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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1530**

Kraus-Anderson Construction Company,
Respondent,

vs.

Superior Vista LLC, et al.,
Defendants,

Dale E. Brandt, et al.,
Appellants.

**Filed July 6, 2010
Affirmed
Shumaker, Judge**

St. Louis County District Court
File No. 69DU-CV-08-1828

S. Steven Prince, John H. Lassetter, Leonard Street and Deinard, Minneapolis, Minnesota
(for respondent)

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Associated General Contractors of Minnesota)

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

In this mechanic's-lien-foreclosure action, appellants bank, unit owners and project owner challenge judgment in favor of respondent general contractor, asserting that respondent's lien was subordinate to appellants' mortgage because the district court erred in determining that: (1) the subordination agreement among the parties operated as a lien waiver in violation of Minn. Stat. § 337.10, subd. 2 (2008); (2) advances under appellants' mortgage were optional; (3) respondent's lien attached when abatement work began; and (4) respondent's lien met the statutory requirements of Minn. Stat. § 514.01-.10 (2008). We affirm.

FACTS

Appellant Superior Vista, LLC purchased and developed property in Duluth, called Superior Vista Condominiums (the project), that is at the center of this dispute. On April 21, 2005, Superior Vista entered into a \$11.5 million construction contract with respondent, Kraus-Anderson Construction Company, for its services as general contractor for the project. Kraus-Anderson agreed to provide Superior Vista with a short-term loan of \$1.3 million to assist in purchasing the project property. Superior Vista purchased the property on April 29, 2005.

Superior Vista relied on CoPar Finance, Inc. to arrange financing for the rest of the project. CoPar entered into two loan agreements with Superior Vista, one of which involved a \$13 million loan (the construction loan) that was secured by a mortgage and

recorded on October 10, 2005. At the time the construction loan was recorded it was a contingent loan, conditioned on CoPar finding financing from another source.

The entities agreed that once CoPar obtained funding for the construction loan, Kraus-Anderson would be paid from the construction-loan funds. Kraus-Anderson began its work on the property on October 17, 2005, and worked through the fall and winter of 2005-2006 without payment because the construction loan had not yet been funded.

The City of Duluth required that Superior Vista perform asbestos abatement on the existing building on the project property prior to any demolition work. Because Kraus-Anderson typically does not contract abatement services involving contaminated or hazardous materials, Superior Vista contracted directly with Veit Environmental to perform the abatement work. However, Kraus-Anderson gathered competitive bids on the abatement for Superior Vista, scheduled Veit, and followed up on Veit's performance and paperwork. Veit began its asbestos abatement work on the existing buildings located on the project site on September 19, 2005, and completed the work no later than October 12, 2005. Part of Veit's work included removal of a large part of the old building's roof, including roof decking and structural lumber, and piling those materials on site.

CoPar eventually obtained funding from North American Banking Company (NABC) in February 2006, and accordingly assigned the CoPar mortgage to NABC. On March 16, 2006, CoPar, Superior Vista, Kraus-Anderson, and NABC signed a subordination agreement, which stated that Kraus-Anderson agreed "not to enforce or apply any security, or assert or file any mechanics' or materialmans' lien now or hereafter existing or to sue upon or collect or receive payment of, and Superior Vista

agrees not to pay the [c]ontract [c]laim,” until NABC’s claim has been paid in full (the standstill provision of the subordination agreement).

A certificate of substantial completion was signed on March 29, 2007. The certificate was subject to a notice of “incomplete or defective work,” which consisted of punch lists containing an estimated \$232,688.94 of work to be completed before Kraus-Anderson’s performance under the contract would be considered complete. The certificate further indicates that five months were allowed to complete and correct the identified work. Kraus-Anderson submitted its final application for payment on May 21, 2007. The punch-list work was completed on approximately July 12, 2007.

