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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-853

Premier Bank,
Respondent,

vs.

Dan-Bar Homes, Ltd., et al.,
Defendants,

A. M. E. Construction Corporation,
Appellant,

J. L. White Co., Inc., et al.,
Defendants.

Filed December 2, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-07-19662

Katherine M. Melander, Stephen F. Buterin, Coleman, Hull & Van Vliet PLLP, Minneapolis, Minnesota; and

James M. Jorisson, Thomas W. Newcome, Leonard, O'Brien, Spencer, Gale & Sayre, Minneapolis, Minnesota (for respondent Premier Bank)

Blake R. Nelson, Karl E. Robinson, Shari A. Jacobus, Hellmuth & Johnson PLLC, Eden Prairie, Minnesota (for appellant A.M.E. Construction Corporation)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant building contractor argues that the district court erred by concluding that its mechanic's lien does not relate back to another contractor's work that predated respondent bank's mortgage. Because the district court's finding that appellant and the other contractor contributed to separate improvements to the real property is reasonably supported by the evidence, we affirm.

FACTS

Defendant Dan-Bar Homes Ltd. was the owner of a parcel of real property located at 4150 Dight Avenue in Minneapolis. Between 2004 and 2006, Dan-Bar purchased three adjacent parcels located at 4136 Dight, 4140 Dight, and 4152 Dight with the intention of building condominiums spanning all four lots.

In 2004, Dan-Bar built the first building, known as phase one, at the corner of Dight and East 42nd Street on the lot known as 4150 Dight. Phase one was "pretty successful" so Dan-Bar proceeded with the second and third phases. Ultimately, Dan-Bar planned for the project to include four phases.

Dan-Bar intended that phase two of the project would span lots 4136, 4140, and 4152. According to Daniel Bartus, owner of Dan-Bar, phase-two construction required the removal of some trees and demolition of a house at 4140 Dight. Dan-Bar hired A-1 Hauling & Excavating to do the work. A-1 removed the house in 2005, and also removed some trees along an alleyway. Bartus described the work A-1 did as "a combination of filling, excavating and demolishing." For this work, A-1 gave Dan-Bar an invoice dated

April 23, 2005. The invoice states that the charges were for "excavating and fill in for house demoed at parcel with address 4140 Dight" and for "complete demolition of house located at 4140 Dight including dumpsters." Referring to this invoice, Bartus testified that it was "all the things that we would do . . . to prep a piece of ground . . . for a new foundation." Dan-Bar paid A-1 $23,000 for this work.

As memorialized in an agreement dated March 20, 2006, respondent Premier Bank lent Dan-Bar $1,800,000 secured by a mortgage on 4136, 4140, and 4152 Dight. The mortgage was filed with the Hennepin County Registrar of Titles and Hennepin County Recorder on March 21, 2006.[1] The loan closing statement reflects the $23,000 payment to A-1 as a charge for "Tree Removal/Demo." It also reflects a $10,000 charge for "Excavating, filling/Demolition," which Bartus described as "kind of a continuation," and stated that "everybody got paid at that point." All A1's work, including demolition, excavation, and tree grubbing, was complete prior to the loan closing.

Appellant A.M.E. Construction Corp. worked on phase two between April 10 and 25, 2007. The parties stipulated that the value of A.M.E.'s work was $30,000, but Dan-Bar did not pay A.M.E. A.M.E. timely served a mechanic's lien on Dan-Bar and complied with all requirements of Minn. Stat. §§ 514.01 – .995 (2008).

On September 18, 2007, Premier filed a complaint in district court seeking foreclosure of its mortgage on the three properties, alleging that Dan-Bar had defaulted on the $1,800,000 loan. Premier also named 22 other potential lienholders as defendants in the suit, including A.M.E. A.M.E. filed an answer, counterclaim and cross-claims,

[1] One of the lots was abstract, and two were Torrens.

alleging that it had a mechanic's-lien interest in the properties, and that its interest was superior to Premier's mortgage. A.M.E. asked the court to determine the priority of the parties' interests in the real property.

