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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-548**

Scherer Bros. Lumber Co.,
Respondent,

vs.

Metro-Prairie Construction Company, et al.,
Defendants,
Construction Mortgage Investors Co.,
Appellant.

**Filed March 16, 2010
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CV0812335

Anne T. Behrendt, Thomas M. Zappia, Zappia & LeVahn, Ltd., Fridley, Minnesota (for respondent)

Timothy J. Grande, Mychal A. Bruggeman, Mackall, Crounse & Moore, PLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In this challenge to summary judgment in favor of respondent material supplier in a mechanic's-lien-foreclosure action, appellant, mortgagee of the benefited property,

argues that summary judgment was inappropriate because material fact questions exist about the date of respondent's last delivery of materials that determined the timeliness of the lien statement and foreclosure action. Because appellant failed to produce evidence sufficient to raise a genuine issue of material fact about the date of last delivery, we affirm.

FACTS

The relevant facts, viewed in the light most favorable to appellant Construction Mortgage Investors, Co. (CMIC), are as follows. CMIC holds a mortgage on Lot 9, Block 6, Heritage Park Housing Addition located in Minneapolis (the property). The property is owned by Metro-Prairie Construction Company (Metro). Metro's general contractor, Homes By Three Rivers (HBTR), entered into contracts with respondent Scherer Bros. Lumber Co. (Scherer Bros.) for building materials and labor to build a home on the property. HBTR also contracted with Scherer Bros. for materials for approximately ten similar projects on other adjacent and nearby properties.

Scherer Bros.'s major deliveries of materials to the property ended early in 2006, and the home was shown in the spring Parade of Homes, which began on February 11, 2006. But additional materials were provided to the property by Scherer Bros. in March, June, July, August, September, and October 2006, and the garage was not completed until winter 2006.

Scherer Bros. served a copy of its verified mechanic's-lien statement on Metro and recorded the statement on February 15, 2007, stating that the last contribution to the improvement of the property occurred on October 31, 2006. Subsequent invoices and

purchase orders showed that additional materials were billed to the property in January and July 2007.¹ On September 21, 2007, Scherer Bros. filed an amended mechanic's-lien statement, updating the last date of contribution to the improvement of the property to July 11, 2007.

It is not disputed that: (1) cedar lattice, delivered on January 19, 2006, was returned to Scherer Bros. on February 9, 2006; (2) Scherer Bros. delivered white privacy lattice and cedar lattice to the property in July 2006, but the cedar lattice from this delivery was also returned; (3) the invoice and order for materials delivered on July 11, 2007, describe the materials as cedar lattice, treated pine 2x4s, and rough cedar 1x4s; (4) photographs of the property indicate that no cedar lattice was used on the property; and (5) cedar lattice was used on homes on adjacent and nearby properties.

A Scherer Bros. salesperson stated in his affidavit that the job supervisor for HBTR ordered the materials delivered to the property on July 11, 2007. The order and invoice for these materials reference Customer Order No. 05032-P-140, the code assigned by Scherer Bros. to the general purchase order for the property. The last materials shipped by Scherer Bros. on six other similar projects in the area involved decking or lattice materials; delivered between two and six months after completion of the majority of deliveries on two of these properties.

Because HBTR failed to pay for the building materials, Scherer Bros. brought a mechanic's-lien-foreclosure action on May 15, 2008. CMIC was the only party to appear

¹ Scherer generally created invoices on the date materials were delivered or picked up by a customer.

and contest the lien. On cross-motions for summary judgment, the district court concluded that CMIC had failed to raise a genuine issue of material fact regarding the date of last delivery and granted summary judgment to Scherer Bros. This appeal followed.

D E C I S I O N

On review of a district court's grant of summary judgment, we examine the record to determine "(1) whether there are any genuine issues of material fact for trial; and (2) whether the [district] court erred in its application of the law." *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 (Minn. 2007) (quotation omitted). No genuine issues of fact exist where "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). The nonmoving party must present specific facts showing that there is a genuine issue for trial. *Id.* at 70-71. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). "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).

