STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2129

Big Lake Lumber, Inc.,
Respondent,

vs.

Security Property Investments, Inc., et al.,
Defendants,

21st Century Bank,
Appellant,

Wright Lumber & Millwork, Inc.,
Respondent,

Pearson Plumbing Corp.,
Respondent,

J. DesMarais Construction, Inc.,
Respondent.

Filed September 21, 2010
Reversed and remanded
Hudson, Judge

Sherburne County District Court
File No. 71-CV-07-1131

Karl E. Robinson, Shari A. Jacobus, Hellmuth & Johnson, PLLC, Eden Prairie, Minnesota (for respondent Big Lake Lumber, Inc.)

Steven R. Little, Stephen F. Buterin, Coleman, Hull & Van Vliet, PLLP, Minneapolis, Minnesota (for appellant)

Steven B. Szarke, Szarke Law Office, Buffalo, Minnesota (for respondent Wright Lumber & Millwork, Inc.)

Bridget A. Brine, Duluth, Minnesota (for respondent Pearson Plumbing Corp.)

Tim Sime, Gerald VonKorff, Nicholas R. Delaney, Rinke-Noonan, St. Cloud, Minnesota (for respondent J. DesMarais Construction, Inc.)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

HUDSON, Judge

On appeal from summary judgment, appellant bank argues that the district court erred in ruling that its mortgage is junior to respondents' mechanics' liens because the liens could not, as a matter of law, relate back to certain earlier work provided before the mortgage was recorded. Because a genuine issue of material fact exists as to whether respondents' work was performed as a part of the same continuous improvement as work performed prior to the mortgage being recorded, we reverse and remand.

FACTS

This case involves improvements made to real property located in Sherburne County. Mark Hilde and his wife, through their company, M & L Cabinets and Countertops, Inc. (M & L), obtained a construction loan to purchase the property with the intention of building a personal residence. On July 25, 2005, M & L hired Tony Wruck and Wruck Excavating, Inc. (Wruck) to design a septic system. On August 13 and 14, 2005, Wruck also cleared trees and vegetation from a portion of the lot and hauled away

stumps. Hilde testified that, although he initially intended to build a house on the property, he decided after the clearing work not do so because he and his wife already owned two houses, and they did not want to incur another house payment at the time. He testified that the property subsequently "sat idle for quite awhile."

In early July 2006, Jason Shackelton entered into a purchase agreement with M & L to purchase the property. Shackelton co-owned a company with Michael Glime. At some point during the summer or fall of 2006, Glime introduced Hilde to Chris Schonning as a potential buyer of the land. Schonning wanted to purchase a property for investment purposes. Glime and Schonning agreed that Glime or his company would make M & L's mortgage payments for the acquisition and construction of a house on the property and split the profits with Schonning when the house was sold.

On October 4, 2006, the purchase agreement was modified, Schonning was substituted for Shackelton and, accordingly, Schonning signed the purchase agreement. That day, Schonning also entered into a construction agreement with MLH Construction, Inc. (MLH), another company owned by Hilde, to construct a house on the property. At the closing on October 26, 2006, M & L conveyed the property to Schonning by warranty deed, and the deed was recorded the next day. By quit-claim deed also dated October 26, 2006, Schonning conveyed an undivided one-half interest in the property to Glime's company. The quit-claim deed was recorded on January 24, 2007.

Schonning obtained financing from appellant 21st Century Bank to purchase the property. Schonning executed and delivered a mortgage in favor of appellant in the principal amount of $290,000, secured by the property. The mortgage was recorded on

October 27, 2006. At the closing, Hilde provided appellant with an affidavit in which he stated that "[t]here has been no labor or materials furnished to the Premises for which payment has not been made."

The day after closing, Wruck provided MLH with a new bid for proposed work to be done on the property, including digging backfill and final grading, stump removal, building a driveway approach including hauling, and installing an in-ground septic system. According to Wruck, all of the work described in the bid began after November 7, 2006. By January 2007, Hilde and Schonning's relationship had deteriorated, and MLH was asked to leave the project. Respondent J. DesMarais Construction, Inc. (DesMarais), the framing contractor, took over as general contractor. DesMarais contracted with respondent Pearson Plumbing Corp. (Pearson) to provide labor and materials and also purchased materials from respondent Big Lake Lumber Inc. (Big Lake).

Schonning eventually defaulted on his mortgage, and appellant foreclosed. Respondents and other contractors and subcontractors filed mechanics' liens against the property for labor and materials provided for construction of the Schonning house. It is undisputed that none of the respondents performed any work prior to the recording of appellant's mortgage.

Respondents brought mechanics'-lien foreclosure actions seeking to foreclose their respective liens and sought to postpone the sheriff's sale that was scheduled pursuant to appellant's mortgage foreclosure. Appellant responded that its mortgage was

prior to and superior to all of the mechanics' liens. The parties asked the district court to decide the priority issue on cross-motions for summary judgment.

At summary judgment, appellant argued that its mortgage had priority because none of the mechanics'-lien claimants provided labor or materials until after the mortgage was recorded. The lien claimants argued that their liens related back to the tree removal and excavation work performed by Wruck in August 2005 because that work was the beginning of the same continuous project to which respondents contributed. Appellant countered that, even if the August 2005 work was the beginning of the project, the project was abandoned by the previous property owner, as evidenced by the 14-month work stoppage after Wruck's work in August 2005. The district court stated that "whether the labor or material furnished constituted the actual and visible beginning of the improvement is a question of fact which would normally preclude summary judgment," but determined that the only issue was whether the project was abandoned and decided in favor of the lien claimants. This appeal follows.

