

CASE NO. A07-0377

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**State of Minnesota**  
**In Court of Appeals**

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SUPERIOR CONSTRUCTION SERVICES, INC.,

*Appellant,*

VS.

LATORIA BELTON, LaTONYA T. HARRIS, TOWN & COUNTRY  
CREDIT CORPORATION, JOHN DOE, MARY ROE  
AND ABC CORPORATION,

*Respondents.*

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**RESPONDENT TOWN & COUNTRY CREDIT  
CORPORATION'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**LEGAL ISSUE**

**I. DID THE DISTRICT COURT CORRECTLY RULE THAT TOWN & COUNTRY'S MORTGAGE LIEN HAS PRIORITY OVER ANY LIEN OF SUPERIOR CONSTRUCTION?**

Trial court held: The trial court correctly ruled that Town & Country's mortgage lien has priority over any lien of Superior Construction.

Langford Tool v. Phenix Bio Composites, LLC, 668 N.W.2d 438 (Minn. App. 2003)

**A. DID SUPERIOR CONSTRUCTION ABANDON THE PROJECT IT HAD BEGUN ON THE SUBJECT PROPERTY?**

**B. DID SUPERIOR CONSTRUCTION PRESENT ANY ADMISSIBLE EVIDENCE ESTABLISHING MATERIAL FACT ISSUES CONCERNING WHETHER IT ABANDONED THE PROJECT IT HAD BEGUN ON THE SUBJECT PROPERTY?**

**II. DID THE DISTRICT COURT CORRECTLY EXCLUDE FROM CONSIDERATION THE UNTIMELY AFFIDAVITS SUBMITTED BY SUPERIOR CONSTRUCTION?**

Trial court held: The trial court correctly excluded from consideration the untimely affidavits submitted by Superior Construction.

Minnesota General Rules of Practice 115.03

**III. DID SUPERIOR CONSTRUCTION WAIVE ANY RIGHT TO CONTEST THE PRIORITY OF TOWN & COUNTRY'S MORTGAGE LIEN OVER ANY CLAIMED LIEN OF SUPERIOR CONSTRUCTION?**

Trial court held: The trial court held that the issue of waiver was moot because of the ruling in favor of Town & Country that its mortgage lien had priority over any lien of Superior Construction.

Meagher v. Kavli, 251 Minn. 477, 88 N.W.2d 871 (1958)

## STATEMENT OF THE CASE

The Appellant Superior Construction Services, Inc. (hereinafter "Superior Construction") commenced its mechanic's lien action in September, 2005, in Hennepin County District Court, the Honorable Tony N. Leung presiding. (Appellant's Appendix 1, hereinafter "A") Superior Construction later scheduled a default motion against Latoria Belton, LaTonya Harris, and Town & Country Credit Corporation (hereinafter "Town & Country"). (Respondent's Appendix 1, hereinafter "R") Town & Country owned a mortgage lien against the subject property which was recorded on January 28, 2005. (para. 4 of Aff. of Kelly Moeller, R.48 and mortgage, R.49-52) The hearing for the scheduled default motions was to take place on December 8, 2005. (R.1) The motion for default judgment was to be based on both a mechanic's lien and a claim of a "constitutional lien". (R.10-14)

On November 28, 2005, the attorney for Town & Country had a telephone conversation with the attorney for Superior Construction. At that time, the attorney for the Plaintiff agreed to withdraw the motion for default judgment against the Defendant Town & Country. (para. 3, Dec. 5, 2005, Aff. Gary Bodelson, R.15-16 and Dec. 5, 2005, Memorandum of Law, R.10-14) However, the attorney for Superior Construction indicated that he still intended to have a default judgment entered against the owners of the property, Latoria Belton and LaTonya Harris. The claim for default judgment was to be based on what the attorney for Superior Construction alleged to be a "constitutional lien", which could potentially have been ruled to have priority over Town & Country's mortgage. (para. 3, Dec. 5, Aff. Gary Bodelson, R.15-16 and Dec. 5, 2005, Memorandum of

Law, R.10-14) On November 29, 2005, the attorney for Town & Country served and filed its Answer and Counterclaim. (R.3) On December 5, 2005, the attorney for Town & Country served and filed Town & Country's Memorandum of Law and Affidavit of Gary Bodelson in opposition to Superior Construction's motion for default judgment. (R.8-17) Only then did the attorney for Superior Construction cancel its motion for default judgment based on a claim of a "constitutional lien".<sup>1</sup>

On December 23, 2005, less than a month after Town & Country's attorney had become involved in the case, Superior Construction filed a motion for summary judgment against Town & Country. (A.65) The hearing was unilaterally scheduled by Superior Construction to be heard on January 23, 2006. (A.65-66)<sup>2</sup> On January 12, 2006, Town & Country served and filed its cross-motion for summary judgment against Superior Construction. (R.21-22; see also Town & Country's Memorandum of Law in Support of Summary Judgment Motion which is part of court record) On January 23, 2006, there was a hearing on the cross-motions for summary judgment. At the hearing, Superior Construction was allowed to obtain a default judgment against Town & Country which