As against a mortgagee, a mechanic's lien attaches with "the actual and visible beginning of the improvement." Minn. Stat. § 514.05, subd. 1 (2008).

The lien ceases at the end of 120 days after . . . furnishing the last . . . material, . . . unless within this period:

(1) a statement of the claim is filed for record with the county recorder . . . and;

(2) a copy of the statement is served personally or by certified mail on the owner or the owner's authorized agent or the person who entered into the contract with the contractor.

Minn. Stat. § 514.08, subd. 1 (2008). The time limits for creation of a mechanic's lien are strictly construed, and failure to record the lien statement within 120 days of the contractor's final contribution invalidates its lien. *David-Thomas Cos. v. Voss*, 517 N.W.2d 341, 343 (Minn. App. 1994). No lien shall be enforced unless the holder asserts the lien, which can be done by bringing a foreclosure action in district court, within one year of the date of the last item of the claim as set forth in the recorded lien statement.

Minn. Stat. § 514.12, subd. 3 (2008).

A contribution of any value to an improvement to real estate may result in a mechanic's lien, but when calculating the deadline for filing a mechanic's-lien statement, nominal or insignificant amounts of labor performed or material furnished for the *sole* purpose of extending the filing deadline are to be disregarded. *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 374 N.W.2d 493, 498 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985). Section 514.08 is liberally construed "in favor of workmen and [suppliers] in determining the last item of improvement." *Id.* For that reason, separate orders or deliveries under the same estimate are generally considered to be "related parts of an entire contract" for purposes of establishing a lien. *Rochester's Suburban Lumber Co. v. Slocumb*, 282 Minn. 124, 129–30, 163 N.W.2d 303, 307 (1968).

CMIC argues that evidence of the return of cedar lattice previously delivered to the property and no apparent use of cedar lattice on the property negates Scherer Bros.’ reliance on its business records of delivery of cedar lattice to establish the date of last contribution to the property. CMIC argues that evidence that cedar lattice was not used on the property, coupled with the claimed delivery date many months after construction of the improvement was complete, raises a genuine issue of material fact about whether the July 11, 2007 delivery actually occurred, or, if delivery occurred, whether Scherer Bros. was justified in believing that the cedar lattice was to be used on the property.²

It is well established that “actual incorporation of the material into the building [on a premises subject to a mechanic’s lien] is not essential to the right of lien.” *Thompson-McDonald Lumber Co. v. Morawetz*, 127 Minn. 277, 279, 149 N.W. 300, 301 (1914). “Material sold and in good faith delivered to the contractor for use in the building entitles the [supplier] to a lien, whether the material be in fact delivered upon the premises or not.” *Id.* at 280, 149 N.W. at 301. After a supplier delivers materials to the contractor, the supplier is not bound to follow the contractor and see to it that the materials are in fact delivered to the construction site. *Koza v. Ryan Dev., Inc.*, 384 N.W.2d 233, 235–36 (Minn. App. 1986) (citing *Thompson-McDonald Lumber Co.*, and reiterating the rule “that no actual improvement is necessary in order to establish a lien for a good faith

² On appeal, CMIC implies what it explicitly argued to the district court: that even if the materials listed were delivered on July 11, 2007, they must have been delivered pursuant to a separate transaction between Scherer Bros. and the owner and cannot serve as a last date of delivery under the original contracts. But CMIC has produced no evidence to support its speculation that there was a separate transaction.

supplier”), *review denied* (Minn. May 29, 1986). Here, CMIC has produced no evidence that the materials were not delivered to the property for use on the property.

When, from the facts and circumstances, a material supplier is justified in the belief that the last material sold is to be used on the same building and premises as prior deliveries, the time for filing a lien statement runs from the date of the last material sold. *Thompson Lumber Co. v. Pettijohn Pure Prods. Co.*, 157 Minn. 404, 406–08, 196 N.W. 567, 568 (1923) (holding that where all the circumstances justified supplier’s belief that additional materials, valued at \$5.97 and ordered 52 days after prior delivery of materials, were intended for the same improvement, a lien statement filed within the statutory period from provision of the additional materials was timely even though the additional materials were actually used for a different improvement).

