

CASE NO. A08-0418 , A08-569

State of Minnesota
In Court of Appeals

S.M. HENTGES & SONS, INC.,

Defendant,

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,

Respondents,

and

LAND GEEKS, LLC, a Minnesota Limited Liability Co.; MICHAEL VINCENT;

Defendants,

SHORT ELLIOTT HENDRICKSON, INC., a Minnesota Corporation;

Appellant,

THE CITY OF CANNON FALLS; AND THE COUNTY OF GOODHUE,

Defendants.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This is an appeal from a final judgment of the Goodhue County District Court, the Honorable Robert R. King, Jr. presiding, entered on February 8, 2008, which, in part, dismissed Appellant Short Elliott Hendrickson, Inc.'s ("SEH") mechanic's lien claim for failure to comply with the prelien notice requirement of Minn. Stat. § 514.011, subd. 2. By Order, dated April 11, 2008, this Court consolidated SEH's appeal with the appeal of Respondents Richard and Martha Mensing (the "Mensings") of the Judgment granting Plaintiff S. M. Hentges & Sons, Inc. ("Hentges") a mechanic's lien on the Property for oral argument and decision.

STATEMENT OF THE FACTS

The Mensings do not dispute the statement of facts contained in SEH's Brief. It is undisputed that SEH did not serve any prelien notice on the Mensings.

ARGUMENT

1. *The Trial Court Correctly Determined That SEH's Failure To Give Prelien Notice To The Mensings Invalidated Its Mechanic's Lien.*

The Trial Court correctly concluded that SEH was required to serve the Mensings with the prelien notice required by Minn. Stat. § 514.011, subd. 2 as a condition of obtaining a mechanic's lien on the Property. It is undisputed that SEH failed to do so. Accordingly, its mechanic's lien is invalid. *Christle v. Marberg*, 421 N.W.2d 748 (Minn. App. 1988).

SEH relies on the exception from the prelien notice requirement contained in Minn. Stat. § 514.011, subd. 4b. In doing so, SEH relies entirely on the unpublished Court of Appeals decision in *E & H Earth Movers, Inc. v. Waland Companies*, 1998 Minn. App. LEXIS 385 (Minn. App. April 7, 1998). Since the *E & H* case is an unpublished decision, it has no precedential value. Minn. Stat. § 480A.08, subd. 3(c). More importantly, *E & H* was wrongly decided, and is in direct conflict with published decisions of the Supreme Court and the Court of Appeals, as pointed out in the dissent by Judge Short.

The Trial Court correctly rejected *E & H*, and correctly chose to rely on the published decision of the Court of Appeals in *Christle v. Marberg*, 421 N.W.2d 748 (Minn. App. 1988). First, as the Trial Court noted in its decision, the facts of *E & H* are distinguishable from this case. In *E & H*, the lien claimant was under direct contract with the property owner and developer, Waland Companies. In this case, Land Geeks was the developer and party with whom SEH contracted. SEH did not contract with the Property owners, the Mensings. Significantly, *E & H* did not involve an attempt by the lien claimant to assert a lien against the sellers of the property, with whom it did not contract, because the sale to Waland had been closed prior to the lien filing. In this case, SEH is seeking to impose a lien against the Mensings' interest in the Property, even though the Mensings did not hire or contract with SEH.

Second, the *E & H* Court incorrectly construed Minn. Stat. § 514.011, subd. 4b when it interpreted "more than four family units" to mean "more than

four residential lots.” Nothing in the statute supports the *E & H* court’s interpretation. Rather, the heading of Minn. Stat. § 514.011, subd. 4b states: **“Exceptions; multiple dwelling.”** The heading does not say “multiple lots.” The Legislature certainly could have expressly stated that the exception applied when four or more lots were involved in an improvement, which would have essentially eliminated the prelien notice requirement for all residential subdivisions. However, the Legislature chose to use the phrases “multiple dwelling” and “family units,” which clearly connote a multi-unit building, such as a townhome or condominium.

