 2007 construction statement that did not reflect the cost of the six additional septic mounds. Stafne was not informed of the campsite's change in ownership.

In May 2007 Stafne received the septic-system plan that showed the additional six septic mounds. After reviewing the plan, Stafne told Holt and Bambenek that the required mound system was "very big and very expensive" and that the additional costs for the mounds, tanking, piping, larger pumps and switchgear would more than double the cost of the septic system estimated in the proposal and would add approximately

$200,000 to the project beyond the $289,523 proposal. Stafne testified that Holt instructed Stafne to continue building because they were in too deep and had no option but to proceed. In addition to the extra work required for the septic system, Holt and Bambenek also orally requested and paid Stafne for a sewer dump, a pool drain, and a playground that were not included in the proposal.

Stafne ceased work on the project in early October 2007 after Holt and Bambenek failed to pay his submitted invoices. Stafne calculated the outstanding balance at approximately $232,000. When the amount remained unpaid, Stafne filed and recorded a mechanics' lien against the property and, in November 2007, sued to foreclose the lien.

At trial, Holt and Bambenek argued that their contract with Stafne was a lump-sum or fixed-amount agreement and that the amount stated on the October 2 contract represented the total cost of the completed project. The district court concluded that the contract was unambiguously unit-based, that Holt and Bambenek breached the construction contract, and that Countryside LLC was unjustly enriched by Stafne's work in an amount equal to the unpaid invoices. The district court denied posttrial motions for a new trial or amended findings and conclusions, and Holt, Bambenek, Countryside LLC, and Bridgewater Bank appeal.

D E C I S I O N

A total of fourteen issues are raised on appeal, but consolidation of related issues and exclusion of two issues that are based on a misconstruction of the district court's order reduce that number to six. These six issues are whether the district court erred when it concluded that (1) the signed proposal was a unit-based rather than a lump-sum

contract, (2) the restriction on alterations to the proposal did not preclude Stafne's claims of nonpayment, (3) Holt and Bambenek are liable for the breach and Countryside LLC is liable for unjust enrichment, (4) the mechanics' lien is valid and not overstated, (5) the mechanics' lien is not defective for failure to identify Countryside LLC as the property owner, and (6) Stafne is entitled to ten-percent prejudgment interest on the mechanics' lien.

I

The primary issue at trial was whether the signed proposal constituted a "unit-bid contract" or a "lump-sum contract." Holt, Bambenek, and Countryside LLC (referred to collectively as "property owners") did not dispute that the signed proposal was a contract and neither did Stafne; they instead dispute the nature of the contract. The property owners contend that it is a lump-sum contract. "Under a lump-sum agreement, the contractor agrees to complete the work for a set price, regardless of the actual costs incurred in completing the construction." *U.S. v. Johnson*, 937 F.2d 392, 394 n.2 (8th Cir. 1991). Stafne contends that it is a "unit-bid contract" in which "the contractor submits a price per unit (the cement work, for example, may be a unit) for each of the various categories." *Johnson, Drake & Piper, Inc. v. U. S.*, 483 F.2d 682, 684 (8th Cir. 1973). A "unit-bid contract" is used when "the final quantities of work cannot be determined with accuracy until final completion." *Id.*

The contract prepared by Stafne essentially consists of a list of the type of work to be performed, followed by the per-unit price for the work type (per square foot, per foot, etc.) and then an estimate of the cost to perform the estimated number of units of each

type of work. The contract does not include estimates for all of the categories listed on the one-page sheet, and the scope of the listed work appears to be too vague to support calculation of a total. The contract nonetheless provides a total for the estimates listed, but also includes a final payment provision that allows for the "Bal. at agreeable amounts later."

"[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc*., 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a written instrument, "the intent of the parties is determined from the plain language of the instrument itself." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). We conclude that the district court correctly determined that the document was a unit-based contract. By its plain terms, the contract states an intent to enter into an agreement in which costs would accrue according to a unit formula as the work progressed; it is not an agreement to complete all work on the campsite for the amount stated in the proposal. The contract provides the per-unit price of various categories of materials and work to be furnished and a provisional total based on an estimate of the total quantity of some of the required units. It states a unit price for many of the categories but allows for changes in unit quantity.