On October 18, 2007, Kraus-Anderson filed a mechanic’s lien statement against the project for \$1,526,449.41, which indicated that the first date of work on the project was October 17, 2005, and the last date of work was July 13, 2007. On May 14, 2008, Kraus-Anderson brought suit against NABC, the owners of the condominiums, and Superior Vista, to determine and foreclose its mechanic’s lien, and for other relief. NABC and the unit owners brought counterclaims against Kraus-Anderson, asking the court to enforce the subordination agreement between Kraus-Anderson, NABC, Superior Vista, and CoPar. NABC sought a declaratory judgment that NABC’s remaining interest in the project was prior and superior to Kraus-Anderson’s interest, or, in the alternative, a judgment dismissing Kraus-Anderson’s complaint and its prayer for enforcement of the mechanic’s lien. NABC also asserted affirmative defenses that Kraus-Anderson did not comply with the requirements of section 514 of the Minnesota Statutes, specifically by failing to file a proper and timely lien statement and by overstating the lien amount.

NABC moved for summary judgment as to the priority of its interest in the unsold units of the project over Kraus-Anderson's mechanic's lien, based on either the subordination agreement or the inability of Kraus-Anderson to relate its mechanic's lien back to asbestos abatement work performed by Veit because the abatement work was preparatory. In response, Kraus-Anderson moved for summary judgment on priority, asking the district court to find the subordination agreement unenforceable to the extent it required Kraus-Anderson to waive its right to a mechanic's lien, that the subordination agreement subordinated only the portion of Kraus-Anderson's claim that was its \$240,000 fee to NABC's interest, that the CoPar mortgage was an optional mortgage, and that Kraus-Anderson could relate its lien back to Veit's abatement work.

The district court determined at summary judgment that (1) the subordination agreement had the effect of a lien waiver and was, therefore, partially void and unenforceable under Minn. Stat. § 337.10, subd. 2; (2) to the extent that the subordination agreement was valid and enforceable, only Kraus-Anderson's contract claim of up to \$240,000, and not its entire mechanic's lien, was subordinated to NABC's interests; (3) as a matter of law, the CoPar mortgage was an optional mortgage and consequently Kraus-Anderson's mechanic's lien was entitled to priority; (4) the asbestos abatement work performed by Veit constituted the actual and visible beginning of improvement of the project; and (5) Kraus-Anderson could relate back its work to the asbestos-abatement done by Veit and attach its lien prior to the recording of the CoPar mortgage of October 10, 2005, because the asbestos abatement constituted the beginning of one continuous improvement that encompassed Kraus-Anderson's work.

A bench trial was then held on February 24-25, 2009, to determine the validity and amount of Kraus-Anderson's mechanic's lien. The district court concluded that (1) the punch-list work performed by Kraus-Anderson's subcontractors was required and served the same general purpose of the project; (2) Kraus-Anderson could rely on the work completed by its subcontractors to establish the last work date for purposes of determining whether Kraus-Anderson satisfied the 120-day filing requirement; (3) Kraus-Anderson's lien statement filing met the 120-day filing requirement; and (4) Kraus-Anderson did not intentionally or deliberately overstate its lien amount. Accordingly, the court ordered judgment in favor of Kraus-Anderson regarding the priority of the mechanic's lien, with \$240,000 of the lien amount subordinated to NABC.

NABC moved for amended findings or in the alternative a new trial. With few exceptions not material to the appeal, the district court denied the motions. This appeal followed.

D E C I S I O N

With a few pertinent exceptions, the facts of this case are largely undisputed. Appellants primarily challenge the district court's legal determinations based upon the facts before it at summary judgment. In reviewing the district court's summary-judgment determinations, we must consider "(1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We "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).

I.

Appellants argue that the standstill provision in the Kraus-Anderson subordination agreement does not function as a waiver of Kraus-Anderson's mechanic's lien rights so as to violate Minn. Stat. § 337.10, subd. 2. We disagree.

“The construction and effect of a contract presents a question of law, unless an ambiguity exists.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). “Unambiguous contract language must be given its plain and ordinary meaning.” *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). A contract must be interpreted in such a way so as to give all its provisions meaning. *Current Tech. Concepts, Inc. v. Irie Enters, Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

The district court found that the language in the standstill provision constituted a lien waiver as a practical matter, making it void and unenforceable. We find that the district court did not err as a matter of law in its reading of the provision, and accordingly conclude that the provision created a de facto mechanic's lien waiver, thus violating Minn. Stat. § 337.10, subd. 2, which states:

Provisions contained in, or executed in connection with, a building and construction contract requiring a contractor, subcontractor, or material supplier to waive the right to a mechanics lien or to a claim against a payment bond before the person has been paid for the labor or materials or both that the person furnished are void and unenforceable. This provision shall not affect the validity of a waiver as to any third party who detrimentally relies upon the waiver.