Third, the *E & H* Court and SEH incorrectly relied on the owner’s “sophistication” to excuse noncompliance with the prelien notice provision. The Minnesota Supreme Court has expressly rejected such an approach, stating that “[I]f the courts began evaluating the relative sophistication of owners, it could eliminate the protection of the prelien notice requirement the legislature has granted to homeowners.” *Emison v. J. Paul Stearns Co.*, 488 N. W.2d 336, 338 (Minn. 1992). See *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982). Accordingly, attempts to interject fact issues regarding the owner’s “sophistication” are expressly rejected by binding precedent.

Fourth, the *E & H* Court and SEH incorrectly imply that the mechanic’s lien law is to be liberally construed in favor of lien claimants. This is also an incorrect interpretation of the Supreme Court’s prior decisions as they relate to prelien

notice. In *Merle's Construction Company, Inc. v. Berg*, 442 N.W.2d 300 (Minn. 1989), the Supreme Court specifically held that:

The prelien notice is no mere technicality. Failure to give the notice defeats the mechanic's lien. *Nasseff v. Schoenecker*, 312 Minn. 485, 491, 253 N.W.2d 374, 377 (1977). There must be strict compliance with the prelien notice statutory requirements. *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn.1982). The court of appeals correctly held that the trial court erred in dismissing the prelien notice as a technicality which could be overlooked.

442 N.W.2d at 302.

The Trial Court correctly relied on *Christle v. Marberg, supra*, which is quite similar to this case on its facts. SEH seeks to distinguish *Christle*, on the ground that it did not discuss or consider the subdivision 4b exception. Admittedly, *Christle* does not expressly discuss subdivision 4b, but rather discusses the related exception contained in subdivision 4c. However, implicit in the decision is the conclusion that none of the exceptions to the prelien notice requirement applied. Certainly, the Court and counsel would have analyzed subdivision 4b, as well as subdivision 4c, if there was any reasonable argument that it applied. Apparently, neither the Court, nor counsel felt that the exception applied, which is consistent with the Mensings' analysis herein. This case is governed by *Christle*. There is no reason why this Court should disregard this clear precedent and reach a different result.

Finally, SEH attempts to bolster its erroneous interpretation by reference to legislative history. SEH's attempt is to no avail. SEH does not identify the author of the handwritten note on the version of the bill relied upon. The note may have

been made by anyone. In *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955), the Supreme Court held that it was improper to rely on the motive or interpretation of a single legislator in construing a statute, stating:

Even if we were to hold that it would be proper to inquire into the motives of the legislature, it is difficult to see how this could be done. In that respect there is a vital difference between acts of congress and acts of our state legislature. In determining what has preceded enactments of congress, reference may be had to the congressional record where debates of committees as well as action of congress itself are recorded. In our legislature there is no record of debates or other action taken, either in committee or otherwise, except such as are reported in the journals of the house and senate. Laws would rest on an insecure foundation if courts were to seek to determine motives of individual members of the legislature in passing laws by resort to extraneous evidence which was not part of the journal entry. (Emphasis added).

245 Minn. at 380, 71 N.W.2d at 876.

Finally, SEH takes contradictory positions on the role that the owner's "sophistication" plays in the analysis. On page 10 of its Brief, SEH states that "Subdivision 4b neither requires nor invites Minnesota courts to distinguish landowners from developers – or to measure their relative sophistication – in determining whether its exception applies." However, on page 11, SEH argues that the prelien notice requirement was meant to protect unsophisticated owners. The *Christle* Court specifically addressed the issue of the statute's protection of sophisticated, large residential developers as follows:

Christle also argues that the legislature intended the pre-lien notice to protect farmers and individual homeowners, and provided an exemption from this notice for commercial developers. Christle argues that appellant and Marberg were commercial developers of

residential properties, and thus the pre-lien notice requirement should not apply.

The legislature designed the pre-lien notice requirement to protect individual homeowners and farmers. *Korsunsky*, 370 N.W.2d at 33 n. 2. Read literally, this statute may in some circumstances protect large residential projects such as multi-story apartments or condominiums. In certain cases the excavation, site preparation, etc. for large residential towers could require that pre-lien notice be given to the owner of the property, thus protecting large residential developers. Although this seems at odds with the aforementioned intent, we decline to act contrary to the statute's plain language.