The unit-based nature of the contract is confirmed by the payment schedule. If the contract were for a lump sum, the balance provided in the payment schedule would be fixed as the difference between the amounts required to be paid as the down payment and the progress payment. Instead, it is reflected as an "agreeable amount," which denotes

that this total is subject to variation according to the amount of work performed. The unit-based nature is also confirmed by the open-ended projects, such as the parking areas, which can be "as big or small as wanted." Under the property owners' interpretation of lump sum, this provision could require construction of a parking area so large that it could readily exceed the total estimated amount. The contract plainly reflects a unit-based price that cannot be finally computed until the number of required units is determined.

Even if the imprecise contract language introduces elements of ambiguity, the result would be the same. When "a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003) (quotation omitted). Extrinsic evidence may be considered to resolve a contract's ambiguity. *In re Trust of Campbell*, 258 N.W.2d 856, 864 (Minn. 1977).

The record and the district court's findings are replete with evidence of the parties' intent to enter into a unit-based contract. Gary Stafne testified that he lacked sufficient information about the project when he prepared the proposal to enable him to bid the entire project and that he prepared the proposal using only Holt's rudimentary drawing of the finished campsite. The district court found that it was unreasonable for Holt and Bambenek to have believed that the contract included all of the subsequent changes they requested to the project, including the eight septic mounds when the contract provided for only two. As early as the winter of 2006-07, just three months after Stafne began work, Stafne was submitting, and the property owners were paying, bills based on unit-based

work, including charges for extra work not included in the original proposal. Stafne testified that Holt instructed him to continue with the septic mounds despite his informing her that the price had increased by more than $200,000. The conduct of the property owners and the circumstances of the contract's preparation are consistent with the district court's conclusion that the contract was unit-based.

The bank argues on appeal that if this is the way the contract is construed then it is essentially no contract at all. For several reasons we disagree. First, this argument was not presented to the district court. Second, all of the parties agreed in their pretrial pleadings and throughout the trial that the proposal was a binding contract. Third, caselaw supports the enforcement of a statutory mechanics' lien based on labor and materials "furnished by agreement on an open and running account." *See Brekken v. Holien*, 289 Minn. 95, 97, 182 N.W.2d 717, 719 (1970) (upholding district court's determination that contractor's total-cost proposal did not limit homeowner's obligation when details were not specified, changes were made at owner's request, and labor and materials were "furnished by agreement on an open and running account"). The contractor's total amount in *Brekken*, similar to Stafne's total amount, was estimated by relying on a sketch of the work to be performed. *Id.*; *see also Malmin v. Grabner*, 282 Minn. 82, 85, 163 N.W.2d 39, 41 (1968) (concluding that contractor was entitled to value of labor and materials furnished and not limited to total amount estimated for purposes of property owners obtaining loan from bank).

Finally, we reject the property owners' and the bank's argument that the contract should be construed against Stafne as the drafter. This rule of construction applies only

when a contract provision is ambiguous. *Current Tech. Concepts Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). And even when addressed to ambiguity, it does not "ineluctably lead to the conclusion that the drafter is to lose." *Turner v. Alpha Pi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979). Because we have concluded that the contract between Stafne and the property owners is plainly unit-based, the drafting rule does not apply. Furthermore, the record and the district court's findings would prevail over the general drafting rule. *See Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966) (recognizing that construction of any ambiguity is question of fact).

