

Case No. A08-0319

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Wallboard, Inc.

Appellant,

vs.

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

Respondents.

RESPONDENTS' BRIEF

Ryan J. Trucke, #030590X
Matthew R. Doherty, #0352159
BRUTLAG, HARTMANN &
TRUCKE, P.A.
3555 Plymouth Boulevard, Suite 117
Minneapolis, MN 55447
(763) 222-2504

Attorneys for Appellant

Ryan J. Hatton, #310803
Gerald W. Von Korff, #113232
RINKE-NOONAN
1015 West St. Germain St., Suite 300
P.O. Box 1497
St. Cloud, MN 56302
(320) 251-6700

Attorneys for the Respondents

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ISSUE PRESENTED

Must a contracting owner who leases less than 5000 square feet of usable space pay for sheetrocking improvements twice, even though supplier of sheetrocking subcontractor failed to provide subdivision 2 subcontractor's pre-lien notice to the contracting owner, on the theory that the contracting owner's landlord owns more than 5000 square feet?

The District Court ruled that a lien against a contracting owner with less than 5000 square feet of leasehold space is invalid unless pre-lien notice is provided.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The parties entered into a stipulation of facts which formed the basis for the District Court's decision. Respondent Bath and Body leases less than 5000 square feet in the Crossroads Mall. The mall is owned by Respondent St. Cloud Mall, LLC.¹ To keep

¹ Article 9 of the lease between Bath & Body and the Mall contains the following provision:

Tenant shall not permit a lien or claim to attach to the Leased Premises and shall promptly cause the lien or claim to be released. If Tenant contests the lien or claim, Tenant shall, following 30 days written notice, indemnify Landlord. If Tenant shall fail to cause a lien to be discharged or bonded, within 30 days after being notified of the filing of the lien, in addition to any other right or remedy, Landlord may discharge the lien by paying the amount claimed to be due. The amount paid by Landlord, together with interest at the Interest Rate and all costs and expenses, including reasonable attorneys' fees incurred by Landlord, shall be due and payable by Tenant to Landlord as additional rental within 30 days following Tenant's receipt of Landlord's bill accompanied by substantiating evidence of the amounts shown on the bill.

See Lease, Article 9 at Exhibit A.

terminology consistent with appellant's brief, we refer to the owner as Crossroads Center Mall. In order to make the leased space ready for its retail business, contracting owner Bath and Body contracted in writing² with a general contractor to construct the necessary improvements. Memorandum, Page 3 to Order of District Court, dated December 28, 2007. The general contractor hired subcontractor Foss Drywall to do the sheetrocking work. Foss, in turn, purchased about \$22,000 of sheetrock-related-supplies from its supplier Wallboard. Neither Foss nor Wallboard provided a subcontractors subdivision 2 pre-lien notice to Bath & Body. There is no claim that Foss did work beyond the limits of Bath & Body's leasehold space, nor is there a dispute as to the extent of the space: it is stipulated that the leasehold space owned by the contracting owner here is below 5000 square feet.

Upon completion of the contract, Bath and Body paid the general contractor in full, and the general contractor provided Bath & Body with a full and complete lien waiver of the total construction contract price, including payment for subcontractors and supplies. The general contractor also obtained lien waivers from its subcontractors, including Foss, showing that Foss had been fully paid for all of its sheetrocking labor and supplies. Foss executed a full lien waiver and stating that there were no unpaid suppliers

² Minnesota Statutes Section 554.011 subdivision 1 requires the general contractor to provide a pre-lien notice to the contracting owner in the construction contract itself, if there is a written construction contract. This case does involve a dispute about the subdivision 1 notice.

or subcontractors.

Foss, however, failed to pay Wallboard for supplies and subsequently filed for bankruptcy. Wallboard commenced this mechanics lien action against Bath & Body and Crossroads Center Mall. Wallboard alleged its lien against the tenant's interest extended also to the landlord Crossroads Center Mall's interest, because Crossroads Center Mall had failed to post a statutory landlord's disclaimer. The parties recognized that Wallboard's right to a lien hinged entirely upon whether the subdivision 2 subcontractor's pre-lien notice was required. An exception applies if the property in connection with the improvement to real property exceeds 5000 square feet of usable floor space.³ We contended below that "in connection with an improvement to real property...." refers to the property owned by the contracting owner, and the Court agreed. We argued that the purpose of the notification is to alert the contracting owner of the existence of unknown subcontractors, and for this reason, it is the contracting owner's property that must be referred to in the statutory exception.