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<sup>1</sup> Contrary to the unsubstantiated assertion of Superior Construction, the attorney for Town & Country had a telephone discussion with the attorney for Superior Construction ten days before the scheduled default judgment hearing on December 8, 2005 (para. 3, R.15-16) Also, contrary to the unsubstantiated assertion of Superior Construction, the attorney for Town & Country did not request a postponement of the December 8, 2005, hearing in order to serve an Answer. Town & Country's Answer was served nine days prior to December 8, 2005. (para. 4, R.16) Superior Construction did not cancel the December 8, 2005, hearing it had scheduled until after Town & Country had served and filed its Memorandum of Law on December 5, 2005. (R.8-14) Those documents clearly established that Superior Construction had no basis for obtaining a default judgment against the property owners for a lien against the property which could be used as a separate claim for priority against Town & Country apart from the mechanic's lien claim. (R.8-14)

<sup>2</sup> Contrary to the assertion of Superior Construction, the default hearing which had been scheduled for December 8, 2005, was not "reset". The new motion against Town & Country scheduled by Superior Construction to be heard on January 23, 2006, was based on a claim for summary judgment, not a default judgment (A.65-66) Furthermore, the rescheduled motion for a default judgment against Belton and Harris was limited to a judgment that would constitute a judgment lien against the subject property as of the time of the entry of judgment. (A.15-19) Therefore, unlike the Footnote continued on next page

established the basis for a judgment lien against the subject property which arose from the time of the entry of the judgment against Belton and Harris. (A.15-19)

Also at the January 23, 2006, hearing, Superior Construction's attorney requested additional time in which to submit additional evidence in response to Town & Country's motion. (See letter from Town & Country's attorney to the District Court dated August 3, 2006, R.58) The District Court graciously allowed Superior Construction to submit additional evidence in response to Town & Country's summary judgment motion.

After more than six months had passed without the submission of any additional evidence from Superior Construction, Town & Country submitted a letter dated August 3, 2006, to the court requesting that a decision be made on the cross-motions for summary judgment based on the evidence that was of record at that time. (R.58) Based on an apparent request by Superior Construction, a second hearing was scheduled on the previously served cross-motions for summary judgment. The hearing was scheduled for September 28, 2006. At the hearing, Superior Construction served three additional affidavits on the attorney for Town & Country. Two of the affidavits were dated September 20 and September 21, 2006, respectively. (A.144 and 148) The third affidavit was from Superior Construction's attorney concerning an attempted deposition of Latoria Belton on April 19, 2006. (A.120) There are no facts in the record indicating any excusable basis for submission of affidavits on the day of a rescheduled hearing that took place more than eight months after the original hearing on the cross-motions for

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requested judgment relating to the cancelled December 8, 2005, hearing, the default judgment following the January 23, 2006, hearing could not be used as a basis for claiming priority against Town & Country.

summary judgment. The District Court did not allow consideration of the untimely submitted affidavits. (Fn. 1, Order for Summary Judgment, R.61-62)

On December 20, 2006, the District Court issued its Order entering summary judgment in favor of Town & Country, establishing that Town & Country's mortgage lien had priority over any lien of Superior Construction. (R.59-68) On February 16, 2007, Superior Construction filed a Notice of Appeal. The Notice of Appeal inexplicably referenced an alleged judgment "Ordering the dismissal of Plaintiffs claim of negligence against Defendant Washington Mutual". (A.149) Also, instead of obtaining a certified copy of the actual judgment that was ultimately entered in this case, Superior Construction only filed with the Court of Appeals the Order on Cross-Motions for Summary Judgment.

Superior Construction alleged in its Statement of the Case filed with the Court of Appeals, that a "transcript was necessary to review the issues on appeal". On or about February 21, 2007, the Court of Appeals notified the Appellant that the transcript must be ordered within ten days and a transcript certificate must be filed within ten days thereafter. On or about March 23, 2007, the Court of Appeals ordered Superior Construction to comply with its obligations concerning the transcript, or face sanctions for not doing so. Superior Construction failed to respond to either of the court's notices concerning the transcript. Following Superior Construction's failure to comply with its obligations concerning the transcript, or otherwise communicate with the court concerning the status of the transcript, the Court of Appeals dismissed Superior Construction's appeal by an Order dated April 11, 2007. (R.69) Superior Construction

thereafter made a motion to reinstate the appeal. On May 15, 2007, the Court of Appeals issued its Order allowing the reinstatement of Superior Construction's appeal of the case. (R.71) The Order sanctioned Superior Construction by refusing to allow oral argument and by refusing to accept any filings from Superior Construction without a proper Affidavit of Service. (R.71-75)

### **STATEMENT OF FACTS**

At the end of May, 2002, the Respondent Latoria Belton retained Superior Construction to repair damage that had been caused by a fire on property located at 6108 - 73<sup>rd</sup> Avenue North, Brooklyn Park, Minnesota, Hennepin County, legally described as follows:

Lot 25, Block 1, Forest View.

