

NO. A08-0319

State of Minnesota
In Court of Appeals

Wallboard, Inc.,

Appellant,

vs.

St. Cloud Mall, LLC and Bath & Body Works, LLC,

Respondents.

APPELLANT WALLBOARD, INC.'S REPLY BRIEF

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INTRODUCTION

Pre-lien notice is not required for an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space. Through various creative arguments Respondents claim the pre-lien notice exception does not apply because the area that was improved upon is less than 5,000 square feet even though the real property in question contains over 5,000 square feet of floor space. This reply brief will address Respondents' arguments.

LAW AND ARGUMENT

I. PRIOR CASE LAW SUPPORTS THE CONCLUSION THAT A LIEN ATTACHES TO THE ENTIRE PROPERTY, NOT JUST THE IMPROVED SPACE

Section II. D. of Respondents' brief argues that the case law cited by Appellant that provides for an expansive view of useable floor space offers no support in this case. This is incorrect. The cases cited recognize and set forth that the legislature's demarcation line is the total size of the building on the property, not the total size of an improvement or the size of the leased space. Respondents attempt to distinguish a few of the cases, but ignore the cases that support Appellant's contention: Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 853 (Minn. 1977) and Master Asphalt Co. v. Voss Const. Co., Inc. of Minneapolis, 535 N.W.2d 349 (Minn. 1995).

For over thirty years, Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 853 (Minn. 1977) has been relied upon by real estate practitioners for the conclusion that an improvement to existing property includes the entire property, not just the area that has been improved upon. In Polivka Logan Designers, Inc., the Minnesota Supreme

Court, in interpreting a former version of Minn. Stat. § 514.011, concluded that “usable square feet of floor space” meant the total space either “before or after the construction work.” Polivka Logan Designers, Inc., 251 N.W.2d at 853. In Polivka Logan Designers, Inc., a commercial building was increased in size by the work in question by 5,415 square feet to make the property exceed the statutory exception, which at that time, was 10,000 square feet. The court held that the subcontractor was not required to give notice to the owner with respect to the possibility of the subcontractor's mechanic's lien because the area to be included was the “total” square footage, not just the area that was improved upon. Id. (emphasis added). The Court recognized:

An interpretation of “improvement” that includes only the floor space provided by the work in question appears to confound the legislature's design. An example of this flaw would be an existing one-million-square-foot building which a contractor improves by adding a new addition consisting of 9,000 usable square feet of floor space. Under the trial court's interpretation, the owner of the building would be entitled to notice. Another example: Assume an electrical contractor rewired and furnished other labor and materials on an existing building containing 40,000 square feet of usable space. He would be required to give notice to the owner or lose his lien rights. This would not be so if he did the same work in the initial construction of a new building of 10,000 or more square feet of usable space. We do not think the legislature intended these incongruous and unreasonable results. Minn. St. 645.17(1). Moreover, there is no significant reason for distinguishing an owner of a building the floor space of which is increased to more than 10,000 square feet by new construction work and an owner who initially constructs a building of the same size and who would not be entitled to notice. Admittedly, the legislative demarcation at 10,000 square feet of floor space is somewhat arbitrary (as are all such classifications), but that demarcation must nevertheless be interpreted reasonably.

Id. (emphasis added).

In Master Asphalt Co. v. Voss Const. Co., Inc. of Minneapolis, 535 N.W.2d 349 (Minn. 1995), the court recognized in dicta that when a commercially leased unit is a part

of a larger commercial unit, it is the entire larger commercial unit that is looked at to determine whether the pre-lien notice exception applies. While the facts outlined in the court's opinion do not provide a precise determination of the square feet of the leased unit and the entire commercial unit, the court nonetheless determined that the property in question was exempt from the pre-lien notice requirements pursuant to Minn. Stat. § 514.011, subd. 4c. Id. at 354.