Wallboard urged the District Court, as it urges here, that the courts must construe the statutory language in favor of subcontractors to protect small business tradespeople. We responded in the District Court, and reassert here, that Wallboard wrongly relies on

³ Notice is not required "in connection with an improvement to real property which is not in agricultural use and which is wholly or partially nonresidential in use if the work or improvement (b) is an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space...."

cases granting liberal construction in favor of lien claimants if the proper notification procedures have already been complied with. We also argued that the statute works as intended when it focuses on the conduct of the contracting owner, because it is the contracting owner who is best situated to make sure that lien claimants get paid. The District Court found:

The intent of the pre-lien notice requirement is, in part, to ensure that unsuspecting small businesses not be forced to pay twice for the same work.....a finding that no pre-lien notice is required will result in no protection for small business owners who lease property in located commercial spaces of over 5,000 usable floor space.

The District judge recognized that “[A]n owner includes the owner of any legal or equitable interest in real property whose interest in the property (1) is known to one who contributes to the improvement of the real property, or (2) has been recorded or filed for record if registered land, and who enters into a contract for the improvement of the real property.” Clearly, the statute provides protection for tenants, she recognized.

“Basically, any entity with a claim to an interest in the subject property, including mortgagees, easement holders, purchasers and sellers on contracts for deed, and fee owners. Minn. Stat. § 514.011, subd. 5. See Dolder v. Griffin, 323 N.W.2d 773, 779 (Minn. 1982) (finding that the party holding an equitable interest in the property was the owner); Custom Design Studio v. Chloe, Inc., 584 N.W.2d 430, 432-33 (Minn.Ct. App. 1998) (holding that contractor who knew of seller's ownership interest was required to

serve pre-lien notice on seller).⁴

The contracting owners here was Bath and Body, the Court found:

“There is no evidence that Crossroads Center was involved in the contract for improvements at all. Therefore for purposes of Minn. Stat. § 514.011, the owner of the real estate interest relevant to a pre-lien notice is Bath and Body Works, not Crossroads Center. The Bath and Body Works store is less than 5000 feet. The pre-lien notice requirement applies to Bath and Body Works because of its smaller size and because no other exception applies. Wallboard could easily have protected its interest by giving Bath and Body Works a pre-lien notice but did not do so. While it is unfortunate that any party must bear the loss, the Court finds that the most equitable determination is to find in favor of Defendants.

Wallboard appeals here from the Court's determination.

II. ARGUMENT

A. Summary of the Argument.

This case involves a dispute over whether the exception from pre-lien notification for improvements to property with more than 5000 square feet of usable square feet should apply to a contracting owner who leases less than 5000 square feet of usable floor space in a shopping center. Both parties have argued in the District Court and here, that the answer depends upon an analysis of the statutory purpose of the pre-lien notification and exceptions. Both parties recognize that the statutory language is not clear on this point. Indeed, Wallboard concedes that that “The Minnesota statutes do not precisely

⁴ The Memorandum continues: “Bath and Body Works is a tenant and has a claim of right to the use of the property; therefore, Bath and Body Works is an owner under the definition of Minn.Stat. § 514.011 subd. 5 and has an equitable interest in its portion of the property.”

define the phrase "an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space." Appellant's Brief at Page 12.

The purpose of pre-lien notification is to prevent contracting owners from failing to pay lien claimants who contributed to the improvement. This purpose is promoted by focusing on the status of the contracting owner, not the size of property owned by others in which the contracting owner's premises is situated. The legislature determined that the owners of premises of small premises were less likely to be able to protect themselves without pre-lien notice. And that reasoning applies to owners of small businesses, whether their small business is located in a huge mall or in a small standalone space. A tiny store in a large mall or downtown skyscraper is just as likely to be owned by a small business as a tiny store located in a small standalone building.

Wallboard makes several arguments to deflect attention from the interest owned by the contracting owner.