Superior Construction stopped working on the house in January, 2003. (R.61) Other than a 12/27/03 invoice of a sub-contractor for delivery of some material at some unknown time prior to 12/27/03, it is undisputed that no labor or materials was provided between January, 2003, and March 11, 2005. (R.61-62) Ms. Belton tried to make several telephone calls to Superior Construction in 2003 to inquire whether Superior Construction was going to continue working on the fire damage repair that had not been completed. (para. 11, Aff. Latoria Belton, R.56) Superior Construction did not respond. (para. 11, R.56) Ms. Belton concluded that the project had been abandoned by Superior Construction. (para. 11, R.56 ) It was not until the end of February, 2005, that Superior Construction again communicated with Ms. Belton concerning recommencement of work

for the fire damage repair on the subject property. (para. 11-12, R.56-57) Superior Construction commenced additional work on the subject property on March 11, 2005. (R.62) On January 28, 2005, a mortgage executed by Ms. Belton and the Respondent Ms. Latonya Harris in favor of Town & Country was registered as a memorial on the Certificate of Title with the Hennepin County Register of Titles office as Document No. 4071232. (para. 4, Aff. Kelly Moeller, R.48) The mortgage secured on December 4, 2004, mortgage loan in the original amount of \$263,500.00. (para. 4, R.48) Prior to granting the mortgage loan to Ms. Belton and Ms. Harris, Town & Country did not have any knowledge of any work that may have been done by Superior Construction. (para. 3, R.47-48) Town & Country also had no prior knowledge of any claims against the property that Superior Construction has made in this case. (para. 3, R.47-48) It is undisputed that Superior Construction did not register a Mechanic's Lien statement as a memorial on the Certificate of Title with the Register of Titles office until June 22, 2005. (R.62 ) On or about December 12, 2005, the attorney for Superior Construction sent a letter to the agent for Town & Country. In that letter, the attorney for Superior Construction stated, "Your company is being served as a formality. We will stipulate to the priority of your company's mortgage." (para. 5, R.48 and R. 53-54)

### **STANDARD OF REVIEW**

On an appeal relating to issues decided on summary judgment, a reviewing court asks (1) whether there are any genuine issues of material fact and (2) whether the lower

court erred in its application of law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

Summary judgment is appropriate where no genuine issues of material fact exist and judgment is proper as a matter of law. Basich v. Board of Pensions, Evangelical Lutheran Church of America, 540 N.W.2d 82, 85 (Minn. App. 1995). “In order to successfully oppose a summary judgment motion, a party cannot rely upon mere denials or general assertions, but must demonstrate that specific facts exist which create a genuine issue for trial.” Johnson v. Van Blaricom, 480 N.W.2d 138, 140 (Minn. App. 1992). “A party opposing a motion for summary judgment cannot rely upon naked allegations of his pleadings but must present specific facts showing genuine issues for trial.” Marose v. Hennameyer, 347 N.W.2d 509, 511 (Minn. App. 1984). There is no genuine issue of material fact if, “...the non-moving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the non-moving party’s case to permit reasonable persons to draw different conclusions.” DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. App. 1999).

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY RULED THAT TOWN & COUNTRY’S MORTGAGE LIEN HAS PRIORITY OVER ANY LIEN OF SUPERIOR CONSTRUCTION.**

Contrary to the assertion of Superior Construction, the District Court correctly applied the law established in Langford Tool v. Phenix Bio Composites, LLC, 668

N.W.2d 438 (Minn. App. 2003), in regard to the summary judgment issued in favor of Town & Country. Clearly, the two year abandonment of the repair project begun by Superior Construction on the subject property constituted a basis under Langford to rule that Superior Construction's claimed mechanic's lien would not relate back to the time of the pre-abandonment work. Therefore Town & Country's mortgage has priority because it was recorded before any post-abandonment work was commenced by Superior Construction.

The District Court also correctly determined that no material fact issues existed in regard to whether an abandonment of the repair project took place. Although the District Court also correctly refused to allow untimely affidavits submitted by Superior Construction to be considered, the court made it clear that the content of the affidavits would not have created fact issues altering the decision of the case. Superior Construction based its factual argument on what it claimed were "reasonable inferences" that should have been made in regard to the facts that were presented. Superior Construction also claimed the District Court disregarded "material facts". However, Superior Construction's arguments about "inferences" are based on self-serving conclusions which are not reasonable. Also, no material facts were presented by Superior Construction which created any actual material fact issue in this case. The District Court decision in favor of Town & Country in this case should be affirmed.