II

At trial and on appeal the property owners and the bank have contended that the property owners did not waive the contract's typewritten provision that "[a]ny alteration or deviation" from the contract's specifications "involving extra costs will be executed only upon written order, and will become an extra charge over and above the estimate." We note at the outset that this is not, as the property owners argue, a general prohibition against any oral changes to the contract. Its language appears to be aimed at protecting the construction company from oral requests for additional work that would involve additional costs. In either event, the district court found that this restriction was waived, and the facts and the law support this determination. *See Meagher v. Kavli*, 251 Minn. 477, 486, 88 N.W.2d 871, 878 (1958) (stating that waiver is question of fact). Stafne clearly waived the provision by accepting additional oral requests for work that involved additional costs. And by repeatedly requesting oral modifications to the contract in the form of additional work, the property owners also clearly waived any requirement that

modifications to the contract involving extra costs must be in writing. *See Appollo v. Reynolds*, 364 N.W.2d 422, 424 (Minn. App. 1985) (recognizing that waiver applies to provision that exists for contracting party's benefit when contracting party ignores condition precedent and continues to exercise rights).

The record demonstrates that the property owners waived any restriction against oral modification. Holt specifically instructed Stafne to continue with the septic installation even after Stafne, Gorman, and the inspector informed Holt that the cost of the project would nearly double because of the additional septic work. Holt and Bambenek orally requested that Stafne undertake additional projects, including a playground, a sewer dump, and a pool drain. The property owners did not dispute their responsibility to pay for these projects. Bambenek admitted in testimony that Stafne was asked to perform work "above and beyond the original contract." This testimony demonstrates a knowing disregard for any writing requirement. The district court did not err by concluding that the property owners waived the disputed provision.

III

The property owners raise a series of issues relating to the district court's determination on breach of contract and unjust enrichment that they did not raise in the district court and that appear to be based on a miscomprehension of the district court's findings. The district court found that Holt and Bambenek breached the construction contract with Stafne by failing to pay the outstanding invoices. The district court further found that Holt and Bambenek's LLC was unjustly enriched by Stafne's work in an

amount equivalent to the unpaid invoices. The record supports the district court's findings and conclusions on liability.

The property owners' primary challenge is the district court's finding that they are individually liable under the contract. They contend that they are not liable because they did not sign it. The evidence was undisputed, however, that Bambenek did sign the contract. Significantly, Holt and Bambenek both admitted in their answer to Stafne's complaint, that they entered into a contract with Stafne. And their entire trial theory was based on this contractual relationship. "Once a matter is deemed admitted, it is established for purposes of the proceeding. Any effort to submit adverse evidence on the matter or to attempt to contradict an admitted fact would be irrelevant because the issue is no longer in dispute." *In re Welfare of J.W.*, 391 N.W.2d 791, 796 (Minn. 1986). Although Holt appears to have raised an aspect of this claim in her posttrial motion for a new trial, it is an ineffective attempt to unravel the entire fabric of the three-day trial. A party may not raise an issue for the first time as a legal basis for a new trial. *Ellingson v. Burlington N. R.R.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). Because Holt and Bambenek admitted they entered into a contract with Stafne and litigated on that basis, the issue is conclusively settled. We also note that the record is replete with uncontradicted evidence that they acted in concert on a joint-venture theory. Holt and Bambenek not only admitted that they were bound by the contract, they constructed the trial around the binding nature of the contract.

The property owners also argue that the district court erred in finding Countryside LLC liable for unjust enrichment and by not finding that Stafne had negligently bid the

proposal and was therefore not entitled to allege unjust enrichment. A theory of negligent bidding was not raised in the pleadings, in posttrial motions, or during the three-day trial. Because these arguments were neither raised in nor considered by the district court, we decline to address them. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally will not consider matters not argued to and considered by district court).

IV

Bridgewater and Countryside LLC challenge the amount of the lien. Bridgewater's argument on this issue relies on the assertion that the contract was a lump-sum agreement and that the reasonable value of Stafne's work was the proposal estimate. This argument has been directly addressed in section I. The contract was not a lump-sum or fixed-amount agreement.

Countryside also argues the lien was fraudulently exaggerated by Stafne. *See* Minn. Stat. § 514.74 (2010) (providing in part: "In no case shall a lien exist for a greater amount than the sum claimed in the lien statement, nor for any amount, if it be made to appear that the claimant has knowingly demanded in the statement more than is justly due."); *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp*., 383 N.W.2d 357, 361 (Minn. App. 1986) (stating that "before a lien is invalidated under this section, it must be proven that the lien claimant acted fraudulently, in bad faith, or made an intentional demand for an amount in excess of that due"), *review denied* (Minn. May 22, 1986). But the district court found that there was no evidence of any fraud or bad faith by Stafne, and that the amount of the lien was less than the reasonable amount of the goods and services

provided. These findings are supported by the record, and we therefore conclude the lien amount was proper.