- That Bath and Body happens to be a large company. To this we respond that the cases clearly state that the individual status of a particular contracting owner is of no consequence. The law applies in an even handed way without regard to the actual magnitude of the company that happens to occupy the small space that has been improved.
- That Chapter 514 is construed liberally in favor of lien claimants. To this we respond that the cases establish, to the contrary, that notification requirements are

B. Chapter 514's Notification Requirements are Strictly Enforced to Avoid Double Payment by the Contracting Owner and to Encourage Identification of Subcontractors.

We first discuss appellant's erroneous contention that appellate courts have laid down a rule that statutory language should be construed in favor of lien claimants who fail to give pre-lien notice. Of course each party has argued to statutory purpose and policy, because we recognize that the statutory language does not offer an unambiguous answer. This is not the first time that Chapter 514 has forced the Courts to discern legislative intent. The statute regularly presents interpretative problems for the Courts, some of which were then resolved by legislative clarifications,⁵ but a number of unresolved interpretative issues remain.⁶

The exception at issue here grants an exception to the pre-lien notification requirement protecting contracting owners in connection with “an improvement to real

⁵ For example, Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 853 (Minn. 1977) (usable floor space includes existing and added floor space); Wong v. Interspace-West, Inc., 701 N.W.2d 301 (Minn. App. 2005) (Computer generated notice is printed, not typewritten).

⁶ For example, section 514.011 refers throughout to “the notice required by this section,” when in fact the section refers to two different notices with substantially different texts. Subdivision 1(b) (contractor's notice) contains an exception for the notice required by this subdivision dealing with an owner of the improved real estate while subdivision 4a contains an overlapping exception dealing with notice required by “this section.” Subdivision 4b refers to real property consisting of more than four family “units,” with no definition of the term unit. The phrase “usable square feet of floor space” has led to a number of disputes which have required judicial construction. The definition of the term “owner” is broad and applies to the owner of any legal or equitable interest in the property, while the statute often refers to “the owner,” as if there were one.

property where the existing property contains more than 5,000 total usable square feet of floor space.” Hence the core question is whether one views the size of the property from the perspective of the contracting owner, or as appellant argues, from the perspective of the contracting owner's landlord.

Clearly, when the tenant is the contracting owner, the tenant is an owner for purposes of the pre-lien notification requirements. Nasseff v. Schoenecker, 253 N.W.2d 374, 378 (1977) (it is the lessees who are the owners of an equitable interest, which interest this court has held since the last century may be subject to a lien). The District Court found that the statutory purpose is best served by requiring unidentified subcontractors to focus on the property interest held by the contracting owner. We've already pointed out that encouraging subcontractors to give notice is the most reliable and effective way of avoiding the duplicate payment problem that otherwise occurs here. Minnesota Statutes Section 514.01 provides a statutory mechanics lien to persons who contribute to the improvement of real estate⁷. The lien attaches to whatever interest, legal or equitable, the contracting owner has in the property subject to the lien. 6 Minnesota Practice § 32.3 (at footnote 8).⁸ Where the tenant contracts for improvements, the tenant's

⁷ Chapter 514 has been frequently amended to clarify or correct issues unresolved by the statutory language. As a result, older appellate decisions must be carefully scrutinized in the context of the statute as it existed when the decision was issued.

⁸ Even when the landlord has refused to authorize the improvements, posting the statutory notice is not always a reliable solution. See Master Asphalt Co. v. Voss Construction Co., 525 N.W.2d 349 (Minn. 1995) (notice of non-responsibility was not

strictly construed to fulfill the statutory objective of assuring that the contracting owner is protected against inadvertently being forced to pay twice for the same improvement. We argue also that encouraging pre-lien notification practices benefits subcontractors by creating practices in the construction industry that assure distribution of the contracting owner's funds to identified subcontractors.

- That while the statutory exceptions refer to property, they do not refer to the owner. To this we respond that ownership is inherent in the concept of property. Improvements to a small store in a row of separately owned adjoining commercial downtown stores would not be exempt simply because the sum of all contiguous properties exceed 5000 square feet. The area of property is measured by stopping at the boundary lines of the usable space owned by a single owner.
- That several cases have construed the borders of usable space expansively. To this we respond that all of these cases have involved the area of space owned by a single contracting owner: none of these cases have suggested that you can add to the space owned by other owners.