**A. SUPERIOR CONSTRUCTION ABANDONED THE PROJECT IT HAD BEGUN ON THE SUBJECT PROPERTY.**

It is undisputed in this case that there was no work done on the project in question from January, 2003, until March, 2005, a period of over **2 years**.<sup>3</sup> (R.61-62) In Superior

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<sup>3</sup> An invoice from one subcontractor for one minor item of material was dated 12-29-03. However, Superior Construction admitted through its president that it did not know when the item of material referenced in the invoice was provided. (P. 51, l. 8-13, Depo. Randall Hedden, attached as part of Ex. 2, Aff Gary Bodelson, R.32) Due to the lack of knowledge concerning when the alleged item was provided, the invoice record does not constitute evidence of labor or materials provided between January, 2003, and March, 2005. (See Rule 56 05 M.R.C.P. Footnote continued on next page

Construction's appellate brief, there is no denial of the cessation of work for over two years. However, Superior Construction criticized the District Court for relying "primarily" on the fact that there was an extremely long period of time during which no work was performed. Superior Construction's criticism of the District Court totally ignored that the court in Langford Tool v. Phenix Bio Composites, LLC, specifically ruled that a cessation of work can be the basis for concluding that an abandonment took place. 668 N.W.2d at 444. Superior Construction insists that a subjective intent of abandonment be established. However, the court in Langford made no such ruling. The court in Langford merely found that even under an intent to abandon standard, such intent "can be inferred from the physical actions". Thus, under both rules, the actual termination of work can trigger an abandonment. 668 N.W.2d at 444. In this case, the abandonment of work was twice as long as the abandonment in the Langford case. Clearly, the two year cessation of work in this case would objectively establish Superior Construction's intent to abandon, even if an intent to abandon was necessary.

Superior Construction also ignores that there are other facts to support the District Court's ruling in addition to the extremely long two year absence of work. It is undisputed that for **at least** 22 months (January 2003-November 2004) there was not even an attempt by Superior Construction to contact Latoria Belton to recommence

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requiring that facts submitted in a summary judgment motion be based on personal knowledge and be otherwise admissible as evidence.) Also, even if the 12-29-03 invoice was admissible to establish that one item was provided on December 29, 2003, the cessation of labor and materials for 11 months, followed by another cessation of labor and materials immediately thereafter for an additional 14 1/2 months, is just as conclusive in establishing abandonment as one continuous 25-26 month period.

work.<sup>4</sup> Also, Latoria Belton testified that she tried to contact Superior Construction by telephone on several occasions in 2003, but received no response. (para. 11, R.56) Also, Latoria Belton testified that she began again living on the premises in January, 2003. (para. 8, R.56) Also, there was no evidence presented by Superior Construction indicating that any materials or tools were left on the site. To the contrary, Latoria Belton testified that the only work which needed to be done after the abandonment was restoration of damaged kitchen cabinets and counters and some work on some vents and an upper level closet. (para. 13-14, R.57)

Even more importantly, Superior Construction chooses to ignore the testimony of its own president, who, through his own admission, established that the two year cessation of work was contrary to normal and customary practices. The president of Superior Construction testified that he had no explanation for the two year cessation of work. (P. 54, l. 2-12, Depo. Randall Hedden, attached as Ex. 2, Aff. Gary Bodelson, R.33) The president of Superior Construction then testified as follows in regard to whether such an extremely lengthy gap in providing labor and materials was unusual:

Q: Getting back to the gaps that appear in the dates of the items that were listed for material and labor that was provided, again just to recap, I think that the gap was between January 30, 2003 and then to December 29<sup>th</sup>, 2003 and then a bigger gap from December 29<sup>th</sup>, 2003 to March 11<sup>th</sup>, 2005. Now would that be unusual to have those big of gaps in providing work or labor for jobs that Superior Construction did?

A: Unusual? Yes.

Q: So typically or at least the standard practice would be to get an agreement with a homeowner to do a job, do the job, bill for it or

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<sup>4</sup> Latoria Belton testified in her Affidavit that Superior Construction never tried to contact her until February, 2005, a period of 25 months. (para. 11, R.56) Even if the untimely affidavits submitted by Superior Construction were considered in this case, it is important to note that the affidavits would acknowledge that Superior Construction did not attempt to contact Latoria Belton until November, 2004.

make efforts to get paid for it and that would be it? Is that correct?

A: Correct.

(p. 57 L.14 - p. 58 L. 2, Depo. Randall Hedden attached as part of Ex. 2, Aff. Gary Bodelson, R.34)

This testimony from the president of Superior Construction reflects the fact that this case involves one individual customer who had no prior history with Superior Construction and simply wanted to have one project conducted without any delay. Even apart from the testimony of Superior Construction's own president, any reasonable person would conclude that any person or entity performing repair work under such circumstances would not quit working before a project was completed, unless there was an intent to abandon the project.<sup>5</sup> Superior Construction also indicates that the work performed after the abandonment involved the same project as the pre-abandonment work. However, such an allegation is irrelevant. The only relevant issue is whether an abandonment of the project took place. In fact, in order for a "recommencement" of an abandoned project to take place, it must be presumed that only one project exists.

