STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0312

Riverview Muir Doran, LLC,
Appellant,

vs.

JADT Development Group, LLC, et al.,
Respondents,

First Choice Bank,
Appellant,

Darg, Bolgrean, Menk, Inc., et al.,
Defendants,

and

First Choice Bank,
Appellant,

vs.

JADT Development Company, LLC, et al.,
Respondents,

Riverview Muir Doran, LLC,
Appellant,

Darg, Bolgrean, Menk, Inc.,
Defendant,

KKE Architects, Inc.,
Respondent,

and

KKE Architects, Inc.,
Respondent,

vs.

JADT Development Company, LLC,
Respondent,

First Choice Bank, et al.,
Appellants,

Darg, Bolgrean, Menk, Inc., et al.,
Defendants.

Filed September 15, 2009
Reversed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-06-21709

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellants First Choice Bank and Riverview Muir Doran, LLC, challenge the district court's determination that they had actual notice of respondent KKE Architects, Inc.'s, prior mechanic's lien, and that, therefore, that lien was superior to the mortgages held by First Choice Bank and Riverview Muir Doran, LLC. Because appellants did not have actual notice of the existence of the lien and because respondent had executed a partial lien waiver that didn't indicate any additional sums were due, we reverse.

FACTS

The facts of this case are largely undisputed. JADT Development Group, LLC purchased a parcel of land, described as "Lot 1, Block 1, JADT Addition" (Parcel I)[1] in October 2004 for the purpose of developing a housing project known as River View Homes (Project). JADT hired respondent KKE Architects, Inc., to provide architectural services in connection with the Project. Parcel I was part of Phase II of the Project. On March 22, 2005, JADT gave appellants First Choice Bank and Riverview Muir Doran, LLC mortgages against Parcels I, II, and III worth $20,358,550.[2] Both of these mortgages were recorded on March 23, 2005.

[1] JADT is also the owner of two other parcels of land known as Parcels II and III that were part of the Project, but which are not in dispute in this appeal.

[2] First Bank's mortgage was in the amount of $19,125,000. Riverview's mortgage was in the amount of $1,233,550.

KKE had begun work on the project prior to the closing of appellants' mortgages.[3] At the time of the closing of the mortgages, 27 invoices for work completed by KKE on the Project were presented for payment. The closer, Chicago Title Insurance Company issued a check to KKE in the amount of $97,139.33 on March 23, 2005. There is nothing in the record to indicate that appellants were aware of any other debt for unpaid work owed to KKE related to the project at the time of the closing.

The check was accompanied with a partial lien waiver. The partial lien waiver expressly stated that KKE "affirms that all materials and labor furnished on behalf of [KKE] have been paid in full, EXCEPT:" followed by a blank space. KKE's chief financial officer, Robert Mayeron, testified that he was aware that the partial lien waiver included this language, but that he did not think that signing the document would serve as a waiver of KKE's claim of priority. Mayeron testified that he executed the document knowing that there was still outstanding debt not satisfied by the check, but that he did not communicate to the closer that KKE was still owed more money. The partial lien waiver was executed on April 4, 2005. Prior to the execution of the lien waiver, there had been no communication between KKE and appellants concerning the loans from appellants to JADT or the payment, waiver, or subordination of KKE's claim against Parcel I. The district court held that appellants had made no inquiry into the extent of KKE's claim against Parcel I.

[3] The district court's decision indicates that KKE began work related to Parcel I in January 2003. No explanation is given for why KKE began work more than a year and a half before Parcel I was conveyed to JADT.

On November 27, 2006, KKE served JADT with it mechanic's lien statement, claiming a lien in the amount of $235,996.34 and recorded this first statement with the Hennepin County Recorder. On December 29, 2006, KKE served and recorded an amended mechanic's lien statement, claiming a lien in the amount of $358,028.34.

There was no actual and visible beginning of improvement on the ground of Parcel I related to the Project.

KKE sought to foreclose its mechanic's lien, and appellants sought to foreclose their mortgages. In the resulting litigation, appellants jointly moved for summary judgment. In its amended findings of fact, conclusions of law, and order for summary judgment, the district court held that appellants received documents that referred to KKE and the architectural services provided by KKE in the improvement of Parcel I prior to the closing of appellants' mortgages. The district court concluded that before their mortgages were recorded, appellants "had actual notice of KKE's prior mechanic's lien against Parcel I," and, therefore, KKE's lien was prior and superior to appellants' mortgages. The district court ordered that Parcel I be sold to satisfy KKE's lien. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

> that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *Id.* at 71; *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as "incorrect legal standard" and clarifying that "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions").

Appellants challenge the district court's determination that KKE's mechanic's lien is prior and superior to appellants' mortgages on Parcel I.

"Statutory construction is a question of law, which this court reviews de novo." *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998)). "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)), *review denied* (Minn. May 29, 2001). When the district court grants summary judgment

based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto*, 581 N.W.2d at 856.

"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 (2008). There is no dispute in this case that KKE's lien was not recorded until November 2006, some 20 months after appellants' mortgages were recorded, and that, therefore, appellants had no record notice of KKE's lien. It is also undisputed that there had been no actual visible beginning of improvement on the ground for Parcel I. Therefore, for KKE's lien to have attached and have priority over appellants' mortgages, appellants must have had actual notice of KKE's lien prior to recording their mortgages.

The district court held that, before closing, appellants "received documents that referred to KKE and the architectural services furnished by KKE in the improvement of Parcel I," and that appellants "made no inquiry concerning the extent of KKE's mechanic's lien against Parcel I." The district court further concluded that, before closing and the execution of the partial lien waiver by KKE, "there was no communication between KKE and [appellants] concerning the loans made by [appellants] to JADT and the payment, waiver or subordination of KKE's mechanic's lien against Parcel I," but that "[appellants] had actual notice of KKE's prior mechanic's lien against Parcel I" before their mortgages were recorded.