To conclude that “usable square feet” only applies to the area being improved and not to the entire building would directly contradict the Minnesota Supreme Court's holding in Polivka Logan Designers, Inc. and the basic inherent nature of a mechanic's lien. A mechanic's lien claimant cannot go to the county recorder's office and record a mechanic's lien only upon a leasehold interest. If a verified mechanic's lien statement had its legal description as “The space designated as leased unit # 220 of Lot 1, Block 1, Crossroads Addition Plat 3, Stearns County, Minnesota” the County Recorder would reject the mechanic's lien for recording because unit #220 is not a legal interest in real property. This of course is distinctly different from a condominium unit with separate legally defined units. Mechanic's liens, like any other recorded legal interest, can only be recorded against a legally defined piece of property.

Through circular reasoning, Respondent attempts to argue that the legally defined property interest is irrelevant because Bath & Body has a leasehold interest on a unit that is less than 5,000 square feet. Because the leasehold interest contains less than 5,000 square feet of usable space, Respondents argue that lack of pre-lien notice is fatal to the

validity of the lien. This argument ignores the fact that the Mechanic's Lien attaches to the entire property.

The only way St. Cloud Mall, LLC could have limited Appellant's lien rights so that the lien would only attach to the leased space would be to post notice of its intent not to be bound by the lien. Minn. Stat. § 514.06 provides a mechanism for a property owner to protect its fee interest from being subject to a mechanic's lien for improvements contracted by another. See Minn. Stat. § 514.06; Master Asphalt Co. v. Voss Constr. Co., 535 N.W.2d 349 (Minn.1995); Marksman Const. Co., Inc. v. Mall of America Co., 1997 WL 757392, *1 (Minn. App. 1997). St. Cloud Mall, LLC stipulated to the fact that it failed to post notice. Furthermore, Respondents fail to point out that they stipulated to the fact that the lien, if valid, applies to the entire Property. Regardless of Bath & Body's arguments, there can be no argument that Wallboard's Mechanic's Lien is valid as it applies to St. Cloud Mall, LLC. St. Cloud Mall, LLC did not post notice, had knowledge of the improvement and Appellant was not required to give St. Cloud Mall, LLC pre-lien notice. As a result, at worst, Wallboard's Mechanic's Lien is valid against St. Cloud Mall, LLC and the entire Property.

II. BATH & BODY IS A LESSEE

Respondents' "Issue Presented" starts with a distortion of the facts. Respondents refer to Bath & Body Works, LLC ("Bath & Body") as an "owner" of the leased space. Bath & Body is a lessee not an owner. An owner of a property is one who has the legal right to property and who is in possession of title and complete dominion over the

property. St. Cloud Mall, LLC is the “owner” of the property legally described as Lot 1, Block 1, Crossroads Addition Plat 3, Stearns County, Minnesota (“Property”). Bath & Body has an equitable leasehold interest over an arbitrarily designated area within the Property. This distinction is critical. Respondents’ rely upon the distortion throughout their Response and they use it as a basis to conclude the lack of pre-lien notice is fatal to the validity of Wallboard’s Mechanic’s Lien.

Respondents erroneously rely upon Nasseff v. Schoenecker, 253 N.W.2d 374, 378 (MN 1977) for the conclusion that “Clearly, when the tenant is the contracting owner, a tenant is an owner for purposes of the pre-lien notification requirements.” The use of the word “Clearly” should be a sufficient clue that the statement is tenuous. Respondents’ argument over extends the holding in Nasseff. The case holds, in a fact scenario nearly on point with this case, that where a fee owner has knowledge of improvements being made and fails to serve or post notice that the improvements were not made at his instance, his fee interest is subject to mechanics’ liens. Id. at 376. The case mentions in dicta that lessees are owners of an equitable interest in leased property. Id. at 378. The case is distinguishable on two points: Nasseff involves contractors rather than subcontractors, and the lease applies to the entire property, not simply to a separate unit within the legally described property. This is significant because the Nasseff court did not need to address the issue of pre-lien notice found in Minn. Stat. § 514.011, subd. 4c. The court determined, because there were no subcontractors, the direct contract with an owner exception applied.

In this case, St. Cloud Mall, LLC stipulated that it had knowledge of the improvements being made and that it failed to serve or post notice that it would not be subject to a mechanic's lien. The primary difference between this case and Nasseff is that in Nasseff the court relied on the direct contract within an owner exception to pre-lien notice found in Minn. Stat. § 514.011 and concluded the pre-lien notice statute was not applicable. Nevertheless, the present case is not a case involving a "hidden lien." St. Cloud Mall, LLC was fully aware of the improvements being made and had it wanted to protect its interest, it could have done so by posting notice of its intent not to be bound by a mechanic's lien.