These facts established as a matter of law that an abandonment took place, regardless of which of the two rules referenced in the Langford case is applied. Superior Construction implicitly indicates in its brief that an attempt to abandon cannot be established unless there is a specific admission from the abandoning party. Such an impossible standard has never been applied in any case and is directly contrary to the ruling in Langford, which establishes that "the actual termination of work can trigger an abandonment". 668 N.W.2d at 444. Also, the fact that

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<sup>5</sup> The facts in this case would be clearly distinguishable from Poured Concrete Foundation v. Audron, Inc., 529 N.W.2d 506 (Minn. App. 1995), in which a significant period existed between the times that a mechanic's lien claimant performed work on a house. In the first place, the issue of abandonment was never raised in that case. Also, the lien claimant in that case had a 12 year working relationship with the developer/owner who regularly retained the lien claimant. The work provided in that case related to the ongoing construction of new homes in an entire development area. The developer and lien claimant had established a custom of having the delayed final cleaning process in question done by the lien claimant. The court in Poured Concrete Foundation v. Audron, Inc. also pointed out that construction was being done by the lien claimant on other homes being built by the developer during the period of delay before the final cleaning process was completed on the home or homes in dispute (See Footnote continued on next page)

the Langford case involved a trial rather than a summary judgment decision is not relevant. It is well established that a party cannot rely on a claim that it would develop facts at trial as a basis for defending against a summary judgment motion. Borom v. City of St. Paul, 289 Minn. 371, 184 N.W.2d 595, 597 (1971) Furthermore, the facts concerning abandonment in this case are much clearer than they were in the Langford case, which involved a termination of work for 1 year rather than the 2 year abandonment in this case.

The summary judgment decision in favor of Town & Country's priority is also justified on the basis of simple fairness. Superior Construction could have preserved its mechanic's lien rights back to the date of the pre-abandonment work in 2002 if it had chosen to file a mechanic's lien statement within 120 days of the cessation of work in January, 2003. This would have provided notice to Town & Country, or any other lender, that Superior Construction was making a claim against the subject property. Instead, Superior Construction failed to preserve any mechanic's lien rights until a mechanic's lien statement was registered as a memorial in June, 2005, almost 2 1/2 years after it abandoned the project in question. In the meantime, Town & Country provided a \$263,500.00 mortgage loan to Ms. Belton and Ms. Harris with no knowledge of Superior Construction's claims. In fact, unlike the new construction involved in the Langford case, the repair project in this case was done on a previously existing premises. No facts were presented in this case indicating that Town & Country had any knowledge that any work had been done on the premises for which a mechanic's lien could possibly have been claimed. To the contrary, the evidence presented established that Town & Country did not know of any work that had been performed. (para. 3, R.47-48) Under such circumstances, it would be a clear

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Poured Concrete Foundation v. Audron, Inc., 529 N.W 2d at 511-512. Such facts are clearly distinguishable from one singular repair project on one home for one non-professional customer with whom no prior history existed.

injustice to allow Superior Construction to have priority over Town & Country's mortgage. The decision of the District Court in favor of Town & Country should be affirmed.

**B. SUPERIOR CONSTRUCTION DID NOT PRESENT ANY ADMISSIBLE EVIDENCE ESTABLISHING MATERIAL FACT ISSUES CONCERNING WHETHER IT ABANDONED THE PROJECT IT HAD BEGUN ON THE SUBJECT PROPERTY.**

Superior Construction repeatedly accuses the District Court of failing to consider what Superior Construction alleges to be "reasonable inferences" and material facts. Superior Construction's accusations against the District Court are utterly without merit.

Superior Construction alleges that a "reasonable inference" was created by the fact that Latoria Belton did not call another contractor and did not send correspondence to Superior Construction. Superior Construction claims a reasonable inference from this "fact" is that Ms. Belton did not believe the project to be abandoned. Superior Construction's claim is ridiculous. It is not "reasonable" to conclude that Ms. Belton was lying about thinking an abandonment had taken place simply because she didn't write to Superior Construction or make unsolicited comments about the 2 year abandonment after Superior Construction finally decided to recommence work. Furthermore, Superior Construction presented no facts which contradicted Latoria Belton's testimony that she made telephone calls to Superior Construction several times in 2003 without response. Even the untimely affidavits submitted on September 28, 2006, establish that **no** attempt was made to communicate with Ms. Belton from at least January, 2003, to November, 2004, a period of 22 months. Superior Construction's self-serving and unreasonable arguments about factual "inferences" are nothing more than a desperate attempt to divert the court's attention away from the fact that over a 2 year abandonment of work took

place. Despite the arguments of Superior Construction, the court is not required to save a party from summary judgment by drawing unreasonable factual inferences. City of Savage v. Varey, 358 N.W.2d 102, 105 (Minn. App. 1984)

It should also be mentioned that even if a reasonable inference existed that Latoria Belton did not believe an abandonment took place, such a belief would not be material to this case. On a motion for summary judgment the sole question before a court is whether an issue of established material fact exists. Marose v. Hennameyer, 347 N.W.2d 509, 511 (Minn. App. 1984) A material fact is one that would affect the outcome of the case. Pischke v. Kellen, 384 N.W.2d 201, 205 (Minn. App. 1986); Zappa v. Fahey, 310 MN 55, 245 N.W.2d 258-260 (1976). It was Superior Construction, not Latoria Belton, that abandoned the work it had begun. Although Ms. Belton's testimony concerning her belief about the abandonment of the work is uncontroverted, the issue of what Ms. Belton believed is not a material fact which would affect the outcome of the case.