In the next section of this brief we summarize the notification framework established by Chapter 514 and show that it is designed to give the contracting owner the tools necessary to avoid having to pay for the same improvement twice.

interest is subject to the lien. 6 Minnesota Practice § 32.3 (at footnote 9). And, if the tenant contracts with the general contractor, Minnesota Courts have consistently held that it would be unconstitutional to extend the lien to the landlord's interest, unless the landlord has consented or authorized the lien. See Master Asphalt Co. v. Voss Construction Co., 525 N.W.2d 349 (Minn. 1995). The lien is on the property of the tenant, but under Section 514.06, the landlord is deemed to have impliedly authorized the lien, unless the work involves repairs performed at the instance of the lessee. 6 Minnesota Practice § 32.4. When the landlord does not authorize improvements in the leasehold premises, the landlord may prevent the lien from attaching to the landlord's estate by posting notice that such improvements are not authorized.

Because the lien is statutory, it is essential that the lien claimant comply with all procedural pre-conditions to creation of the lien. "Time and notice requirements are particularly crucial." See 6 Minnesota Practice § 32.1. These procedural requirements, found in Chapter 514, seek to provide a balance of protections to general contractors, their subcontractors, and to contracting owners. The statute thus seeks:

(1) to provide the general contractor with security for payment against the contracting owner (here Bath & Body), so that persons in the construction trades are compensated for their improvements to real estate. Minn. Stat. § 514.01.

adequately posted; two of the notices were removed). The pre-lien notice is delivered to the contracting owner, providing certainty that the notification has been received.

(2) to assure that the contracting owner has notice that the contractor claims the right to a lien, that the general contractor will hire subcontractors and materials suppliers, and the accompanying enforcement leverage that the statute provides in the event of non-payment or a dispute about performance. Minn. Stat. § 514.011, subd. 1. Both sections (1) and (2) are intended to notify the owner of the subcontracts so the owner may protect the property from liens.

(3) to provide relief to subcontractors (such as Foss and Wallboard) who lack a direct contract with the contracting owner, in the event that the general contractor is paid but fails to use the contracting owner's payments to reimburse subcontractors, and

(4) to protect the contracting owner from having to pay twice for the same improvements.⁹ Minn. Stat. §§ 514.07, 514.011, subd. 1, 2, 514.03.

In balancing these concerns, Chapter 514 recognizes a distinction between the preconditions to attachment of the lien (such as pre-lien notice), and enforcement of a valid lien that has been attached or perfected. Contrary to the argument in Appellant's brief at pages 10-11 the Courts have not "consistently held" over the years that the notice requirement should be "liberally construed" in favor of workmen and materialmen.¹⁰

⁹ These procedures include requirement of notice by contractors (§ 514.011 subdivision 1) and subcontractors § 514.011 subdivision 2, unless certain exceptions apply. § 514.011 subdiv. 1(b), § 514.011 subdiv 4a-4c. Section 514.07 protects the owner from duplicate payment by allowing the owner to withhold payment sufficient funds to pay identified subcontractors for whom lien waivers have not been provided.

¹⁰ A subcontractor is entitled to protection if the subcontractor makes a good faith effort to provide the notice, but fails to provide the precise notice required. § 514.011

The statute makes it clear that a person who fails to provide the pre-lien notice is not entitled to a mechanic's lien. Minn. Stat. § 514.011, subd. 2. See also Merle's Construction Company, Inc. v. Berg, 442 N.W.2d 300 (Minn. 1989) (pre-lien notice is no mere technicality); Niewand v. Carlson, 628 N.W.2d 649 (Minn. Ct. App. 2001); London Construction Co. v. Roseville Townhomes, Inc., 473 N.W.2d 917, 919 (Minn. Ct. App. 1991); Dolder v. Griffin, 323 N.W.2d 773, 779-80 (Minn. 1982). Mechanic's lien laws are strictly construed as to the question whether a lien attaches, and are construed liberally only after the lien has been created and attached. "While the Mechanic's Lien Act is to be liberally construed as a remedial act, yet mechanics' liens exist only by virtue of the statute creating them, and such statutes must be strictly followed with reference to all requirements upon which the right to a lien depends." Dolder v. Griffin, at 780.