Because the subordination agreement concerned the financing of the project, it falls under Minn. Stat. § 337.10, subd. 2, as a provision “executed in connection with” the

construction contract between Superior Vista and Kraus-Anderson. The standstill provision did not just subordinate Kraus-Anderson's ability to enforce a mechanic's lien. It also required Kraus-Anderson to refrain from even *filing* any mechanic's lien until NABC's claim had been paid in full. The district court, considering the condition of the real-estate market and the economic conditions at the time, reasoned that the chances that NABC's claim would be paid in full within the statutory time period for filing a mechanic's lien (120 days) were highly unlikely. The standstill provision operated as a de facto lien waiver and was thus invalid. The district court went on to determine that, based on the definition of "contract claim" in the subordination agreement, Kraus-Anderson only subordinated \$240,000 of its contractor fees to NABC's claim, which Kraus-Anderson does not dispute.¹

II.

Appellants argue that even if the subordination agreement was void, the CoPar mortgage, and thus NABC's interest, had priority over Kraus-Anderson's mechanic's lien because advances under the CoPar mortgage were obligatory. We disagree.

¹ The subordination agreement stated that NABC had a security interest in the "contract claim" and the contract claim is subordinate to the "lender's claim." "Contract claim" is defined in the subordination agreement as "All of Superior Vista's now existing or hereafter arising liabilities to Kraus-Anderson under the Contract for payment of a portion of the Contractor's Fee in the amount of \$240,000." "Lender's claim" is defined as "All of Borrower's now existing or hereafter arising indebtedness and liabilities to the Lender, whether direct or indirect, absolute or contingent, joint or several, whether as maker, endorser, guarantor, surety or otherwise, as well as the notes or instruments evidencing the same."

The date of recording with the county recorder or the registrar of titles establishes mortgage priority. Minn. Stat. § 507.34 (2008). A mechanic's lien attaches when the first item of material or labor is furnished for the beginning of the improvement and, unless the lienholder has actual notice of the mortgage, it is preferred over a mortgage not then on record. Minn. Stat. § 514.05, subd. 1. Minn. Stat. § 514.10 permits mechanics' lienholders to bring foreclosure suits. This statutory scheme protects the prior mortgagee. *See Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 112, 156 N.W.2d 247, 251 (1968) (referring to an earlier version of Minn. Stat. § 514).

In addition to statutory law, common law provides that if the language of a loan agreement indicates that an advance under a mortgage is obligatory, then it has priority over a mechanic's lien obtained after the mortgage is given and before such an advance is made. *Home Lumber Co. v. Kopfmann Homes, Inc., et. al.*, 535 N.W.2d 302, 304 (Minn. 1995). If subsequent advances are optional, then a mechanic's lien will have priority over those optional advances. *Id.* “[T]his question is to be answered solely on the basis of the terms of the controlling documents themselves,” and is thus a question of law which we review de novo. *Id.*

Although the loan agreement between Superior Vista and CoPar stated that CoPar “shall make advances against the [n]ote to fund construction of the project in accordance with the [p]lans,” it also contained a provision stating that CoPar's obligation to make advances was conditioned on its ability to obtain the sufficient funds to make the advances. CoPar did not have funding for the loan at the time it entered into the agreement and was thus unable to make any payments or advances for Kraus-Anderson's

work. The loan agreement is worded to protect CoPar from a breach-of-contract claim resulting from its failure to obtain the required funding. Within the loan agreement, CoPar limited its risk so that it did not have to fully commit to making advances at the time it was recorded. Thus, CoPar had the option to refuse to make advances if it did not have the requisite funding. Furthermore, it makes good sense that the priority of CoPar's mortgage, which had no funds behind it when it was recorded, should be determined at the date of its first advance, rather than when it was recorded.

The district court did not err in reading the loan agreement language to mean that CoPar was not obligated to advance funds to Superior Vista, so that such future payments to Superior Vista were optional.

III.

