STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2337

EnComm Midwest, Inc.,
Respondent,

vs.

James M. Larson and Kari L. Larson d/b/a Larson Properties, et al.,
Appellants,

First National Bank of Elk River, et al.,
Defendants.

Filed January 27, 2009
Affirmed in part and reversed and remanded in part
Peterson, Judge

Isanti County District Court
File No. 30-C5-05-000237

James E. Blaney, Blaney & Ledin, Ltd., 990 Inwood Avenue North, Oakdale, MN 55128 (for respondent)

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Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

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

PETERSON, Judge

Appellant property owners (1) challenge the award of damages, costs, and attorney fees to respondent on its mechanic's-lien claim, arguing that the jury's finding that respondent failed to substantially perform the underlying contract precludes respondent's recovery; (2) argue that the evidence does not support the jury's finding that appellants failed to mitigate damages on their breach-of-contract claim; and (3) challenge the denial of their motion for a new trial. On cross-appeal, respondent challenges the denial of its motion for judgment as a matter of law with respect to appellant's breach-of-contract counterclaim, arguing that the district court's finding that respondent had a valid mechanic's lien on appellant's property was essentially a finding of substantial performance. Respondent also challenges the district court's reduction of the attorney fees awarded. We reverse and remand the award of attorney fees for findings on the reasonable rate for respondent's attorney's services, but otherwise affirm the district court's decision.

FACTS

In fall 2002, appellants James and Kari Larson, Larson Properties LLC, and Larson Plumbing (collectively Larson) entered into a contract[1] with respondent EnComm Midwest, Inc. (EnComm) to construct several buildings on Larson's property. Among

[1] The transaction apparently involved separate agreements for each building, which were entered into between respondent and different subsets of appellants at different times. The district court treated the contracts as divisible parts of a single contract, finding that they were "one continuous job[,] as opposed to two jobs." Larson does not challenge this finding on appeal.

these buildings were Building A, a prefabricated warehouse/retail building, and Building C, a 4,000-square-foot office building. The contract price for Building A was $420,000, and the contract price for Building C was $228,860.

On July 21, 2004, EnComm filed a mechanic's lien on Larson's property in the amount of $111,661.93 for its work on Buildings A and C. *See* Minn. Stat. §§ 514.01-.16 (2008) (governing mechanics' liens on real estate). EnComm later brought an action seeking foreclosure of its lien, interest, costs, and attorney fees. EnComm also brought a breach-of-contract claim alleging that Larson failed to pay $4,634 of the agreed-upon price for Building A and $104,255 of the agreed-upon price for Building C. In response, Larson brought a breach-of-contract counterclaim based on numerous defects in the buildings' construction.

The case proceeded to a hybrid bench/jury trial; the district court acted as fact-finder on the mechanic's-lien claim, and a jury acted as fact-finder on the other claims. After both sides rested, EnComm moved for a directed verdict on its mechanic's-lien claim, which the district court granted. EnComm also moved for partial summary judgment on its breach-of-contract claim with respect to Building C. Larson stipulated to the entry of partial summary judgment, and the district court granted EnComm's motion. The remaining breach-of-contract claims were submitted to the jury, which found by special verdict that (1) EnComm failed to substantially perform the contract with respect to Building A, (2) EnComm breached the contract with respect to Building A, (3) EnComm's breach caused Larson $135,000 in damages, and (4) Larson failed to act reasonably to mitigate $50,000 of the damages caused by EnComm's breach.

Following trial, EnComm sought $102,321.05 in attorney fees for 366.25 hours of legal work at $305 per hour. The district found that $200 per hour was the reasonable hourly rate for EnComm's attorney. The district court also reduced the number of hours because EnComm was not entitled to attorney fees for the portion of the case in which it did not prevail and the mechanic's lien was an issue that did not require significant amounts of attorney time to prepare for trial. The district court awarded EnComm attorney fees for 250 hours based on the time spent on the lien claim and defending against Larson's breach-of-contract counterclaim. Consequently, the district court awarded EnComm $50,000 for attorney fees and $6,724.21 for costs and disbursements.

EnComm received a net award of $83,386.14. The district court reached this amount by starting with EnComm's $111,661.93 mechanic's lien, which included its $104,255 breach-of-contract damages, and subtracting Larson's $85,000 breach-of-contract damages ($135,000 in damages - $50,000 for failure to mitigate), for a subtotal of $26,661.93 awarded to EnComm, and then adding the attorney-fees and costs-and-disbursements awards to the result. The district court also denied EnComm's motion for judgment as a matter of law and both parties' new-trial motions. This appeal followed.

