

CASE NO. A08-0418, A08-569

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State of Minnesota
In Court of Appeals

S.M. HENTGES & SONS, INC.,

Respondent,

vs.

RICHARD MENSING AND MARTHA A. MENSING, Husband and Wife;
a/k/a RICHARD D. MENSING; MARTHA A. MENSING Revocable Living Trust,
MARTHA A. MENSING AND RICHARD D. MENSING, Trustees,

Appellants,

and

LAND GEEKS, LLC, a Minnesota Limited Liability Company; MICHAEL VINCENT;
SHORT ELLIOTT HENDRICKSON, INC., a Minnesota Corporation; THE CITY OF
CANNON FALLS; AND THE COUNTY OF GOODHUE,

Defendants.

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE FACTS

Hentges attempts to describe its relationship with Land Geeks as a traditional contractor/developer relation where the contractor has advanced its services and taken a security interest in the Purchase Agreement return. Significantly, Tom Kaldunski, the Project engineer, testified that Steven Hentges stated that he was a “partner” with Land Geeks in the project. (Trans. p. 283 – 284). Mr. Hentges did not refute or deny Mr. Kaldunski’s testimony. Mr. Hentges also admitted on cross-examination that by taking the Assignment of the Purchase Agreement, Hentges was “stepping into the shoes” of Land Geeks. (Trans. p. 118 – 119). No matter how Hentges wants to characterize the FPS Agreement, the parties clearly viewed themselves as “partners.” As a partner or joint venturer with Land Geeks, Hentges had an ownership interest in the Property. *See Ryan Construction, Inc. v. JAG Investments, Inc.*, 634 N.W.2d 176 (Minn. 2001)(member of joint venture has ownership interest in property sufficient to require personal service on member to commence mechanic’s lien foreclosure action).

Hentges points to the Amendment to the FPS Agreement (Tr. Ex. 4, RA – 00119 – 0026) as evidence that it was not a joint venturer or partner with Land Geeks. However, The Amendment was entered into several months after the FPS Agreement and after Land Geeks had defaulted in making payments to Hentges. In fact, Mr. Hentges testified that the reason for the Amendment was because Land Geeks had failed to make certain payments to Hentges that were

due for lots that had been sold. (Trans. 109 – 110). The Amendment does not alter the true relationship of the parties. In fact, it gives Hentges additional controls over financing and sale of lots.

ARGUMENT

1. *The Trial Court Erred As A Matter Of Law In Determining That Respondent S. M. Hentges & Sons, Inc.'s ("Hentges") Equitable Interest In The Property Did Not Disqualify It From Asserting A Mechanic's Lien Against The Property.*

The Trial Court concluded that the FPS Agreement and the Amendment to the FPS Agreement gave Hentges an equitable interest in the Property, as the assignee or partner of Land Geeks. (Conclusion of Law No. 2, App. p. A-29). Hentges has not sought review of the Court's Conclusion by filing a Notice of Review, nor has it challenged the Conclusion in its Brief. Rather, Hentges relies solely on an erroneous interpretation of *Nelson v. Nelson*, 415 N.W.2d 694, 697 (Minn. App. 1987). Hentges seeks to distinguish *Nelson* on the ground that *Nelson* involved a contract for deed and Land Geeks only had a purchase agreement. However, this is a distinction without a difference.

A vendee under a purchase agreement has an equitable interest in the property. See *Automated Building Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 830 (Minn. App. 1994). As discussed in Appellant's Brief, the *Nelson* court based its holding on the an analysis which does not distinguish between the equitable interest held by a contract for deed vendee, and the equitable interest held by a purchase agreement vendee.

The identity of these equitable interests has been recognized by the Legislature, which has provided the same method for cancelling a vendee's interest in a contract for deed and a purchase agreement. Minn. Stat. § 559.21 provides the same procedure for cancelling a contract for deed and a purchase agreement, thereby recognizing that both create the same type of equitable interest in land. See *Romain v. Pebble Creek Partners*, 310 N.W.2d 118 (Minn. 1981)(test for applicability of statutory cancellation notice requirement is not whether contract is "contract for deed" or "purchase agreement," but whether agreement is contract for conveyance of real estate or any interest therein); *Tran v. Estate of Ditzler*, 411 N.W.2d 6 (Minn. App. 1987)(Purchase agreement for sale of 68 condominium units was "contract of sale" within meaning of statute).