After a court trial, the district court found that: A-1 removed trees and demolished the house at 4140 Dight in March 2005; Premier's mortgage on the three properties was filed with the Hennepin County Recorder and Hennepin County Registrar of Titles on March 21, 2006; A.M.E. performed work on the property located at 4136 Dight in April 2007; and "A.M.E.'s mechanic's lien in the original principal amount of $30,000 was timely served and is a valid mechanic's lien against the property." The court also found that A-1's work on 4140 Dight was "a separate and distinct improvement from that of the construction of the condominiums on the Property" such that the work performed by A.M.E. does not relate back to the time of A-1's work. The court therefore determined that Premier's mortgage had priority over A.M.E.'s mechanic's lien. This appeal follows.

D E C I S I O N

A.M.E. argues that the district court erred by concluding that Premier's mortgage, which was recorded and registered March 21, 2006, has priority over A.M.E.'s lien for work commenced on April 10 and completed April 25, 2007. Under Minnesota law, all mechanics' liens for a given improvement attach as against the owner at "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." Minn. Stat. § 514.05, subd. 1

(2008). But as against a mortgagee, the liens do not attach until the "actual and visible beginning of the improvement on the ground," unless the mortgagee has actual or record notice that work began earlier. *Id.*

Determining when a mechanic's lien attaches under this statute involves a two-step analysis: first, the court must "identify the improvement to which the labor or material contributed," and second, the court must determine "what item of labor or material constituted the actual and visible beginning of that improvement." *Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992). Accordingly, we first address whether A.M.E.'s 2007 work and A-1's 2005 work were part of the same, or separate, improvements.

"Construction work is considered a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 407 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). "A project consists of separate improvements if there is little or no interrelationship between the contracts under which the project was performed." *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*, 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957). In making this determination, courts "focus on the parties' intent, what the contracts covered, the time lapse between projects, and financing." *Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995).

A.M.E. argues that this court should decide this issue de novo, citing *Suburban Exteriors, Inc. v. Emerald Homes, Inc.*, 508 N.W.2d 811, 812 (Minn. App. 1993), and *E.H. Renner & Sons v. Sherburne Homes Inc.*, 458 N.W.2d 177, 179 (Minn. App. 1990), for the proposition that where the evidence is undisputed, this court may rule on the application of section 514.05 as a matter of law. But *Suburban Exteriors* and *E.H. Renner* dealt with whether work was the actual and visible beginning of an improvement on the ground, which is a mixed question of fact and law. *See Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 63, 226 N.W.2d 603, 607 (1975). Whether improvements to real property are part of one continuous improvement or are distinct improvements, on the other hand, is purely a question of fact. *Witcher Constr.*, 465 N.W.2d at 406. On appeal, this court will affirm as long as "the evidence reasonably supports the lower court's finding." *Id.*

Here, the district court found that A-1's work and A.M.E.'s work were not part of a continuous improvement. The evidence shows that A-1 removed trees and a house from 4140 Dight and billed Dan-Bar for that work in April 2005, two years before A.M.E. contributed work to the construction of phase two. Though the undisputed testimony was that A-1's work was necessary for the construction of phase two, and that the work "prep[ped the] piece of ground . . . for a new foundation," there was no evidence that A-1's work bore directly on the construction of the building itself. Although the record establishes that A-1 did some excavating, Bartus's testimony, A-1's invoice, and the line-items on the closing statement suggest that the excavation was related to the demolition and fill-in for the house at 4140 Dight, and did not bear directly

on the construction of the phase-two building. We therefore conclude that the district court's finding that A-1 and A.M.E. contributed separate improvements is reasonably supported by the evidence. We therefore need not address whether A-1's work constituted the actual and visible beginning of the improvement.

Affirmed.