In addition, Respondents erroneously apply the "owner" definition found in Minn. Stat. § 514.011 to conclude that the leasehold interest is the one with the "existing property" referred to in the statutory pre-lien notice exception. The word "owner" is not found in Minn. Stat. § 514.011, subd. 4c. Read as a whole, Minn. Stat. § 514.011 defines the word "owner" as it applies to subdivisions 1, 2, and 3. See, e.g., Nasseff v. Schoenecker, 253 N.W.2d 374, 378 (MN 1977) (applying the owner definition found in Minn. Stat. § 514.011 to the pre-lien notice exception found in subdivision 1). The phrase "owner" is not used in Minn. Stat. § 514.011, subd. 4c, because the exceptions rely solely upon the nature and size of the "existing property" and not upon ownership as a limiting factor. Ownership is only relevant as it applies to Minn. Stat. § 514.011 subdivisions 1, 2, and 3 for determining to whom pre-lien notice should be given. The fact that Bath & Body owns an equitable interest in the property is irrelevant. The

Property consists of the actual legal description, i.e. “Lot 1, Block 1, Crossroads Addition Plat 3, Stearns County, Minnesota”, not just an area designated by the lease.

III. THE “EXISTING PROPERTY” IS OVER 5,000 SQUARE FEET

Minn. Stat. § 514.011, subd. 4c uses the words “existing property.” In this case, the “existing property” consists of a building encompassing an entire mall. Bath & Body’s lease is for a unit inside that building. The exceptions in the statute are limited only by the phrase “existing property.” The statute references the size of the building not the size of the improvement: “an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space.” Minn. Stat. § 514.011, subd. 4c(b). If work was done to one room inside a house or apartment building, the “existing property” would be the legal description of the house or apartment building and the lien would not only attach to the room that was improved upon, but would attach to the entire property. Using Respondents’ logic and analysis, a contractor would be required to give pre-lien notice based upon the size of the room being improved. Carrying Respondents’ logic completely through to its end leads to perverse results.

Respondents argue that use of the word “existing property” has an implied meaning that requires a determination of who owns the “property.” This is incorrect. It is important to review how the analysis of pre-lien notice is conducted. The analysis starts with looking at whether pre-lien notice must be given and specifically, by looking at whether any of the exceptions to pre-lien notice applies. If one of the exceptions

applies, the analysis stops. If the exceptions to the pre-lien notice do not apply, then you look at ownership to determine who should receive notice.

Respondents take an illogical approach by reversing the analysis. They start the analysis by looking at who should receive notice. Once it is determined who should receive notice, Respondents would then analyze whether any of the pre-lien notice exceptions would apply by looking at who should receive notice. This analysis is backwards and illogical.

IV. THE SIZE OF BATH & BODY IS RELEVANT

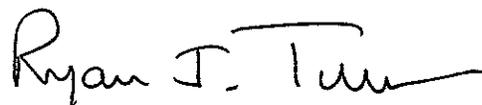
Respondent argues that the size of Bath & Body is irrelevant and should not be considered by this Court. There is substantial precedent to the contrary. The exceptions to the pre-lien notice requirement reflect “the legislature's determination that larger business enterprises do not need the affirmative protection of pre-lien notice requirements.” Master Asphalt Co. v. Voss Const. Co., Inc., of Minneapolis, 535 N.W.2d 349, 354 (Minn. 1995). Certainly, the size of a business is not the deciding factor in the analysis. Nevertheless, the size of a business has been a factor in weighing the equities of individual cases. To suggest otherwise ignores Minnesota case law. Respondents attempt to have it both ways. While on one hand Respondents contend the size of its business is irrelevant, in the same breath they argue that they are a “small” business that should not be required to pay twice for the materials provided by Appellant.

CONCLUSION

Because the Property is not residential or agricultural property and contains over 5,000 square feet of usable floor space, no pre-lien notice was required under Minn. Stat. § 514.011. Accordingly, the judgment of the District Court must be reversed and judgment should be entered in favor of Wallboard.

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