D E C I S I O N

I.

Larson argues that the jury's findings that EnComm failed to substantially perform and breached the construction contract precluded an award of damages on EnComm's mechanic's-lien claim.

Mechanics' liens are purely creatures of statute, existing only within the terms of the governing statutes. *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 828 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). The purpose of a mechanic's lien "is to reimburse laborers and material providers who improve real estate and are not paid for their services." *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004). When, as here, the improvement was provided pursuant to an agreed-upon contract price, the amount of the lien is the unpaid portion of that price. *Delyea v. Turner*, 264 Minn. 169, 174, 118 N.W.2d 436, 440 (1962) (construing Minn. Stat. § 514.03).

When the lienor's work is defective, the amount of the lien may be reduced by the diminution in the improvement's value caused by the defects. *Asp v. O'Brien*, 277 N.W.2d 382, 384 (Minn. 1979). But our supreme court has observed that a property owner's right to deductions for defective improvements "is one of recoupment, not counterclaim." *Knutson v. Lasher*, 219 Minn. 594, 599, 18 N.W.2d 688, 692 (1945). The distinction between the two is important because, unlike a counterclaim, recoupment is purely defensive. *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 704 & n.5 (Minn. 1980). Recoupment is a common-law doctrine that allows equitable adjustment of the lienor's recovery in light of the lienor's breach of contract in the transaction from which the lien arises. *Townshend v. Minneapolis Cold-Storage & Freezer Co.*, 46 Minn. 121, 124-25, 48 N.W. 682, 683 (1891). Thus, while a counterclaim can allow the property owner to recover more than the value of the lien, recoupment can only reduce the amount of the lien. *See Household Fin.*, 288 N.W.2d at 704 & n.5 (noting that damages

recovered under a counterclaim are independent of and can exceed plaintiff's claim, but recoupment operates only to reduce plaintiff's damages). Essentially, the amount recouped represents the portion of the unpaid contract price for which the property owner did not receive the full value of the bargained-for improvements due to the lienor's breach. *Cf. Eischen Cabinet*, 683 N.W.2d at 816 (stating that the lien's purpose is to ensure that the lienor is paid for improving the property); *Delyea*, 264 Minn. at 174, 118 N.W.2d at 440 (holding that the amount of the lien is a function of the unpaid portion of the underlying contract to provide those improvements).

Larson's breach-of-contract counterclaim can be construed as an affirmative defense of recoupment based on the diminished value of Buildings A and C caused by defects in their construction. *See Townshend*, 46 Minn. at 124, 48 N.W. at 683 (holding that a matter pleaded as a counterclaim may also constitute a recoupment defense). And although there is no right to a jury trial in a statutory mechanic's-lien action, *Engler Bros. Constr. Co. v. L'Allier*, 280 Minn. 208, 211, 159 N.W.2d 183, 185 (1968), there does not appear to be any rule prohibiting having a jury decide whether EnComm performed the contract insofar as it relates to Larson's implicit common-law recoupment defense, *cf. Banning v. Hall*, 70 Minn. 89, 93, 72 N.W. 817, 818 (1897) (suggesting that district court has discretion to submit case to jury even if there is no right to a have a jury decide it). After all, the jury could have determined that Larson's breach-of-contract damages for the defects in Building A exceeded the unpaid balance of the contract price secured by EnComm's lien, making their claim a true counterclaim.

Larson argues that the jury's findings of breach and substantial nonperformance preclude EnComm from recovering under the mechanic's lien. This argument necessarily fails because the lien covered the unpaid contract price on both Building A and Building C, but only EnComm's performance with respect to Building A was submitted to the jury.[2] The jury's findings that EnComm breached and failed to substantially perform the contract with respect to Building A are irrelevant to whether EnComm performed its contractual obligations with respect to Building C. In fact, Larson stipulated to partial summary judgment resolving the breach-of-contract issue with respect to Building C in EnComm's favor. And most of EnComm's $111,661.93 lien represented the unpaid $104,255 owed for Building C; EnComm alleged that only $4,634 remained unpaid on Building A.

Construing Larson's breach-of-contract counterclaim as an affirmative defense of recoupment, EnComm is entitled to a mechanic's lien in the amount of the unpaid contract price for Building A and Building C. This amount, however, is reduced by the diminution in Building A's value caused by the defects in its construction. Thus, EnComm's lien of $111,661.93 would be reduced by the $85,000 in damages caused by EnComm's breach, resulting in a net award to EnComm of $26,661.93.[3] And although

[2] A lienor who works on two or more buildings pursuant to the same general contract may file a single lien covering both. Minn. Stat. § 514.09 (2008). The lienor may also elect to "apportion the demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each, respectively." *Id.* EnComm filed a single lien encompassing both buildings but separately pleaded the amount owed for each building in its breach-of-contract claim.

