STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0352

Shaw Acquisition Corporation, d/b/a Shaw/Stewart Lumber Co.,
Respondent,

vs.

Troy Shannon, et al.,
Defendants,

Commercial Mortgage Fund, LLC, et al.,
Appellants,

Atlas Foundation, Inc.,
Respondent,

Remodeling, Inc. d/b/a Concept Landscaping,
Respondent,

Donnelly Brothers Construction Company, Inc.,
Respondent,

Warrick M. Hallett d/b/a Warrick Hallett Carpentry,
Respondent,

Creative Lighting, Inc.,
Respondent.

Filed March 31, 2009
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 27-CV-07-2747

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellants challenge the grants of summary judgment to respondents, arguing that because of work-quality issues, respondents were not entitled to claimed lien amounts, and claimed lien amounts are overstated and thus void. Appellants also argue that the district court erred by awarding unreasonable attorney fees to respondent Shaw. We affirm.

D E C I S I O N

Troy Shannon, the general partner of Suisse Builders, contracted with a number of subcontractors to build a luxury house in Excelsior. Suisse Builders began experiencing financial difficulties and defaulted on payments owed to many subcontractors and creditors. In late 2007, Shaw/Stewart Lumber Co. (Shaw), Creative Lighting, Inc. (Creative), Concept Landscaping (Concept), Warrick Hallett Carpentry (Warrick), Donnelly Brothers Construction Company, Inc. (Donnelly), and Atlas Foundation, Inc. (Atlas) (collectively respondents), sought summary judgment on their respective mechanic's lien claims. Appellants Commercial Mortgage Fund, LLC, Highland Bank, and Bridgewater Bank were the only parties opposing respondents' motions. Because the facts supporting each claim vary, the facts pertinent to each respondent are incorporated below.

I.

As an initial matter, respondents argue that because the property was sold at a sheriff's sale on June 13, 2008, appellants no longer have an interest in the property; thus, this appeal is moot.

The issue of mootness may be raised at any time. *See Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (stating that "mootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence"). The general rule is that when, pending appeal, an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be

dismissed as moot. *In re Inspection of Minn. Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984). The mootness doctrine, therefore, implies a comparison between the relief demanded and the extant circumstances of the case, in order to determine whether there is a *live* controversy that can be resolved. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). "The concept of justiciability forms a threshold for judicial action and requires, in addition to adverse interests and concrete assertion of rights, a controversy that allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). An issue is not moot if a party could be afforded effectual relief. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).

Whether an issue is moot is a question of law, which this court reviews de novo. *Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005).

Mechanic's lien holders are authorized to foreclose their liens to enforce their lien rights. Minn. Stat. § 514.10 (2008). Once the foreclosure sale has occurred and is confirmed by the *court*, the debtor has six months to redeem the property. Minn. Stat. § 514.15 (2008). As such, the debtor's property interest is not extinguished until the six-month statutory redemption period has expired. Once the debtor's six-month redemption period has expired, junior creditors "may redeem within seven days after the expiration of the redemption period . . . in the order of priority of their respective liens . . . ." Minn. Stat. §§ 550.24, 580.24(a) (2008). Thus, depending on their number, junior creditors may

continue to have an interest in the property long after the debtor's six-month redemption period has expired.

Here, the property was sold at a sheriff's sale on June 13, 2008, and confirmed by the district court on July 15. Therefore, the date of expiration of the debtor's property interest is January 15, 2009—six months after confirmation of the sheriff's sale. Moreover, following that date, the property is subject to 12 mortgage liens and 15 mechanic's liens, all of which have a statutory right of redemption. The record establishes that appellants' mortgage liens are junior to respondents' mechanic's liens, but the order of priority of the remaining junior creditor's liens and whether there are any split priority liens remains unclear. As such, it is impossible to determine when, if at all during the pendency of this appeal, appellants will cease having an interest in the property and therefore when the issue may be rendered moot.

II.

Summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. To successfully defeat a motion for summary judgment, the nonmoving party must "extract *specific*, admissible facts from the voluminous record" that show that a genuine issue of material fact exists. *Kletschka v. Abbott-Nw. Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988). A genuine issue of material fact cannot be established based on evidence that merely creates a metaphysical doubt as to a factual issue and

based on evidence that is not sufficiently probative so as to permit reasonable people to draw different conclusions regarding an essential element of a party's case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We will affirm a district court's grant of summary judgment if it can be sustained on any ground. *Horton v. Twp. of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

On review of the district court's grant of summary judgment, we consider whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, the evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 516 (Minn. 2005).