This strict enforcement of pre-lien and other requirements is premised on the balancing that we described above. By requiring notice and proper attachment, the statute seeks to encourage responsible conduct by the contracting owner, the general contractor and subcontractors who are not in privity with the contracting owner. This purpose is only furthered when parties are respectively aware of each others existence and can effectively act to avoid an inequitable result.

In this context, the notice provided by subcontractors who lack privity with the

subd. 2(b). This amendment appears designed to provide protection to subcontractors from the decision in Neiwand v. Carlson, 628 N.W.2d 649 (Minn. Ct. App. 2001).

contracting owner is of critical importance to the protections provided the owner under Chapter 514, because it avoids the possibility of double liability for the same work.¹¹ As stated in Nasseff v. Schoenecker, 253 N.W.2d 374, 377 (1977):

The notice requirement's "evident purpose [is] to protect an owner from hidden liens arising from labor or materials supplied to the contractor by subcontractors or materialmen who extended credit to the contractor on the security of the owner's property and whose identities were unknown and often unascertainable by the owner."

The notice does more than protect contracting owners against having to make duplicate payments. It encourages practices which protect subcontractors by making it more likely that the subcontractor is paid by the contracting owner out of loan proceeds or other proceeds allocated to the construction project. When subcontractors religiously provide pre-lien notices, they are more likely to be paid. It is shortsighted, we think, to view the statutory pre-lien notification requirement only with hindsight, after an event of non-payment has already occurred. For, when a number of subcontractors have not been paid, it may be too late for the contracting owner to come up with the duplicate payment, and often the proceeds after lien foreclosure are inadequate to secure payment to the previously unknown subcontractors. The best way to protect subcontractors is to create a legal environment where they are likely to make themselves known so that the original

¹¹ See Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 852 (Minn. 1977) citing Spannaus, *Mechanic's Lien Law Reform*, 41 *Hennepin Lawyer* 10; Nygren, *Mechanics Lien Laws as Amended by the 1973 Minnesota Legislature*, 42 *Hennepin Lawyer* 8.

contract price can get reliably distributed to its proper recipients in the first place. And that occurs when the contracting owner identifies all his subcontractors.

Four statutory sections work together to achieve this result. First, Section 514.07 protects the owner from duplicate payment by allowing the owner to withhold payment sufficient funds to pay identified subcontractors for whom lien waivers have not been provided. Under that statutory protection, Bath & Body could insist upon and receive, lien waivers from all subcontractors and the general contractor in amounts certified to total the contract price. When the contracting owner insists on receiving such lien waivers, and diligently refuses to make payments unless waivers covering the total contract price are received, then the only remaining risk is that there is an unknown subcontractor. That situation arises typically, because the general contractor (or as here, one of the subcontractors) fails to identify a potential lien claimant at the time of final payment. And that is our case: subcontractor Foss provided a lien release to the general contractor.

Second, Section 514.011, subdivision 3 affords Wallboard the right to obtain from the general contractor the name and the address of the contracting owner and the contractor must supply the information within 10 days, or be liable for any damages to Wallboard as a result, plus reasonable costs and attorney fees. This assures that Wallboard can determine where to provide its notice.

Third, the pre-lien notice requirement found in Minnesota Statutes Section 514.011

subdivision 2 forces out into the open potentially unknown suppliers and subcontractors before work begins thus encouraging the subcontractor, the general contractor, and the contracting owner to act responsibly to make sure that the contract price is paid over to the persons who supplied the work for which payment is made.

Fourth, Section 514.011 subdivision 1 requires the general contractor to provide notice of these other three statutory protections to the contracting owner. This notice must be contained in the written contract, if there is one, or provided in a separate notice if there is no written contract. The notification is designed to prevent non-payment circumstances from arising in the first instance, and it is clear that the notice is directed to the contracting owner. Under Minnesota law, the notice says "you have the right to pay persons who supplied labor or materials for this improvement directly for this improvement and deduct this amount from our contract price..." Plainly, the you here to whom this notice is directed is the contracting owner, not its landlord.

When these four provisions work as intended, claims for duplicative payment are thus avoided or eliminated. All four of these statutory provisions work by creating communication between the contracting owner and the subcontractors, to make sure that the contracting owner has the opportunity to see that the subcontractors are paid before releasing funds intended for them. The status of the contracting owner's landlord has nothing to do with these provisions. An exception to the notification requirement based on the landlord's status would make no sense. It is worth emphasizing once again that the

universe of subcontractors are not helped by expanding the circumstances where pre-lien notification is not required, because pre-lien notification prevents non-payment of subcontractors.