In *Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, our supreme court interpreted the language of the 1987 amendment to Minn. Stat. § 514.05, subd. 1, which added the

language requiring actual notice, and held that the appellants in that case had actual knowledge that the lienholder had performed lienable work and knew, or should have known, that the lienholder had not been paid for such work. 513 N.W.2d 241, 244 (Minn. 1994). The supreme court held that actual knowledge of those facts was actual notice of the possibility that a mechanic's lien would attach. *Id.*

KKE seeks to minimize the importance of the conclusion made by the district court in *Kirkwold*, and subsequently relied upon by the supreme court, that the appellants in that case knew or should have known that the lienholders had not been paid for their work. KKE argues that the supreme court's reference to that finding was not a holding by the supreme court that a subsequent mortgagee must know that a lien claimant has not been paid. We note, however, that despite this argument, KKE also argues that appellants knew "that [KKE] had not been paid," and, alternatively, "[a]ppellants should have known that KKE was not paid in full."

Examining the holding in *Kirkwold*, and the nature of a lien, it is difficult to understand how a party could be held to have had actual notice of a prior lien when that party knew that work had been completed, but not that a debt was owed for the work. In *Kirkwold*, our supreme court made multiple references to the fact found by the district court that the appellants there knew or should have known that the lienholder had not been paid for lienable work completed. *Id.* By its very nature, a lien is "[a] legal right or interest that a creditor has in another's property, lasting [usually] until a debt or duty that it secures is satisfied." *Black's Law Dictionary* 941 (8th ed. 2004). Axiomatically, a lien cannot be held where there is no debt owed. The district court in *Kirkwold* specifically

found that the appellants knew or should have known that a debt was owed because the claimants had not been paid for their work. There is no such conclusion here.

In *M.E. Kraft Excavating and Grading Co. v. Barac Constr. Co.*, our supreme court rejected an argument, similar to that made by KKE here, that the mortgagee of a property should be charged with notice of a lien even though no actual visible improvement had begun on the land, where the mortgagee had actual knowledge that an architect had done preliminary work prior to the recording of the mortgage. 279 Minn. 278, 284-85, 156 N.W.2d 748, 752 (1968) (citing *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 448, 214 N.W. 503, 504 (1927)). Our supreme court specifically noted that even though the mortgagee in *Kraft* had knowledge that the architect had done work, the mortgagee had no knowledge that the architect had not been paid for his services. *Id.* at 281, 156 N.W.2d at 750.

> [W]hile an architect may have a lien for his services against the owner, liens filed subsequent to a mortgage, such as we have here, do not attach from the time the architect commences his work or the services are completed because his work does not constitute an actual and visible beginning of the improvement on the ground.

Id. at 285, 156 N.W.2d at 753 (citing *Erickson v. Ireland*, 134 Minn. 156, 158, 158 N.W. 918, 919 (1916)). Accordingly, the commencement of an architect's services is not sufficient to attach a lien.

> It would be very unjust if the land could be afterwards swallowed up by mechanics' liens for work which had not been commenced on the ground, and *of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or his mortgage*.

Id. at 284, 156 N.W.2d at 752 (emphasis added) (quotation omitted).

The record supports appellants' assertion that the only notice they had of any debt for unpaid work owed to KKE in relation to Parcel I came from the 27 invoices, which were paid in full at the closing. We also agree with appellants that KKE had the opportunity to notify them of any additional outstanding debts when KKE returned the lien waiver. The lien waiver executed by KKE specifically provided KKE space in which to state outstanding debt. KKE failed to notify appellants of any further outstanding debts. KKE's chief financial officer admitted that KKE never directly communicated with appellants regarding the Project, and that KKE never informed the closer or appellants that the 27 invoices did not represent the entire debt owed for KKE's design services.

KKE does not argue that any other notice was provided to appellants. Rather, KKE argues that "[a]ppellants should have known that KKE was not paid in full." But KKE does not explain how appellants should have known KKE was not paid in full. KKE also argues that appellants misconstrue the nature of "actual notice" by disregarding the possibility of "implied actual notice" because implied notice charges a party with notice of everything that could have been learned through sufficient inquiry where the party had sufficient information to put them on guard. KKE cites no Minnesota authority interpreting section 514.05 to permit attachment of a lien based on "implied actual notice", and we reject such an interpretation. Section 514.05, subdivision 1, is unambiguous that actual notice is required, not implied or constructive notice. *See* Minn.

Stat. § 645.16 (2008) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

KKE argues that we should read section 514.05 in pari materia with section 507.34 of the recording act. We disagree.[4] Section 507.34 and section 514.05 do not relate to the same subject matter so as to allow them to be read in pari materia, as the former deals with conveyances and the latter with attachment and notice of liens. KKE cites no authority reading the two in pari materia. Moreover, the result urged by KKE, that section 514.05 be read to include implied notice and the duty to inquire, directly contradicts the express, unambiguous language of section 514.05. *See* Minn. Stat. § 645.16.

On this record, appellants lacked actual notice that any debt for unpaid work was owed to KKE beyond that satisfied at closing. Section 514.05, subdivision 1, does not require a bona fide mortgagee to inquire as to the extent of any lien, but rather requires that the mortgagee must have had actual notice of the lien prior to recording the mortgage for the lien to take priority.

Because we reverse the district court's determination that appellants' mortgages are junior to KKE's lien, we do not reach the other issues raised by the parties regarding the proper scope of KKE's lien.

Reversed.

[4] Section 507.34 states that unrecorded conveyances of real estate are void as against any subsequent purchaser, attachment, or judgment. Minn. Stat. § 507.34 (2008).