Shaw

In 2006, Shaw provided custom trim for the project. Although notification of any problem was required under the contract, neither Shannon nor Suisse Builders ever complained about the quality or quantity of the trim provided by Shaw. Suisse Builders has not paid Shaw, leaving $78,791[1] due and payable. In granting Shaw's motion for summary judgment, the district court found that (1) appellants waived their overstated-lien claim because they failed to properly plead it as an affirmative defense,[2] (2) Suisse Builders did not timely object to pricing or delivery as required by the contract, and

[1] This is the principal amount of materials provided by Shaw to Suisse Builders; the lien amount also includes interest.

[2] Appellants raise the overstated-lien claim against all respondents. This argument is addressed separately in section III.

(3) the "contention that there was an overcharge was not supported by any competent evidence."

On appeal, appellants first assert that the district court erred by granting summary judgment arguing that, because Shaw delivered $19,000 in extra trim, the amount owed to Shaw is in dispute. Shaw concedes that extra trim was delivered but asserts that the lien amount is unaffected because the extra trim is attributable to either (1) work-order changes made by the trim contractor, Warrick, after Shaw had provided the originally ordered custom trim, which was not restockable, or (2) extra trim Shaw routinely provides without charge to such projects to ensure that the trim contractor has an adequate supply on site. Appellants do not dispute or rebut Shaw's assertions.

Moreover, appellants posit that the "extra" trim has a value of $19,000 without providing a basis. Appellants do not point to evidence establishing what Shaw charged per linear foot; they do not know how much of the "extra" trim was properly allocated to change orders made and properly invoiced; they do not know whether or to what extent Shaw's price per linear foot deviated from the lumber-yard prices they used to calculate the $19,000 overcharge; and they do not know how much "extra" trim was actually installed. Appellants' contention that Shaw's lien claim is overstated by $19,000 lacks the necessary evidentiary support to create a material question of fact as to the value of the mechanic's lien.

Appellants also argue that the district court erroneously found that appellants' failure to timely object to pricing or delivery as required by the contract constituted

waiver. But because we affirm on other grounds, it is not necessary to address this argument.

Creative

Creative provided the lighting fixtures, supplies, and accessories for the project at a price of $7,794. Suisse Builders tendered a partial payment of $3,897 but the check was returned for insufficient funds, leaving the full amount, plus interest and fees, due and payable.

In opposing Creative's motion for summary judgment, appellants argued that summary judgment was inappropriate because, according to Commercial Mortgage Fund's chief operating officer, Kenneth Sorteberg, "[t]he panes, chandelier and sconces provide[d] by Creative were delivered in a broken condition." There is no evidence that Sorteberg was present when the materials were delivered. Thus, the district court ruled that Sorteberg's contention lacked foundation and would not be considered. *See* Minn. R. Civ. P. 56.05 (requiring affidavits opposing summary judgment to be made on personal knowledge "and shall show affirmatively that the affiant is competent to testify to the matters therein"). On appeal, appellants argue that the district court erred by granting summary judgment to Creative because, "in awarding Creative the full amount of its lien, [the district court] made a finding that the material supplied by Creative was in working condition at the time of delivery and that it was destroyed by some other party after delivery."

Appellants' argument is misguided. It is not Creative's burden to prove that the materials were conforming tender when delivered; rather, appellants must support their

contention that they were not. The only evidence supporting this contention is the above-quoted statement attributed to Sorteberg, who was not present at time of delivery. Even viewed in the light most favorable to appellants, this conclusory assertion is insufficient to create a question of material fact.

Concept

Concept provided labor and materials for the installation of an interlock paver driveway at a price of $12,924. Suisse Builders paid Concept $8,000, leaving $4,924, plus interest and fees, due and payable.