Superior Construction also makes allegations about Latoria Belton not showing up for a deposition in April, 2006. Superior Construction alleges that some type of unspecified "reasonable inference" is created by that allegation. Contrary to the inexplicable assertion of Superior Construction, no reasonable inferences related to this case are created by an alleged failure to appear at a deposition, and the alleged facts about the attempted deposition would clearly be inadmissible. In the first place, a non-appearance at a deposition would have no relevance to the subject matter of this case. Also, Superior Construction never made a motion for an Order to Show Cause so that a hearing could be held to determine whether the allegations made by Superior

Construction are correct. In fact, the only alleged facts submitted by Superior Construction would indicate that Latoria Belton had no obligation to appear at the deposition. A default judgment in favor of Superior Construction was ordered against M. Belton on February 16, 2006, so she was not a party to the action at the time of the attempted deposition in April, 2006. Also, Minn. Stat. § 357.22 and Rule 45.02 of the Minnesota Rules of Civil Procedure require that all witnesses required to testify under subpoena be paid a statutory witness fee. Minn. Stat. § 357.22 further states that no person is obligated to attend as a witness in any civil case unless at least one day's witness fee is tendered to the witness in advance of the testimony. No facts exist indicating that any such payment was made. Also, the only record of the attempted deposition submitted in an untimely fashion to the District Court by Superior Construction, states that Latoria Belton represented to Superior Construction's attorney that her daughter was in the hospital at the time of the deposition. She also represented that she wanted to talk to her attorney. In response to that representation, Superior Construction's attorney stated that "...we will attempt to reschedule the deposition at such time as we can coordinate it through her legal counsel." (A.126) The only reasonable inference that can be drawn from these facts is that Superior Construction's attorney did not consider Latoria Belton's testimony important enough to bother taking the necessary steps to obtain Ms. Belton's testimony. Superior Construction's arguments concerning the attempted deposition of Latoria Belton were not only untimely, they are also specious.

The same would be true in regard to the other arguments made by Superior Construction about the “facts” it says it presented to the District Court. The alleged facts appeared in one affidavit that was served in a timely fashion and two that were not. However, regardless of the timeliness of the affidavits, none of the alleged facts are material because they would not affect the outcome of this case. One allegation that Superior Construction repeatedly focuses on relates to oral and written statements allegedly made by Ms. Belton after Superior Construction recommenced work in 2005. Apart from the fact that the written statement signed by Ms. Belton in June, 2005, was obviously a self-serving attempt by Superior Construction to renovate its lien, none of the alleged statements are relevant to this case. They simply relate to Superior Construction’s repeated argument that the recommenced work in 2005 was for the same project that had begun in 2002. As stated previously, it does not matter whether the recommenced work was for the same project. All that is material is that there was an abandonment of that project. In order for a “recommencement” of an abandoned project to take place, it must be presumed that only one project exists. The decision in Langford makes it clear that when an abandonment of a project exists, a mechanic’s lien cannot relate back to the pre-abandonment work despite the fact that only one project existed.

Another allegation that Superior Construction focused on relates to the time that communication recommenced between Superior Construction and Latoria Belton after the abandonment. Latoria Belton testified in an affidavit that the communication started again in February, 2005. (para. 11-12, R. 56-57) Superior Construction alleges that communication started again in November, 2004. However, even if the allegation of the

representative of Superior Construction was correct, and even if the mere re-establishment of communication rather than recommencement of work was relevant, no reasonable person could conclude that a 22 month abandonment (January, 2003, through November, 2004) rather than a 25 month abandonment (January, 2003, through February, 2005) would have materially affected the outcome of this case.<sup>6</sup>

One of the untimely submitted affidavits also alleges that Ms. Belton did not live on the premises based on a conversation that the affiant stated he had with an unidentified “tenant” in late 2004. Such evidence would be inadmissible even if it had been submitted to the District Court in a timely fashion. The allegations were based on both hearsay and a lack of foundation. More importantly, any allegation about where Ms. Belton lived in late 2004, even if true, did not contradict Ms. Belton’s affidavit. She stated that she had moved in the building after Superior Construction stopped working in **January, 2003**. (para. 8, R.56) Superior Construction has no idea where Ms. Belton lived at that time because it abandoned its work and ceased communication. Also, it is irrelevant whether Ms. Belton was living on the premises in November, 2004, or not. The only possible relevant fact is that someone was living on the premises. This would confirm that no one was expecting or waiting for Superior Construction to recommence work on the abandoned project.

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<sup>6</sup> Superior Construction has included in the appendix to its brief the Answers to Town & Country’s Interrogatories. The Answers to Interrogatories were never made part of the record in the District Court. Therefore, the Answers to Interrogatories should not be given any consideration. More importantly, even if the Answers to Interrogatories were properly made part of the record, they offer no admissible facts which would extend beyond the scope of the affidavit of Superior Construction’s president and the two untimely affidavits submitted at the September 28, 2006, hearing. In fact, the Answers to Interrogatories confirm that Superior Construction had no communication with Latoria Belton from January, 2003, to at least November, 2004. It also confirms that the recommencement of the work following the abandonment did not recommence until March, 2005, more than 2 years after the pre-abandonment work ceased.