C. The Pre-Lien Notification Provisions are Not Altered Depending on the Sophistication of the Parties Before the Court.

Appellant errs when it suggests that the proper approach to this statute is to enforce it situationally, to enforce it liberally or strictly depending on who the contracting owner happens to be in the particular case before the court. Appellant's brief seems to treat the statute as establishing some kind of rebuttable presumption that certain classes of owners are sophisticated. Appellant's brief says:

Single family home owners are presumed to be unsophisticated. More sophisticated landowners are not given as much leeway by the Minnesota Legislature. Specifically, the legislature has carved out certain exceptions to the pre-lien notice requirement for commercial property and for larger businessman.¹²

Appellant continues by arguing that Bath & Body is a large company, and it would therefore be contrary to the statutory purpose to extend this protection to Bath & Body. It is almost as if Wallboard is suggesting that the statute creates a statutory rebuttable presumption that the owner of less than 5,000 square feet is unsophisticated, and the

¹² Citing Master Asphalt Co. v. Voss Const. Co., Inc., of Minneapolis, 535 N.W.2d 349, 354 (Minn. 1995) (exception furthers a legislative purpose of protecting small business and “small property owners “); Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 853 (Minn. 1977); see also Nasseff v. Schoenecker, 253 N.W.2d 374 (Minn. 1977).

owner of more than 5,000 square feet is sophisticated.

It is true that one of the purposes of the pre-lien notice protection found in Minn. Stat. § 514.011 was intended to protect contracting homeowners, farmers, and small businesses, as Appellant points out, citing Polivka Logan Designers, Inc. v. Ende, 251 N.W.2d 851, 853 (Minn. 1977). The statute achieves that purpose by recognizing that small projects for contracting owners with small business owners deserve more protection. But it is quite plain that the statutory exception applies, or does not apply, depending upon the number of square feet, not the sophistication of the particular contracting owner. Emison v. J. Paul Sterns Co., 488 N.W.2d 336 (Minn. 1992). The Court does not stretch the language situationally in order to save liens impacting large company owners who happen to contract for improvements in a small space.

The issue then is not whether this particular contracting owner is sophisticated or unsophisticated, nor does the comparative size or sophistication of the subcontractor make a difference under the statutory language. Sophistication may be one of the reasons that furnish a rational basis for the different treatment of large improvements and small improvements, but it is not the only statutory purpose served. A party who is sophisticated has a right to expect that the law will be applied correctly and consistently in the same way as a party who is oblivious to the meaning of the law.

The real question here is whether the legislature could have believed that a contracting owner who leases a small space in a large building with many tenants is likely

more sophisticated (or less deserving of protection) than a small business in a single small building. One could easily argue that the reverse is true. What we do know is that the legislature decided to provide protection to owners based upon the amount of usable floor space they own. Section 514.011 subdivision 2 furnishes protection to the tenant contracting owner against unknown subcontractors, and the policy behind that protection applies equally to small tenants whether they are located in large buildings or small.

D. Cases Defining the Outer Perimeter of the Contracting Owner's Usable Space Offer No Support for Appellant's Position.

Appellant's brief next cites a number of cases that define the extent of usable floor space for purposes of the pre-lien notification exception. But in all of these cases, the calculation is applied to property owned by the contracting owner. In C. Kowalski, Inc. v. Davis, 472 N.W.2d 872 (Minn. Ct. App.1991) (petition for review denied) cited by Appellant merely holds that one measures the extent of the owners usable floor space by including the area within the exterior walls owned by the contracting owner. The contracting owner, Kowalski, owned the interior of the improvement and owned the exterior walls as well. Consequently, telling us that the exterior walls were found to be part of Kowalski's usable floor space does not support the contention that if Kowalski's property were located in a shopping center, that the Court would have added to Kowalski's total usable floor space the space of adjoining tenants. When viewed from the perspective of the owner that the statute is designed to protect, it is hard to make the case that the shoe store, or hardware, or other retail space leased by some other owner is really

“usable floor space” to Bath & Body.