Appellants argue that, as a matter of law, the asbestos abatement did not bear directly on the construction so as to fix the priority of Kraus-Anderson's mechanic's lien. Appellants contend that the district court misapplied the law, and that the correct determination is not whether the contribution is a part of the same overall project, but rather, whether the contribution "bears directly on the construction of the building." *Thompson Plumbing Co., Inc. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992). We disagree.

Determining when a mechanic's lien attaches under Minn. Stat. § 514.05, subd. 1, 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., 486 N.W.2d at 786. Appellants do not dispute the visibility of Veit's work, but rather, argue that Kraus-Anderson may not "tack on" the work done by Veit so as to constitute the beginning of the work for the attachment of Kraus-Anderson's lien.

A mechanic's lien may attach based on the lienable work of someone other than the lien claimant, if the initial work done can be considered a part of a continuous, unitary improvement to the property. *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). "[W]hether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact." *Id.* "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." *Id.* at 407 (citing *Kahle v. McClary*, 255 Minn. 239, 241, 96 N.W.2d 243, 245 (1959)). "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 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). In evaluating projects, this court focuses 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).

Here, the district court properly applied the law. The City of Duluth required that asbestos abatement be done prior to the demolition of the old building to make way for

the construction of the new building. Therefore, the asbestos abatement bore directly on the construction work because it was necessary in order for the construction process to begin. The abatement work was furnished in order to accomplish the general purpose of Kraus-Anderson, which was to construct units on the property. Contrary to appellants' arguments, Kraus-Anderson's refusal to perform the abatement work did not render the abatement work any less integral to the construction work required of Kraus-Anderson. The asbestos-abatement work was part of the work contemplated by the construction contract between Kraus-Anderson and Superior Vista. Furthermore, Kraus-Anderson was instrumental in creating the contract between Veit and Superior Vista: it gathered competitive bids on the abatement for Superior Vista, scheduled Veit, and followed up on Veit's performance and paperwork.

Appellants also argue that the asbestos abatement did not constitute an improvement; in particular, that it did not enhance the capital value of the property. The evidence that was before the district court at summary judgment supports its determination that the asbestos-abatement work constituted an improvement. The district court discussed *Kloster*, in which the supreme court determined that electrical work that involved cutting holes in the ceiling constituted an improvement because "both in fact and in law the work done involved the expenditure of labor, was permanent in nature, initiated the enhancement of capital value, and was an alteration of the building." *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975). The district court found as a matter of law that "the removal of asbestos from an existing building constitutes a permanent betterment of real property that enhances its value,

involves the expenditure of labor and money, and makes the property more useful and valuable.”

NABC admitted that Superior Vista had to demolish the existing structures on the property before construction could proceed, and that hazardous waste abatement was required as a first step of that demolition. Superior Vista’s agent agreed that the old building was worth more with the asbestos removed than it had been worth before the hazardous materials were abated. Labor was certainly expended to produce an alteration to the building, as Veit removed a large part of the old building’s roof, including roof decking and structural lumber. On the day the CoPar mortgage was recorded, the Veit crew was working all day on site, removing the old roof and sawing apart the roof deck. It is also uncontested that the asbestos-abatement work was done for the sole purpose of permitting demolition of the property.

The district court did not err in determining that the asbestos abatement constituted a continuous improvement so as to determine that Kraus-Anderson’s mechanic’s lien attached when the abatement work began.

IV.

Challenging the district court’s determinations after a bench trial, appellants argue that Kraus-Anderson’s lien is void as a matter of law for failing to follow the requirements of Minn. Stat. § 514.01-.10. Specifically, appellants contend that because Kraus-Anderson cannot rely on the last work date of the subcontractors who performed punch-list work and were not named in the lien statement, Kraus-Anderson failed to file

its mechanic's lien within 120 days of the last date of work. Appellants also contend that Kraus-Anderson intentionally overstated its lien amount. We disagree.