D E C I S I O N

"On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005); *see also* Minn. R. Civ. P. 56.03 (stating summary-judgment standard). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "[T]he 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). Here, the parties apparently do not dispute whether any of the events occurred, but dispute whether the events that occurred constitute a single continuous improvement, and if so, whether that single improvement project was abandoned. "When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo." *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 638 (Minn. 2006).

Appellant argues that the district court erred in holding that respondents' mechanics' liens related back to Wruck's initial site clearing as part of a continuous improvement that began prior to the attachment of appellant's mortgage. Appellant argues that the district court misapplied the law and that respondents failed to show that Wruck's excavation work "was directly related to the improvement to which [respondents] contributed."

The mechanics'-lien statute provides that whoever contributes to the improvement of real property by performing labor or furnishing material shall have a lien on the improvement and on the land where the improvement is located. Minn. Stat. § 514.01 (2008). As against a mortgagee who does not have notice, a mechanic's lien attaches and takes effect at the time of the commencement of the improvement to which the mechanic's lien relates. Minn. Stat. § 514.05, subd. 1 (2008). The relevant statute states:

> 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. . . .

Id.

Thus, a mechanic's lien may relate back and attach based on the lienable work of someone other than the lien claimant if the earlier and later work can be considered part of a single continuous improvement to the property. *Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992). Determining when a mechanic's lien attaches under Minn. Stat. § 514.05, subd. 1, involves a two-step analysis: the court must first "identify the improvement to which the labor or material contributed," and then determine "what item of labor or material constituted the actual and visible beginning of that improvement." *Id.* "[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 Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957). Construction work is considered "to be one single improvement if it serves the same general purpose or if all the parts form one single improvement." *Poured Concrete Found., Inc. v. Andron Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Construction projects are considered separate improvements if "little or no relationship exists between the underlying contracts." *Id.* (quotation omitted).

Determining lien priority involves interpretation of the mechanics'-lien statutes, which is a legal issue reviewed de novo. *Id.* "Whether the work done was an

improvement within the contemplation of the governing statute is a mixed question of law and fact." *Suburban Exteriors, Inc. v. Emerald Homes, Inc.*, 508 N.W.2d 811, 812 (Minn. App. 1993). "[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). But, "[w]here the facts are not in dispute, this court need not give deference to the [district] court's decision on matters of law." *E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc.*, 458 N.W.2d 177, 179 (Minn. App. 1990).

Here, the parties primarily dispute whether the work performed by Wruck prior to appellant's mortgage is part of the same continuous improvement as the work performed by respondents after appellant's mortgage. According to our caselaw, this is a factual determination. *See Witcher*, 465 N.W.2d at 406. We acknowledge that summary judgment may still be appropriate when no genuine issue of material fact exists because the record as a whole "could not lead a rational trier of fact to find for the non-moving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). But here, the central issue is whether Wruck's work is part of the same improvement as respondents' work, and the facts do not appear so one-sided that a rational factfinder could not find for the non-moving party.

Construction work is considered a single continuous improvement if it is all done for the same general purpose, or if the contributed parts form one single improvement. *Witcher*, 465 N.W.2d at 407. To determine whether respondents' contributions and Wruck's initial site-clearing work may be considered one continuous improvement, "we

focus on the parties' intent, what the contracts covered, the time lapse between projects, and financing." *Poured Concrete Found., Inc.*, 529 N.W.2d at 510.

Here, at the time that Wruck performed the initial clearing of the lot, M & L owned the property. Hilde testified that he purchased the property through a construction loan and intended to build a house for himself and his wife. He noted that they "already owned a house, actually owned two of them," and that he "didn't want to be tied down with another payment on it, so it sat idle for quite awhile." Later M & L sold the property to Schonning. Originally, Schonning was only going to purchase the lot, but it later "turned into a build." By the time respondents performed their work, the property had already been sold to Schonning, and appellant's mortgage had been recorded. In addition, Wruck performed the initial clearing work under a different contract than the work performed under his October 27, 2006 bid for digging backfill and final grading, stump removal, building a driveway approach, and installing a septic system. Respondents' work was also performed under a different contract than Wruck's initial clearing work.

Furthermore, there was at least a 14-month time lapse between Wruck's work in August 2005 and the beginning of the actual construction of the home. Staking of the property apparently took place in July 2006, and approximately $26 worth of silt fencing was purchased from Big Lake Lumber at that time. It is unclear whether the silt fencing was installed on the site at the time of purchase. Construction work on the home itself did not begin until November 2006, after appellant's mortgage was recorded. And Wruck testified that he did not begin to dig and backfill for the basement of the home

until after November 7, 2006. The property was also re-staked, and silt fencing was put up sometime around November 7, 2006, after the mortgage was recorded. It is unclear whether the fencing put up by Wruck after the mortgage was recorded was the same fencing that was purchased earlier. Finally, we note that Wruck's deposition testimony conflicts with Mark Hilde's affidavit concerning when Wruck performed work on the property—Hilde's affidavit states that work was performed prior to the mortgage and an invoice was submitted, while Wruck stated in his deposition that he prepared a bid after the mortgage was recorded on October 27, 2006, and performed the work on or around November 7, 2006. These close, disputed facts demonstrate that there is a genuine issue of material fact as to whether Wruck's initial clearing work and respondents' work were performed as part of the same improvement.

The district court properly acknowledged that whether respondents' work was part of the same continuous improvement as the work performed by Wruck in 2005 was a factual question that may preclude summary judgment. The district court avoided this crucial issue, however, stating in its summary-judgment order and memorandum that the case was ripe for summary judgment because the parties simply disputed whether the project was abandoned. But it is clear from the summary-judgment briefs and the appellate briefs and arguments that the issue is not that narrow. The parties' real dispute is whether the improvement was continuous in the first place, and if so, whether the improvement was abandoned. Because a genuine issue of material fact exists in this case, summary judgment was inappropriate. Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.