Superior Construction also relies on its self-serving statements that no abandonment took place. Superior Construction's emphasis on its own self-serving statements concerning its intent, implies that the law requires an admission of an intent to abandon. There is absolutely no legal authority to support such a ridiculous argument. If Superior Construction was correct, no objective evidence, no matter how compelling, would be sufficient to establish an abandonment. Superior Construction, or any other mechanic's lien claimant, would be able to abandon a project for decades as long as it did not admit that an intent to abandon existed. Superior Construction's unsupported allegations about its "intent" are not material and would not affect the outcome of this case.

The only material facts that are contained in any of the affidavits submitted by Superior Construction, including the untimely affidavits, is that there was an undisputed 2 year gap in the work performed and at least a 22 month gap in any communication between Ms. Belton and Superior Construction. One of the affidavits also reflects that the project manager for Superior Construction who was responsible for the Belton project had a history of abandoning projects (although the term "linger" rather than abandonment was used; Para. 2 p. 2, Aff. Grant Heino, A.141). Such allegations do nothing but support the fact that an abandonment took place.

The facts in this case are clear. A two year abandonment took place in regard to the project that was commenced by Superior Construction on the subject property. Superior Construction has provided no material facts which would affect the outcome of this case to support its request to reverse the District Court decision in favor of Town &

Country's priority. Even if any material facts had been presented by Superior Construction, they certainly would not rise to the level where, when the record is considered on the whole, a rational trier of fact would rule in favor of Superior Construction. See DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (there is no genuine issue for trial when the record on the whole could not lead a rational trier of fact to find for the non-moving party). The District Court's decision should be affirmed.

**II. THE DISTRICT COURT CORRECTLY EXCLUDED FROM CONSIDERATION THE UNTIMELY AFFIDAVITS SUBMITTED BY SUPERIOR CONSTRUCTION.**

As stated in the previous argument, the three affidavits which were excluded from consideration by the District Court are not material to this case. One of the affidavits is from the attorney for Superior Construction. The affidavit concerned only the previously discussed attempt to take the deposition of Latoria Belton. As explained, Superior Construction's failure to obtain the deposition of Ms. Belton has no relevance, and it would not under any circumstances be admissible.

The other two affidavits were from representatives of Superior Construction that had absolutely no involvement with the abandoned project until after it was recommenced approximately two years later. As explained, the affidavits contained no material facts which would support Superior Construction. To the extent any material facts did exist, they were supportive of the conclusion that an abandonment took place.

However, regardless of the content of the affidavits at issue, the District Court was correct in refusing to give them any consideration. Contrary to the procedural history set forth by Superior Construction, Superior Construction's motion which was heard on

January 23, 2007, was not a default motion “reset” from December 8, 2006. It involved a summary judgment motion based on a mechanic’s lien claim against Town & Country. (A.65-66) The motion was scheduled by Superior Construction before Superior Construction’s attorney had any opportunity to conduct any discovery.<sup>7</sup> The motion by Town & Country served on January 12, 2006, was a cross-motion to **Superior Construction’s own summary judgment motion.**

The District Court has discretion in making decisions concerning whether to exclude untimely evidence from consideration. Gebhard v. Niederswiecki, 265 Minn. 471, 122 N.W.2d 110, 116 (1963) (District Court did not abuse its discretion in excluding witnesses who were discovered several days before they were disclosed at the end of a trial). The District Court’s discretion was not abused in this case. The District Court graciously allowed Superior Construction an extension of time to respond to Town & Country’s summary judgment motion even though Superior Construction had been the one that originally scheduled the time for a hearing on a summary judgment motion to take place.<sup>8</sup> Superior Construction thereafter abused the privilege granted to it by the

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<sup>7</sup> Town & Country’s attorney was not involved in this case until the later part of November, 2005. (para. 3, R.15-16) Superior Construction’s Notice of Motion and Motion for Summary Judgment Against Town & Country was served on December 23, 2005. (A.65-66) The cross-motion for summary judgment served by Town & Country on January 12, 2006, was responsive to Superior Construction’s own summary judgment motion. (para. 3, R. 15-16) At the January 23, 2006, hearing, Superior Construction’s attorney asked for an extension of time to respond to Town & Country’s motion. (R.58) After six months passed without any further submission of evidence, Town & Country’s attorney requested the court to make a summary judgment ruling on the cross-motions based on the record that existed. (R.58) To the extent a second hearing was requested, it did not come from Town & Country. At the September 28, 2006, rehearing on Town & Country’s summary judgment motion, the attorney for Superior Construction presented the three additional affidavits at issue.

<sup>8</sup> Contrary to the assertion of Superior Construction, the District Court had the authority to hear Town & Country’s motion served on January 12, 2006, in regard to the January 23, 2006, hearing scheduled by Superior Construction. Rule 115.01 of the Minnesota General Rules of Practice grants the right to modify the 28 day time limit for service of a summary judgment motion as long as it is not less than the 10 days allowed under Minnesota Rules of Civil Procedure 56.03.

court by failing to submit any further evidence for over **eight months**. The court certainly had the right to exclude evidence based on the letter dated August 3, 2006, from Town & Country requesting that the decision be made on the record as it existed at that time. (R.58) To the extent that any additional evidence could have been allowed, it should have been submitted no later than nine days before the rehearing requested by Superior Construction. See Minnesota General Rules of Practice 115.03 (requiring that all affidavits and responses for summary judgment motions be served no later than **9** days prior to a summary judgment hearing). This is particularly true considering the fact that the hearing took place more than **8 months** after the original January 23, 2006, hearing scheduled by Superior Construction. Also, the rescheduled hearing requested by Superior Construction established the end date for responding to any new evidence presented by Superior Construction. By being presented with the evidence at the hearing, Town & Country's attorney did not even have time to read the documents, let alone respond to them.