When materials are furnished and delivered, from time to time, as needed, on one continuous account, in good faith, and in the justifiable belief that they are for the various improvements covered by the account, the district court is justified in rejecting a claim that each improvement involved a separate contract. *Botsford Lumber Co. v. Fuller*, 170 Minn. 130, 133, 212 N.W. 22, 23 (1927). The fact that some of the materials were actually used by the purchaser for other purposes does not destroy the lien. *Id.*

Scherer Bros. produced documentary evidence that the timing of final decking-material delivery to the property was similar to the timing of decking material deliveries for other homes being built in the area by HBTR. In an uncontroverted affidavit, a Scherer Bros. salesperson asserted that his best recollection is that the materials identified in the July 11, 2007 invoice were ordered by the job supervisor for HTBR; the materials

identified were finishing materials that most likely would have been used under the porch decks; and that the delayed delivery of these materials was due to HBTR's decision to complete final grading of the property before installing the finishing materials on the underside of the decks.

The district court held that Scherer Bros. provided the materials in good faith and that there was no evidence that Scherer Bros. had reason to believe that the materials delivered on July 11, 2007 would not be used on the property. CMIC argues that the test is not "good faith" because cases decided after *Thompson-McDonald Lumber Co.* state that a material supplier has to show a "justifiable belief" that the materials would be used for the subject property under all of the facts and circumstances. In *Thompson Lumber Co.*, challengers to a mechanic's-lien foreclosure argued that the claimed last materials delivered (valued at \$5.97) were for a new and independent project and could not be used as a means of prolonging a lien right in the project. 157 Minn. at 405–06, 196 N.W. at 567–68. The supreme court stated:

There is not a circumstance about that last transaction to indicate to [the lienholder] that the additional material was not another extra to go into the work contemplated by the original estimates

. . . .

. . . All the circumstances justified the belief on the part of [the lienholder] that [the materials] were intended for the same improvement as the others. There was nothing to suggest anything else.

Id. at 406–08, 196 N.W. at 568. Similarly, *Botsford Lumber Co.* affirmed the district court's finding that all materials involved were furnished and delivered "as needed, on

one continuous account, in good faith and in the justifiable belief that they were for the improvements planned and not otherwise.” 170 Minn. at 133, 212 N.W. at 23. We conclude that the language of these cases has not established a different standard. And, by stating that Scherer Bros. had no reason to believe that the materials would not be used on the property, the district court was, in effect, stating there no question of fact existed regarding Scherer Bros.’ justified belief, under the totality of circumstances, that the materials would be used on the property. The district court applied the correct standard.

CMIC failed to produce anything beyond speculation that prior returns of cedar lattice and use of white lattice on the property negates Scherer Bros.’ good-faith belief that the materials delivered on July 11, 2007 would be used on the property. CMIC failed to present evidence creating a genuine issue of material fact as to Scherer Bros.’ good faith and justifiable belief that the materials would be used on the property.

CMIC argues that the “good faith” exception for materials delivered but not used on the property only protects a lien from a challenge by an owner or contractor and does not protect a lien challenged by a mortgagee such as CMIC. This argument is without merit. *See Minneapolis Sash & Door Co. v. Hedden*, 131 Minn. 31, 34, 154 N.W. 511, 511–12 (1915) (holding that a mechanic’s lien had priority over a mortgagee’s interest and stating that there is “no ground for distinction between such a mortgagee and an owner”).

To argue that the claimed last date of contribution was “invalid,” CMIC also alludes to the fact that the final deliveries were de minimis. Because there is no evidence

in the record that the materials were delivered solely for the purpose of extending the deadline for filing a lien statement, the fact that the final delivery had minimal value does not affect the validity of the date of delivery. Evidence in the record documents that deliveries of materials that were small in value were common on the project, and the original purchase order for the property included the type of materials delivered. As the district court noted, Scherer Bros. had already preserved its lien by serving and filing a mechanic's lien statement before the July 2007 delivery was made and therefore had no incentive to make a de minimis delivery solely to extend the deadline for filing a lien statement.

Affirmed.