Appellant also cites Bendiske Concrete & Masonry v. Barthel Construction, Inc., 515 N.W.2d 95 (Minn. 1994), but that case merely holds that if the owner of a gas station constructs a canopy, the area under the canopy is not included in the 5000 square feet usable square feet calculation. S.K. Candor & Associates, Inc. v. Diede, 1996 WL 722098 (Minn. Ct. App. 1996), also cited by Appellant, offers no new guidance on the exception, but merely restates the holding applied in prior published cases. Sullivan Bros. v. State Bank of Union Grove, 321 N.W.2d 545, 549 (Wis. Ct. App. 1982), a Wisconsin case is likewise irrelevant to the issues presented here.

Use of Kowalski and these other cases to solve the problem presented here is a form of circular reasoning. The square footage owned by Bath & Body was stipulated in this case to include less than 5000 square feet. If Appellant is really arguing that ownership is irrelevant to the calculation required by the exception, then that would lead to the conclusion that structures sharing party walls on an old-fashioned main street would be counted for purposes of pre-lien notice, or that a 2500 square foot condominium unit would exceed 5000 square feet of usable space, because one must count the space owned by others in the same building.

E. Absence of the Word Owner Does Not Imply that Usable Floor Space is Calculated without Regard to Ownership.

Appellant next argues that the word "owner" is not found anywhere within Minn. Stat. § 514.011, subd. 4c because, Appellant argues, the exceptions rely upon the

"existing property" and not ownership as the limiting factor. We disagree. The concept of ownership is inherent in the term property itself. The term property implies the concept of ownership. That is what property is, real estate that is owned. When measuring the extent of property, one always measures the extent of the owner's property, not property owned by anyone and everyone. In Kowalski, didn't look to the area of usable space available to Kowalski and his next door neighbors. And that is because it is implicit in the use of the term property that an owner's property is being measured. Really, if the legislature had intended that the usable floor space measured for the exception would include property owned by others, then it would seem just as logical that it would have specifically so indicated. The center of the mechanics lien universe, and all of the protections found in Chapter 514, is the contracting owner. Why would the legislature set its policies based on the amount of property owned by persons who are in no position to distribute payments to the general contractor and its subcontractors.

It makes no sense to construe the lien exceptions to allow the usable space measurement to extend beyond the borders of the property owned by the contracting owner. It cannot seriously be argued that in a row of separately owned commercial downtown adjoining properties, for example, that the usable floor space encompasses the entire downtown should be measured for pre-lien notice purposes simply because the buildings are physically adjoined. The measurement ends at the outer wall of the improvement owned by the contracting owner. Appellant's assertion that ownership does

not matter is plainly incorrect. The real question presented here is whether one measures the extent of property owned by the landlord or the tenant, and the court properly found that focusing on the property owned by the contracting owner best implements the statutory purpose.

III. CONCLUSION

This case requires the Court's determination of one issue: (1) was pre-lien notice required? Because the contracting owner's only interest was in property containing less than 5000 square feet of usable floor space, the District Court properly held Wallboard's mechanic's lien was null and void for failure to provide the notice required by Minn. Stat. § 514.011, Subd. 2. Accordingly, the judgment of the District Court must be affirmed.

Dated: April 21, 2008

Respectfully Submitted,

RINKE-NOONAN

By



Gerald W. Von Korff, #113232
Ryan J. Hatton, #310803
Attorneys for Respondents
P.O. Box 1497
St. Cloud, MN 56302-1497
320 251-6700

Case No. A08-0319

STATE OF MINNESOTA

IN COURT OF APPEALS

Wallboard, Inc.,

Appellant,

v.

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

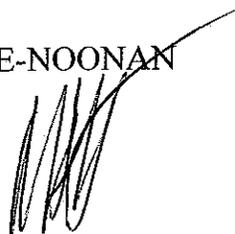
Respondents.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a monospaced font. The length of this brief is 487 lines, 5,611 words. This brief was prepared using Wordperfect 12 software.

Dated: April 21, 2008

RINKE-NOONAN

By 

Gerald W. Von Korff, #113232
Ryan J. Hatton, #310803
Attorneys for Respondents
P.O. Box 1497
St. Cloud, MN 56302-1497
320 251-6700