Furthermore, it is important to note that the two affidavits from the representatives of Superior Construction were dated September 20 and September 21, 2006, respectively. (A.144 and A.148) This clearly showed that the failure to present the affidavits prior to the rescheduled hearing requested by Superior Construction was willful in nature. At the very least, the 8 month delay in submitting the affidavits would establish that the untimely submission was inexcusable. Excluding the untimely affidavits under such circumstances was consistent with the ruling in Gebhard v. Niederswiecki, 265 Minn. 471, 122 N.W.2d 110, 115-116 (1963), which affirmed an exclusion of witnesses willfully not

disclosed until the end of a trial, which was a few days after they were discovered. Also, as stated previously, the three affidavits do not contain any material fact issues supportive of Superior Construction's position. Therefore, Superior Construction could not have been prejudiced by the District Court's exclusion of the affidavits. It was within the District Court's discretion to exclude the untimely affidavits.

**III. SUPERIOR CONSTRUCTION WAIVED ANY RIGHT TO CONTEST THE PRIORITY OF TOWN & COUNTRY'S MORTGAGE LIEN OVER ANY CLAIMED LIEN OF SUPERIOR CONSTRUCTION.**

The District Court correctly ruled that the issue of Superior Construction's waiver on the issue of priority was moot because of the District Court's decision concerning the issue of abandonment. However, even if a material fact issue existed concerning abandonment, the summary judgment in favor of Town & Country should still be upheld based on the issue of waiver. It is well established that an appellate court will affirm summary judgment if it can be sustained on any grounds. Krogness v. Best Buy Co., Inc., 524 N.W.2d 282, 287 (Minn. App. 1994)

The court stated in regard to waiver in Meagher v. Kavli, 251 Minn. 477, 88 N.W.2d 871, 878-879 (1958), that:

**The commonly accepted definition of waiver is that it constitutes a voluntary relinquishment of a known right whose essential elements are both intent and knowledge, actual or constructive. It needs no consideration to support it. If the known right is waived, it cannot be reclaimed without consent of the adversary and once established it is irrevocable even in the absence of any consideration therefore. Since the question of waiver is largely one of intention, it need not be proved by express declaration or agreement, but may be inferred from the acts and conduct of the parties against whom the defense is being asserted.**

It has also been held in regard to the doctrine of waiver that:

**It is essentially unilateral and results as a legal consequence from some act or conduct of the party against whom it operates, without any act of the party in whose favor it is made being necessary to complete it.**

(Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 84 N.W.2d 593, 603 (1957))

In this case, Superior Construction's attorney sent a letter dated September 12, 2005, which stated in a sentence at the bottom of the first page as follows:

“Your company is being served as a formality. We will stipulate as to the priority of your company's mortgage.”  
(Ex. 3, Aff. Kelly Moeller, R.53-54)

Based on the above-cited rulings, the statement from the plaintiff's attorney clearly constituted a waiver of rights to contest the priority of Town & Country's mortgage lien. In fact, it is difficult to envision how an intentional relinquishment of a known right could have been more unequivocally stated. Furthermore, any attempt by Superior Construction to withdraw the waiver is irrelevant. As stated in the above-cited quote from Meagher v. Kavli, the waiver “is irrevocable even in the absence of any consideration therefore.”

Superior Construction argued against the claim of waiver by erroneously invoking principles of contract. However, the doctrine of waiver has nothing to do with contract law. As stated above in the ruling from Anderson v. Twin City Rapid Transit Co., a waiver is unilateral and occurs without any act of the party in whose favor it is made being necessary to complete it. Contract concepts of offer and acceptance have nothing to do with the doctrine of waiver. As was stated in Clark v. Dye, 158 Minn. 217, 197

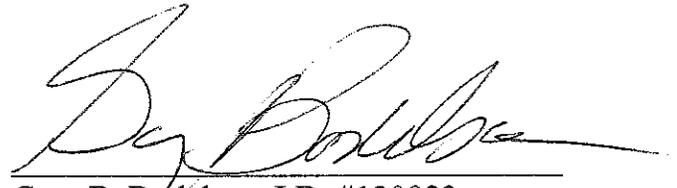
N.W. 209, 212 (1924), a waiver, "...cannot be regarded as a contract, and does not require a consideration to support it." The clearly expressed stipulation for Town & Country's lien priority constitutes an unequivocal waiver by Superior Construction.

**CONCLUSION**

Based on the foregoing arguments, it is respectfully requested that the decision of the Hennepin County District Court be affirmed.

Dated: \_\_\_\_\_

*6/27/07*



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