A mechanic's lien must be filed within 120 days of its last labor performed, or skill, material or machinery furnished. Minn. Stat. § 514.08, subd. 1 (2008). Lien rights extend to contractors, subcontractors, and the subcontractors (or suppliers) of subcontractors. Minn. Stat. § 514.01 (2008). A general contractor owes a non-delegable duty to the owner of a project, regardless if it performs the work itself, or hires subcontractors to perform the work. *Brasch v. Wesolowsky*, 272 Minn. 112, 117, 138 N.W.2d 619, 623 (1965). Work is part of the same project for purposes of filing a lien when the work serves the same general contractual purpose as the prior work. *Poured Concrete Found., Inc.*, 529 N.W.2d at 510. As previously stated, relevant factors include the intent of the parties, the scope of contract, the lapse of time between projects, and financing. *Id.*

Minnesota courts have held that when contractors perform substantial amounts of punch-list work or finishing work, that work extends the lien filing date for a project. *See, e.g., id.* at 243, 96 N.W.2d at 247 (finding that the installation of a hot-air register in a bedroom, though relatively insignificant and performed long after the installation of furnaces, was furnished to accomplish the general purpose of the contract, rather than for the sole purpose of reviving the right to file a lien); *Poured Concrete Found. Inc.*, 529 N.W.2d at 512 (finding that three days of acid washing performed two years after a project's construction extended the lien filing date because the work was performed upon the owner's request, was a customary process to be performed before the sale of units,

and was not nominal); *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 374 N.W.2d 493, 498 (Minn. App. 1985) (finding that work orders performed by subcontractors extended their lien filing dates when the work needed to be done and was not performed for the sole purpose of extending the lien date), *review denied* (Minn. Nov. 26, 1985).

Appellants argue that the punch-list work was actually “warranty work,” meant to address “uncompleted or unsatisfactorily performed work” and to ensure the owner actually receives the work for which he contracted. However, even if the punch-list work was warranty work, it was still work required under the contract. Also, contrary to appellants’ contentions, the punch-list work “add[ed] value to the project” in the amount of at least \$18,000. The district court made specific findings on the *Kahle* factors, which are supported by the record: the work included siding and painting 75% of the building exterior and additional landscaping, performed at the request of Superior Vista; there was no lapse in work between the other project work and the punch-list work; and approximately 300 hours of work on the project occurred between June 11 and July 8, 2007.

The district court did not err in determining that the day the subcontractors completed the punch-list work constituted the last day labor was performed, and that Kraus-Anderson met the 120-day deadline for filing its mechanic’s lien.

Appellants further contend that Kraus-Anderson deliberately or intentionally overstated their lien amount because they included the \$240,000 subordinated amount and \$90,926 of invoiced charges billed directly to Superior Vista.

A lien is void if the claimant knowingly demands in the statement more than is justly due. Minn. Stat. § 514.74 (2008). “To deprive the [lien] claimant of [the] right to a lien under [the] statute, there must be a showing of fraud, bad faith, or an intentional demand for an amount in excess of that due.” *Delyea v. Turner*, 264 Minn. 169, 175, 118 N.W.2d 436, 440 (1962). The district court’s factual determination as to whether a claimant has intentionally overstated a lien claim will not be overturned unless clearly erroneous. *Cox v. First Nat’l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988).

The district court determined that Kraus-Anderson’s total lien amount was \$1,526,420.30, which was \$29.11 less than the \$1,526,449.41 detailed in Kraus-Anderson’s lien filed October 19, 2007. The district court considered this discrepancy de minimus. No evidence was submitted at trial, nor do appellants now provide any evidence, that the amount of \$1,526,420.30 was not owed to Kraus-Anderson. The district court found that the \$240,000 and \$90,926 that Kraus-Anderson included in its lien amount were monies in fact owed to Kraus-Anderson; appellants do not challenge this determination. The \$240,000 amount subordinated by the subordination agreement merely impacts how much of the lien recovery Kraus-Anderson might have to pay to NABC.

The district court did not abuse its discretion in its factual determination that Kraus-Anderson did not deliberately overstate its lien amount.

Appellants argue that Kraus-Anderson’s lien statement was invalid because it did not include the subcontractors whose last contributions were used to establish the lien.

However, there is no such requirement in the statute, or in the case to which appellants cite. *See* Minn. Stat. § 514.08, subd. 2 (2008) (listing the requirements for a lien statement); *Minn. Wood Specialties v. Mattson*, 274 N.W.2d 116, 119 (Minn. 1978) (analyzing the service requirement for a lien statement under Minn. Stat. § 514.08). The district court did not err in determining that Kraus-Anderson's lien statement was valid, meeting the requirements of Minn. Stat. § 514.08 (2008).

Affirmed.