[3] If Larson's damages exceeded the value of EnComm's lien, it could not be construed as a recoupment defense. *See Townshend*, 46 Minn. at 123-24, 48 N.W. at 683 (reasoning

the district court apparently reached this correct result by offsetting Larson's counterclaim award against EnComm's mechanic's lien, the end result is the same.

II.

Larson challenges the district court's attorney-fee award to EnComm for its mechanic's-lien claim. A district court has discretion to award reasonable attorney fees to the prevailing party in a mechanic's-lien action. Minn. Stat. § 541.10 (2008); *Lyman Lumber Co. v. Cornerstone Constr., Inc.*, 487 N.W.2d 251, 255 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). We will not reverse an award of attorney fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

"[T]he award must "bear a reasonable relation to the amount of the judgment secured." *Lyman Lumber*, 487 N.W.2d at 255 (quotation omitted). But a district court should be cautious when awarding attorney fees so that property owners are not discouraged from challenging defects in the lienor's workmanship. *Asp*, 277 N.W.2d at 385. To determine an appropriate amount, the district court should consider (1) the time and effort required, (2) the novelty or difficulty of the issues, (3) the attorney's skill and standing, (4) the value of the interests involved, (5) the results secured at trial, (6) the loss of opportunity for other employment, (7) the losing party's ability to pay, (8) the

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that a counterclaim can be construed as a recoupment because recoupment is a lesser remedy, whereas the reverse is not true). But because we affirm the jury's verdict with respect to mitigation, we need not address the difficult questions about interactions between a mechanic's lien and a true breach-of-contract counterclaim.

customary charges for similar services, and (9) the certainty of payment. *Lyman Lumber*, 487 N.W.2d at 255.

The district court awarded EnComm $50,000 in attorney fees. Larson argues that this amount should be substantially reduced because the jury's findings on EnComm's breach of contract with respect to Building A "lends strong support [to the proposition] that [Larson] meritoriously and successfully challenged the defective workmanship." But although Larson would be entitled to recoupment for EnComm's defective workmanship with respect to Building A, nearly all of EnComm's lien was based on the unpaid contract price for Building C. Thus, Larson's challenge represented only a small part of the workmanship covered by EnComm's lien.

Larson's argument that the attorney-fee award should be reduced because the jury verdict on Larson's breach-of-contract counterclaim exceeded the amount of the lien also fails. Not only does the argument's premise ignore the jury's finding that $50,000 of the $135,000 in damages were attributable to Larson's failure to mitigate damages, the argument is an incorrect statement of law. A district court may award attorney fees greater or less than the amount of the lien. *See Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 498 N.W.2d 465, 470 (Minn. App. 1993) (rejecting argument that fees are excessive merely because they may exceed lien amounts), *aff'd*, 513 N.W.2d 241 (Minn. 1994).

Larson also takes issue with the fact that the district court did not analyze "the actual time spent on perfecting the mechanic's lien" but instead noted "that the bulk of [EnComm's] attorney time was defending the counterclaim." But to the extent that

Larson's counterclaim was effectively a recoupment defense to the lien claim, EnComm was actively litigating the amount it could recover on its lien claim.

Finally, EnComm argues that the district court abused its discretion by reducing the claimed hourly rate from $305 to $200. This argument has merit. Although the district court reviewed the billable-hours evidence submitted by EnComm in depth to arrive at its conclusion that 250 hours was reasonable, it found that EnComm's attorney charges $305 per hour but then, without explanation, found that $200 is the reasonable hourly rate. Consequently, we cannot determine whether the district court considered relevant factors that directly affect the reasonableness of the claimed rate, such as the novelty or difficulty of the issues for which fees were awarded, EnComm's attorney's skill and standing, EnComm's attorney's loss of opportunity for other employment by litigating the case, and the customary charges for similar litigation. *See id.* (listing factors that should be considered). We therefore reverse and remand for the district court to redetermine the reasonable rate. *See Richard Knutson, Inc. v. Westchester, Inc.*, 374 N.W.2d 485, 490 (Minn. App. 1985) (reversing and remanding award of mechanic's-lien attorney fees for proper consideration of applicable factors).

III.