Hentges next seeks to distinguish *Nelson* on the grounds that possession had not been transferred from the Mensings to Land Geeks or Hentges. This argument totally ignores the facts of this case. Clearly, Land Geeks and Hentges had possession of the Property. Land Geeks and Hentges performed very substantial grading and construction on the Property. The work performed by Hentges was done under contract with Land Geeks. Land Geeks sold several of the lots. If Land Geeks and Hentges did not have possession of the Property, then they must have been trespassers. Clearly, both Land Geeks and Hentges had sufficient possession to satisfy any such requirement in *Nelson*.

Finally, Hentges seeks to bolster its erroneous interpretation by citing *Mill City Heating & Air Conditioning v. Nelson*, 351 N.W.2d 362, 365 (Minn. 1984).

While, *Mill City* does hold that a purchaser under an unrecorded purchase agreement for registered land is not an “owner” for purposes of the pre-lien notice statute, the basis for this holding is the Torrens Act, not any distinction between a purchase agreement and a contract for deed. The Court expressly distinguished between registered and abstract property as follows:

The issue, then, is whether a purchaser under an unrecorded purchase agreement for registered land is an “owner” within the terms of Minn.Stat. § 514.011 (1982), the prelien notice statute, and thereby entitled to a prelien notice.

In *Dolder*, we held that purchasers under an unrecorded purchase agreement for unregistered land were “owners” and were entitled to a prelien notice. We are now told in this appeal that the real estate in *Dolder* was, in fact, registered land. Even so, this fact was not presented to us in *Dolder* and, therefore, *Dolder* did not decide the issue before us now.

Registered land stands on a different footing than unregistered land.

The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered.

351 N.W.2d at 364

Hentges chose to enter into a nontraditional agreement with Land Geeks whereby it stood to participate in the profits of the development of the Property, in addition to being paid for its work. Unfortunately, the project was not successful. However, Hentges cannot retroactively change the fact that it voluntarily took a risk, in return for a potentially large reward. By entering into the FPS Agreement, Hentges became an equitable owner of the Property, and,

therefore, became disqualified to assert mechanic's lien rights. The Trial Court erroneously interpreted the law, and its decision should be reversed.

2. *The Trial Court Erred As A Matter Of Law In Determining That Hentges Was Not Required To Serve A Subcontractor's Prelien Notice On The Mensings.*

There is no dispute that Hentges was required to give the Mensings a pre-lien notice. Rather, the dispute is whether the notice given was adequate and correct. It is undisputed that Hentges gave the "general contractor's" notice required by subdivision 1 to both Land Geeks and the Mensings. It is also undisputed that the Mensings were not under a direct contract with Hentges. Accordingly, the express language of Minn. Stat. § 514.011 required Hentges to give the "subcontractor's notice" required by subdivision 2(a). It did not do so, and its lien is rendered invalid. Minn. Stat. § 514.011, subd. 514.011, subd. 2.

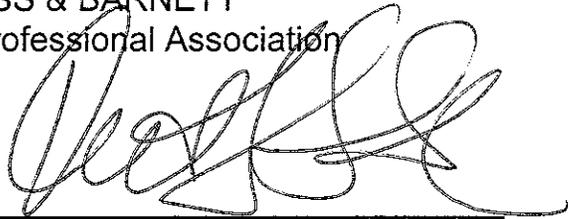
Since Hentges gave the wrong prelien notice to the Mensings, its lien is invalid. The Trial Court erred in holding to the contrary, and must be reversed.

CONCLUSION

Hentges also failed to comply with the requirements of the mechanic's lien statute in perfecting its lien. Minnesota courts have repeatedly held that a lien claimant must strictly comply with the statutory requirements for perfecting its lien. Its failure to do so invalidates the lien.

The Trial Court should be reversed, and this case remanded with direction to enter judgment dismissing Hentges' mechanic's lien claim.

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Dated: April 25, 2008

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