STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1217

Northern Sunrooms & Additions, LLC,
Appellant,

vs.

Merrill R. Dorstad, Larry Meyer,
individually, jointly and severally,
and d/b/a Construction Lien Experts, Inc.,
Respondents.

Filed February 1, 2011
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CV-09-11698

Francis J. Rondoni, Jeffrey D. Bores, Gary K. Luloff, Chestnut Cambronne P.A., Minneapolis, Minnesota (for appellant)

Karl J. Yeager, Debra L. Weiss, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

KLAPHAKE, Judge

Appellant Northern Sunrooms and Additions (NSA), a subcontractor, brought this action against respondent Construction Lien Experts, Inc., (CLE), its owner, respondent

Merrill Dorstad, and its independent sales manager, respondent Larry Meyer, after respondent CLE failed to file a lien for appellant. Respondents' motion for summary judgment was granted on the ground that the exculpatory clause in the parties' contract relieved respondents of liability. Because we see no genuine issue of material fact and no error of law in the summary judgment, we affirm.

D E C I S I O N

This court "review[s] a summary judgment de novo," "determin[ing] whether the district court properly applied the law and whether there are genuine issues of fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Group, LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We view the "facts in the light most favorable to the party against whom summary judgment was granted." *J.E.B. v. Danks*, 785 N.W.2d 741, 745 (Minn. 2010) (quotation omitted).

In January 2009, respondent Meyer faxed Joseph Lucas, appellant's owner, a service order and a customer service agreement to be filled out, signed, and returned. The service order stated that it was to be faxed or mailed to respondent CLE's office. The customer service agreement included an exculpatory clause:

> CLE and Customer agree to hold each other, their respective officers, agents and employees harmless from any and all claims, losses, damages or injuries, including special or consequential damages and attorney's fees caused by, resulting from, or related to information contained in the Service Order Form or the preparation and service of prelien notices and/or preparation service and filing of related mechanic's lien statements, except to the extent such loss or damage is caused by the other's bad faith or willful misconduct. In any event, CLE's total liability to the customer in connection with any such service CLE provides

> to customer shall be limited to the cost of such services rendered in connection with that particular service order.

It is undisputed that Joseph Lucas faxed the signed customer service agreement to respondent CLE's office on January 14, 2009, with a credit card payment of $375 that included $50 for "rush" service because the lien had to be filed by January 21, 2009. Whether Lucas also faxed the service order form for the lien to respondent CLE's office at that time is disputed: Lucas testified that he did fax it to the office as well as to respondent Meyer's home, and respondent Dorstad testified that the office first received it on March 23, 2009, the date appellant learned that no lien had been filed.

Appellant brought this action against respondents Dorstad, Meyer, and CLE, who moved for summary judgment on the ground that the exculpatory clause precluded appellant's claims.[1] The district court concluded that "the exculpatory clause unambiguously applies" to respondent CLE's failure to file a lien and granted respondents' motion.

Appellant raises three arguments against the operation of the exculpatory clause, arguing, first, that the clause is ambiguous. "An exculpatory clause is unenforceable if it is ambiguous in scope." *Voyagaire Houseboats, Inc. v. Lao Xiong*, 701 N.W.2d 783, 789 (Minn. 2005). "Exculpatory clauses . . . are strictly construed against the benefited party." *Id.* (quotation omitted). Appellant asserts that "strictly construing the

[1]As an alternative basis for summary judgment, respondents argued that the lien would have been unenforceable because it sought more than was actually owed to CLE. The district court did not address this issue, so we decline to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that appellate court does not generally consider issues not presented to and considered by the district court).

exculpatory clause yields a reasonable construction whereby respondent CLE may be exculpated from negligent actions but not inaction." But inaction, or failing to act when action is required, may itself be negligent: the logical extension of appellant's argument is that respondent CLE would be exculpated for negligently inserting an incorrect term in a lien but not for negligently omitting such a term. The district court correctly concluded that the exculpatory clause "expressly contemplates claims 'related to' preparation, service, and filing [of mechanics' liens] which on any reasonable interpretation includes failure to perform any of those tasks."

Second, appellant argues that the exculpatory clause was unenforceable because of the disparity in the parties' bargaining power. An exculpatory clause is unenforceable if it contravenes public policy. *Id.* Whether it contravenes public policy is determined by asking if there was a disparity in the parties' bargaining power and if the services being provided were essential services. *Id.* But disparity exists only when it can be shown that the parties had "greatly disparate bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere." *Schlobohn v. Spa Petite, Inc.*, 326 N.W.2d 920, 924-25 (Minn. 1982). Here, appellant retained the contract for a week before signing and returning it; thus, there was an opportunity for negotiation. The service of filing a mechanics' lien can be obtained from many sources, and both parties were small businesses. Appellant does not explain what would have caused the disparity it alleges.

Third, appellant argues that "material factual disputes exist as to whether [respondents'] conduct was willful or in bad faith." But, as the district court concluded,

"[t]he evidence relating to the intent behind the failure to serve or file [appellant's] mechanics' lien at best supports a claim of negligence. There is no evidence to support a determination that any [respondent] acted in bad faith or engaged in willful misconduct." Appellant offers nothing to refute this conclusion or to enable a reasonable person to draw a different conclusion. *See DLH, Inc., v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) ("There is no genuine issue of material fact for trial when the nonmoving party presents evidence . . . which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.").

For all of these reasons, we conclude that the district court did not err in granting summary judgment to respondents.

Affirmed.