In opposing Concept's motion for summary judgment, appellants argued that summary judgment was inappropriate because, after viewing the project, Sorteberg determined that "[t]he pavers [were] cracking and in poor condition and coming apart." In granting Concept's motion, the district court found that (1) appellants' contention that the driveway was defective lacked foundation; and (2) even if the pavers were cracked, it does not mean they were defective when delivered and installed. On appeal, appellants contend that the district court erred by granting summary judgment because appellants raised a fact issue as to whether the contract was performed in a workmanlike manner.

Appellants urge us to identify an issue of material fact based on Sorteberg's asserted opinion that because a few of the pavers were cracked, the work was not performed in a workmanlike manner. Again, appellants' argument is flawed. Sorteberg's submissions do not qualify him as an expert; he is not engaged in the construction industry and has not shown any special skill or knowledge specific to pavers. *See* Minn. R. Evid. 702 (stating that "a witness qualified as an expert by skill,

experience, training, or education may testify thereto in the form of an opinion or otherwise"); *Strauss v. Thorne*, 490 N.W.2d 908, 915 (Minn. App. 1992) (noting that because an affidavit provided "no foundation or basis for evaluating whether the affiant's opinions and interpretations [were] rationally supported" the affidavit was "not admissible and [could not] be considered on summary judgment"), *review denied* (Minn. Dec. 15, 1992). As such, while Sorteberg is competent to testify to the fact that some pavers appeared to be cracked, his opinions regarding causation or that cracking indicates that installation of the driveway was done in an unworkmanlike manner lack foundation. As the district court observed, a number of things subsequent to installation could have caused the pavers to crack.

Warrick

Warrick supplied and installed the trim for the project at a price of $48,200. Suisse Builders wrote Warrick two $10,000 checks, but only one check cleared, leaving $38,200, plus interest and fees, due and payable.

In opposing Warrick's motion for summary judgment, appellants argued that summary judgment was inappropriate because, according to Sorteberg, "[t]he majority of the doors hung in the interior of the house . . . were hung improperly and do not close[, and t]he two doors leading to the sky roof are hung improperly and do not close as they are designed." In granting Warrick's motion, the district court stated that "Sorteberg['s] contentions lack specifics as to [the] number of doors or what apparent defects are preventing the closing. It is conceivable that the defects could be very minor and easily corrected." On appeal, appellants contend that the district court erred by granting

summary judgment to Warrick because, although appellants raised a factual allegation with respect to the quality of work, the district court granted Warrick "the full amount of [its] lien and state[d] only that [it had] not refused to make necessary repairs."

Appellants contend that a question of material fact exists based solely on the statement of Sorteberg, a bank officer with no reported construction expertise, that a number of doors were hung improperly. This argument is also flawed. First, while Sorteberg is a competent witness to the fact that doors do not shut properly, the cause is not so readily apparent and, as found by the district court, the cure may be a minor adjustment. In order to defeat a motion for summary judgment, appellants must do more than make the vague assertion that the doors do not shut properly because Warrick hung them improperly without providing any foundation for the opinion attributing the fault to Warrick. Sorteberg's opinion lacks foundation and there is no other basis in the record to attribute the fault to Warrick.

In addition, while appellants assert that the district court should have determined the reasonable value of the portion of the project Warrick completed, taking into account the "defects," appellants fail to provide details about the nature, quality, frequency, or severity of the alleged defects.

Donnelly

Donnelly completed the stucco work for the project. The original contract price was $9,100, with $6,400 due and payable after the application of the lath and base coat of the stucco. Shannon requested additional stucco work and a second proposal was prepared, quoting a price of $11,790, with $9,000 due and payable after the application of

the lath and base coat of the stucco. Although the second proposal was never signed, it appears that Donnelly proceeded under the assumption that the second proposal was controlling.

During the course of this litigation, Donnelly served two requests for admissions—the first asking that Shannon and Suisse Builders admit that Shannon requested additional stucco work on the home, and the second seeking to have Shannon and Suisse Builders admit that the "reasonable value of the work performed and invoiced . . . under the contract and that you additionally requested is in the principal amount of $9,000.00." Because no response was received, the district court deemed these statements admitted. It is undisputed that Donnelly applied the lath and base coat of the stucco, and that it billed Shannon but did not receive payment.