Larson challenges the jury's special-verdict finding that Larson failed to mitigate $50,000 of the damages caused by EnComm's breach of contract with respect to Building A. We will not set aside a jury verdict on damages "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted).

The measure of damages for a breach of contract is generally the amount required to place the nonbreaching party in the same position as if the contract had been performed. *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. App. 1988). But it is also well-settled that the nonbreaching party is required to act with reasonable diligence to mitigate damages from the breach. *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. App. 1990). How these principles apply depends on the contract's intended purpose. *See* Restatement (Second) of Contracts § 347 cmt. b (1981) (explaining that measuring the expected value of performance generally depends on the particular circumstances of the nonbreaching party's enterprise).

The primary purpose of constructing these buildings was to house Larson Plumbing. Larson's primary theory of damages appears to have been that the defects in construction diminished the buildings' value, especially the insulation EnComm installed in Building A, which Larson argued adversely impacted the building's energy efficiency. EnComm, however, essentially argued that after identifying the problem with the insulation, Larson failed to mitigate the defect before the building was completed, when the cost to remedy the problem would have been only $35,000.

Although we cannot discern from the record why the jury selected $50,000 as the amount by which Larson failed to mitigate damages, damages do not need to be proved with mathematical certainty, *Imdieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 125 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985), and assessing them "is the peculiar province of the jury," *Schindele v. Ulrich*, 268 N.W.2d 547, 552 (Minn. 1978). The jury could reasonably have concluded that Larson reasonably should have directed EnComm

to fix the insulation problem before the building was completed. And it could reasonably have found that Larson failed to mitigate $50,000 of the damages by not doing so.

IV.

Larson challenges the district court's denial of its motion for a new trial. Whether to grant a new trial is a matter within the district court's discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). We will not disturb the district court's decision absent a clear abuse of that discretion. *Id.*

Larson has not identified any error that the district court made in denying its new-trial motion. Rather, Larson merely requests remand for a new trial on the issue of damages in the event that we decline to reverse on the mitigation issue. On appeal, however, error is never presumed. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997). And it is the appellant's burden to affirmatively demonstrate error before we will reverse. *Id.* Larson has failed to meet this burden.

V.

EnComm challenges the district court's denial of its motion for judgment as a matter of law (JMOL) on the breach-of-contract claims with respect to Building A. "JMOL is appropriate when a jury verdict has no reasonable support in fact or is contrary to law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007); *see also* Minn. R. Civ. P. 50.01(a) (standard for granting JMOL). We review a district court's decision on a JMOL motion de novo. *Longbehn*, 727 N.W.2d at 159.

EnComm argues that the district court's determination that it was entitled to the full amount of the mechanic's lien "was a determination that $111,661.93 was the

'reasonable value' of the work EnComm performed and that there should be no setoff." EnComm's argument against Larson's recoupment is simply the flipside of Larson's argument against EnComm's recovery and fails for the same reason.

As we discussed in section I, reducing a mechanic's-lien award based on defective improvements is a matter of recoupment, not counterclaim. *Knutson*, 219 Minn. at 599, 18 N.W.2d at 692. Also, the supreme court has stated: "Set-off and counterclaim are usually used interchangeably. But recoupment is something essentially different. . . ." *Imperial Elevator Co. v. Hartford Accident & Indem. Co.*, 163 Minn. 481, 484, 204 N.W. 531, 532 (1925) (quotation omitted). If the district court could submit the breach-of-contract issue underlying Larson's counterclaim/recoupment defense to the jury, there is no reason it could not determine the amount of the lien before reducing EnComm's recovery based on the jury's findings.

Furthermore, the breach underlying Larson's recoupment covered only a fraction of EnComm's lien. And although recoupment is limited to breaches of contract in the same transaction underlying the plaintiff's claim, it is not limited to the particular aspect of the transaction on which the plaintiff's claim is based. *Cf. Ingle v. Angell*, 111 Minn. 63, 64-65, 126 N.W. 400, 400 (1910) (allowing recoupment based on nonintersecting subsets of the same transaction as plaintiff's claim). Rather, recoupment is available "as long as the two claims arise from the same transaction and can be adjusted in the same proceeding." *Norwest Bank Minn., N.A. v. Midwestern Machinery Co.*, 481 N.W.2d 875, 879 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. May 15, 1992). Thus, even though the bulk of EnComm's lien represents Larson's failure to pay the contract

price for Building C, Larson can recoup a significant percentage of that amount based on EnComm's performance of the construction contract with respect to Building A because both arise from the same underlying transaction.

Affirmed in part and reversed and remanded in part.