V

Bridgewater argues the lien was defective because it was served only on Holt and it failed to identify Countryside LLC as the property owner. A lien statement must provide "the name of the owner [of the property] at the time of making such statement, according to the best information then had." Minn. Stat. § 514.08, subd. 2(6) (2010). When Stafne prepared the lien, he was unaware that the property had been transferred to Countryside LLC because Holt and Bambenek had concealed the transfer. The best information available to Stafne at the time was that the property belonged to Holt and Bambenek. The lien was valid.

Bridgewater challenges service of the lien on the grounds that it was served on Holt but not Bambenek or Countryside LLC. This argument is without merit. First, Holt and Bambenek admitted in their answer that they were properly served the mechanics' lien. And Minn. Stat. § 514.08, subd. 1(2) (2010), provides that a lien must be "served personally or by certified mail on the owner or the owner's authorized agent or the person who entered into the contract with the contractor." The record contains evidence that Stafne sent the lien by certified mail to Holt and Bambenek and that Holt signed for it. Under the language of the statute, this was sufficient because Holt contracted with Stafne, was Bambenek's agent as a member of the LLC, and the lien was sent by certified mail to Bambenek.

VI

Finally, Bridgewater and Countryside LLC challenge the district court's order for prejudgment interest to Stafne. The property owners argue that prejudgment interest is improper if the damages are unliquidated. But it is not the case that prejudgment interest is allowable only in cases of liquidated claims. *See Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 88 (Minn. 2004) (noting that "[t]he prejudgment interest statute does not require that the damages be readily ascertainable").

Bridgewater's argument is broader and addresses whether the district court erroneously calculated the statutory interest due on Stafne's mechanics' lien judgment. In its order, the district court held that "[Stafne] is entitled to judgment against [d]efendant Countryside Campground, LLC in the amount of $232,708.34 plus statutory interest at a rate as set forth in Minn. Stat. § 549.09 [retroactively] from October 3, 2007." In 2009, Minn. Stat. § 549.09 was amended to change the interest rate on judgments exceeding $50,000 from a rate based on U.S. Treasury Bill interest to a set amount of ten percent. 2009 Minn. Laws ch. 83, art. 2, § 35 at 1055. The amended interest provision became "effective August 1, 2009, and applie[d] to judgments and awards finally entered on or after that date." *Id.* Bridgewater argues that "if it is presumed" that the district court's intent was to order that Stafne's mechanics' lien judgment should earn ten-percent interest starting October 3, 2007, that is, before the effective date of the 2009 amendment to section 549.09, then the district court impermissibly applied the statutory interest provision retroactively. As a consequence, Bridgewater concludes, Stafne's judgment violated the statutory interest provision.

We note first that Bridgewater did not object to Stafne's calculation of lien interest within seven days of Stafne's application for costs and disbursements. *See* Minn. R. Civ. P. 54.04(c) (providing that written objection to costs and disbursements must be submitted no later than seven days after service of costs-and-disbursements application). By failing to timely object in the district court, Bridgewater waived its right to raise the objection on appeal.

Even if Bridgewater had not waived its right to object, its argument that the district court applied the statute retroactively is not supported by the record. Stafne's calculation of prejudgment lien interest, attached as an exhibit to its request for costs and disbursements, reflects that Stafne calculated the prejudgment lien interest from October 3, 2007 to July 31, 2009, at four percent, and from August 1, 2009 to December 14, 2009, at ten percent, as contemplated in the amendment to section 549.09. Bridgewater's speculative contention that the district court may have intended the mechanics' lien to begin earning ten-percent interest from October 3, 2007, is therefore unfounded.

Affirmed.