In opposing Donnelly's motion for summary judgment, appellants argued that summary judgment was inappropriate because "Donnelly was entitled to $9,100.00 for installing and painting of the stucco exterior of the home," but it had not completed the exterior painting. In granting Donnelly's motion, the district court found that, although Shannon's deposition testimony indicated that the finish coat was not applied to the stucco, "[t]he cost of the finish coat is not shown, but is likely a small part of the total contract price," and that because there were no responses to the requests for admissions, the district court deemed it admitted that the reasonable value of the services was $9,000. On appeal, appellants contend that the district court erred by granting summary judgment to Donnelly because the district court "determined [that] the full amount of the lien was due."

Appellants' argument, as well as the district court order, appear to confuse what Donnelly is seeking. By finding that the two requests for admissions were deemed admitted, it appears the district court adopted Donnelly's second proposal. Under this proposal, Donnelly was due $9,000 after the lath and base coat of stucco were applied and another $2,790 after the top coat was applied and the work was completed. Donnelly has not demanded the full payment; Donnelly seeks only the $9,000 due after the lath and base coat were applied, and it is undisputed that the application of the lath and base coat of the stucco was properly completed. As such, the terms of the second proposal dictate that the reasonable value for that work is $9,000, supported by the deemed admission that "[t]he reasonable value of the work performed and invoiced . . . is in the principal amount of $9,000.00."

Atlas

Atlas, through a contract with a third party, installed 36 helical piers in the house for the total price of $45,000. Thereafter, Suisse Builders contracted with Atlas directly for the installation of 12 helical piers in the garage, for which Atlas charged $22,142. Although for these 12 the cost per helical pier is $595 more than was charged for each of the 36 installed in the house, Suisse Builders never objected to the work that was performed or the amount billed. However, Atlas was not paid.

Appellants opposed Atlas's motion for summary judgment supported solely by Sorteberg's assertion that, "[b]ased on the amount Atlas charged for the work provided on the home in relation to the work performed on the garage, its mechanic's lien was severely inflated and should have not exceeded $15,000.00 for the work performed on the

garage." In granting Atlas's motion, the district court noted that Sorteberg's affidavit "does not state that he is an engineer, a contractor, or otherwise has foundation to express an opinion as to what a reasonable charge would be for the garage piers. That affidavit is merely argument, and does not create a genuine issue of material fact." On appeal, appellants contend that the district court erred by granting summary judgment to Atlas because the district court "dismiss[ed] the factual allegation stated by [appellants] and indicat[ed] that the evidence submitted was merely argument."

Similar to appellants' other arguments, appellants urge us to identify a question of material fact simply because Sorteberg, a bank officer with no reported construction expertise, stated that because the price per helical pier increased between the first and second contract, the mechanic's lien was "inflated and should have not exceeded $15,000.00." Appellants have failed to provide any evidence to support this assertion. Moreover, appellants fail to address Shannon's admission that the reason Atlas had not been paid was because Shannon and Suisse were out of money.

III.

Appellants next argue that the district court erred by not considering their claim that respondents' lien claims were overstated and therefore void.

"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." Minn. Stat. § 514.74 (2008). However, this is an affirmative defense that is waived if not raised in the answer. *See* Minn. R. Civ. P. 8.03 (stating that generally a party must set forth all of its affirmative

defenses in its pleadings); *Ulstruck v. Home Ass'n*, 166 Minn. 183, 185, 207 N.W. 324, 325-26, 207 N.W. 324, 325 (1926) (refusing to consider overstatement issue when "[n]o such defense was pleaded and no finding was asked thereon"); *Ruedlinger v. Fisher*, 160 Minn. 324, 325-26, 200 N.W. 299, 300 (1924) (refusing to consider overstatement defense when it was "not presented by the pleadings").

Appellants pleaded five affirmative defenses: (1) failure to state a claim on which relief can be granted; (2) laches and estoppel; (3) failure to mitigate or suffer damages; (4) all damages were caused by acts or omissions of someone other than appellants; and (5) assumption of the risk. Appellants contend that the overstated-lien defense is included in the defense of failure to mitigate and/or the defense that all damages were caused by acts or omissions of someone other than appellants. Although appellants cite two cases to support their position, neither case applies here.