412 N.W.2d at 751.

The *Christle* Court's rejection of any "owner sophistication" analysis is consistent with prior Supreme Court precedent, which rejects any such consideration. *Emison v. J. Paul Stearns Co.*, 488 N. W.2d 336, 338 (Minn. 1992); *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982). Presumably, the *Christle* Court considered this same legislative history in reaching its decision quoted above. The *Christle* Court clearly considered the situation involved in this case where site work on a larger residential development would be subject to prelien notice requirements, while the building itself was not. The Court correctly chose to rely on the plain language of the statute, which rendered the exception inapplicable. The same result obtains here.

The Trial Court's decision that SEH's lien was invalid for failure to give the Mensings prelien notice is correct. The law was clear when SEH began work on this project that prelien notice was required to be given to the Mensings. SEH, a large, sophisticated engineering firm, chose not to serve the required notice. The mechanic's lien statute expressly provides that its failure to do so invalidates its

lien. SEH has obtained judgment against Land Geeks, the party with whom it contracted, for the amounts owed. However, SEH does not have a mechanic's lien against the Property.

The Trial Court's decision is correct, and should be affirmed.

2. *There is No Basis For SEH's Argument That Engineer's Are Exempt From Prelien Notice Requirements.*

SEH makes the novel, and unsupported, argument that engineers, as a class, are exempt from prelien notice requirements. This argument fails for at least three reasons. First, SEH did not raise this issue before the Trial Court. Accordingly, it cannot raise it for the first time on appeal. *Park Plaza State Bank of St. Louis Park v. CWS Development Co.*, 303 Minn. 306, 227 N.W.2d 560 (1975); *Northwestern Nat. Bank Southwest v. Lectro System, Inc.*, 262 N.W.2d 678 (Minn.1977).

Second, the case relied upon, *Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 513 N.W.2d 241 (Minn. 1994), does not deal with prelien notice requirements. Rather, *Kirkwold* involved the question of whether the services performed by engineers and surveyors are entitled to lien priority, under Minn.Stat. § 514.05, even though the interest of a purchaser in good faith and a mortgagee were recorded prior to the actual and visual beginning of the improvement on the ground. The Court held that an engineer's lien had priority over the interests of a mortgagee and purchaser who had actual knowledge of the engineer's services when their interests were recorded. 513 N.W.2d at 244 – 245.

There is nothing in *Kirkwold* that suggests that engineers are not subject to the requirements for lien perfection. For example, if SEH's argument is accepted, engineers would not be required to serve and file a mechanic's lien statement as required by Minn. Stat. § 514.08. Nor would an engineer be required to foreclose its lien in the time or manner specified in the Mechanic's Lien Act. See Minn. Stat. §§ 514.10 - 514.12. In effect, an engineer would have a lien even though it was never placed of record, nor notice given to the owner. Clearly, this is not what the Legislature intended.

Third, placing an engineer in such a special class would raise constitutional questions regarding equal protection. See *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977)(Prior version of statute of limitations contained in Minn. Stat. § 541.051 that excluded other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers, granted special immunity to persons within its terms without rational basis for regarding those persons as distinct and separate class and thus violated constitutional provisions forbidding immunity from suit to limited class of defendants without reasonable basis for such classification). It is axiomatic that courts are to interpret statutes to avoid unconstitutionality, if at all possible. Minn. Stat. § 645.17(3).

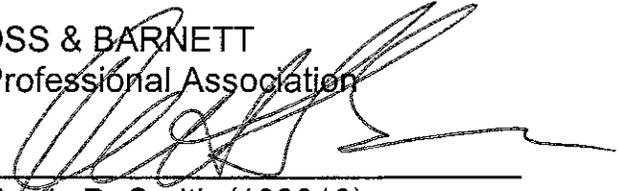
For the reasons stated above, SEH's argument that it is exempt from the prelien notice requirements of the Mechanic's Lien Act should be rejected.

CONCLUSION

The Trial Court correctly determined that SEH's mechanic's lien was invalid for failure to give the Mensings prelien notice. Accordingly, the Trial Court's judgment should be affirmed.

Dated: May 5, 2008

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