First, in *Johnson v. Washington County*, the appellants cited the pertinent statute but failed to cite the applicable subdivision. 506 N.W.2d 632, 636 n.2 (Minn. App. 1993), *aff'd*, 518 N.W.2d 594 (Minn. 1994). We held that appellant's pleading provided respondent sufficient notice that the immunity defense was at issue. *Id.* Here, however, appellants do not cite, or even mention, the overstated-lien statute.

Similarly, in *Bradley v. First Nat'l Bank of Walker*, the appellant's answer stated: "The claims asserted in the Complaint are barred or reduced by contractual limitations and/or statutory limitations" and are "barred by statute," but the answer did not specifically state a statute-of-limitations defense. 711 N.W.2d 121, 128 (Minn. App. 2006). We held that the "boilerplate pleading provisions" provided adequate notice of a

potential statute-of-limitations defense. *Id.* Here, however, there was no mention of statutory defenses that could somehow alert respondents to an overstated-lien defense.

Both *Johnson* and *Bradley* illustrate that the purpose of the answer is to put the opposing party on notice of all potential claims and affirmative defenses. Here, pleading the defense of failure to mitigate or that all damages were caused by acts or omissions of someone other than appellants does not put respondents on notice of the overstated-lien defense.

IV.

Finally, appellants argue that the $48,923 in "attorney[] fees requested by Shaw are outside the scope of reasonableness" because they are 62 percent of the judgment amount. Shaw counters that as lead plaintiff, because its counsel "spearheaded discovery" and took a "leading role" in the litigation, the requested fees are reasonable.

The prevailing lienor in a mechanic's lien foreclosure action is entitled to "costs and disbursements to be fixed by the court." Minn. Stat. § 514.14 (2008). Accordingly, the district court may, in its discretion, award reasonable attorney fees. *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). In determining whether to award attorney fees, the district court should consider the

> time and effort required, novelty or difficulty of the issues, skill and standing of the attorney, value of the interest involved, results secured at trial, loss of opportunity for other employment, taxed party's ability to pay, customary charges for similar services, and certainty of payment.

Kirkwold Constr. Co. v. M.G.A. Constr., Inc., 498 N.W.2d 465, 470 (Minn. App. 1993), *aff'd*, 513 N.W.2d 241 (Minn. 1994).

We review an award of attorney fees for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). A district court abuses its discretion if it resolves the matter in a manner that is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

Here, the district court found:

> The work performed by [Shaw's] attorney . . . has actually benefited all of the mechanic's lienors. There appears to be general agreement among all of the mechanic's lienors that [Shaw's attorney]'s efforts have benefited all of the lien claimants. The result has eliminated a lot of duplication of effort. All of [Shaw's attorney]'s fees and costs are approved as reasonable, and necessary.

The district court's finding is supported by statements made by counsel for other respondents. For example, at the summary judgment hearing, Creative's counsel stated: "Thank God for [Shaw's attorney]; he is the one who did all of the work for . . . all of us lien claimants. And I don't see anything unreasonable about his fees." Similarly, Warrick's counsel stated: "[Shaw's attorney] has taken on this labor for us, and I'm telling you, if he had not done what he did, probably each of us, or many of us, would have had significantly more fees than we have had." Also, it is apparent to us after reviewing the attorneys' billings filed in support of the motions for recovery of attorney fees that Shaw's attorney performed most of the case preparation and incurred the most substantial expenses for shared discovery and legal research.

Finally, appellants' argument raises concern regarding the attorney-fees award as a percentage of the mechanic's lien judgment. Although the award must bear some "reasonable relation" to the amount recovered, an attorney-fee award is not per se unreasonable simply because the fee amount is "high in comparison to the lien amounts recovered." *Nw. Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 251 (Minn. App. 1990); *see also Kirkwold Constr. Co.*, 498 N.W.2d at 470 (holding that "[w]e reject any argument that the fees are excessive merely because they may exceed the lien amounts[,]" and stating that "[l]imiting fees [to the lien amounts] would discourage small lienholders from pursuing valid claims through the legal system").

In sum, viewing the record before us in the light favoring appellants, the district court did not err by granting summary judgment to each of Shaw, Creative, Concept, Warrick, Donnelly, and Atlas; the district court did not err by ruling that appellants waived the overstated-lien defense; and we do not see that the district court abused its discretion by awarding Shaw attorney fees in the amount requested.

Affirmed.