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FILED

Case No: A08-1295
STATE OF MINNESOTA
IN SUPREME COURT

T.A. Schifsky & Sons, Inc.,
a Minnesota corporation,

Plaintiff,

vs.

Bahr Construction, L.L.C., et al.,

Defendants,

Consolidated Lumber Company,
d/b/a Arrow Building Center,

Respondent,

Premier Bank,

Appellant-Petitioner,

Larson Contracting, Inc. et al.,

Intervening Defendants.

and

Premier Bank,

Appellant-Petitioner,

v.

Bahr Construction & Contracting, L.L.C., d/b/a Bahr Construction, L.L.C., et al.,

Defendants,

Consolidated Lumber Company,

d/b/a Arrow Building Center, Inc.,

Respondent.

PETITION FOR REHEARING OF PREMIER BANK

Katherine Melander, Esq.
Stephen F. Buterin, Esq.
Brian W. Varland, Esq.
Coleman, Hull & van Vliet, PLLP
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001

*Attorneys for Appellant-Petitioner
Premier Bank*

Harvey N. Jones, Esq.
Harvey N. Jones, P.A.
1350 South Frontage Road
Hastings, MN 55033
(651) 437-1818

*Attorney for Consolidated Lumber
Company, d/b/a Arrow Building Center*

INTRODUCTION

Appellant Premier Bank respectfully petitions for rehearing pursuant to Minn. R. Civ. App. P. 140.01. As grounds for rehearing, Premier Bank believes the court overlooked and failed to consider the inconsistency and conflict between Minn. Stat. § 514.14 (2008) and Rules 54.04 and 58.01 of Minnesota Rules of Civil Procedure with respect to the time allowed for the taxation of costs and their inclusion in the judgment in a mechanic's lien case. Pursuant to Minn. R. Civ. P. 81.01(a) and accompanying Appendix A, neither Minn. R. Civ. P. 54.04 nor Minn. R. Civ. P. 58.01 govern in this case because they are inconsistent and conflict with the language of Minn. Stat. § 514.14, which requires that the judgment in a mechanic's lien action include costs, including attorney fees, that must be fixed at the time of trial.

The court of appeals did not address this issue in its order dismissing Premier Bank's appeal and the parties did not brief the issue because it first arose during oral argument before this court. Premier Bank therefore respectfully requests that this court grant its petition for rehearing to allow additional briefing and oral argument on the limited issue of when costs must be taxed and inserted into the judgment under Minn. Stat. § 514.14, and the applicability of Rule 58.01 to mechanic's lien actions.

ARGUMENT

In its decision, the court held that the November 26, 2007 order was not properly certified as a final partial judgment under Minn. R. Civ. P. 54.02 because an award of attorney fees in a mechanic's lien case is not a separate claim from the underlying mechanic's lien action determining the validity and amount of the lien. It then determined that because the award of attorney fees was not a separate claim, the December 13, 2007 judgment entered pursuant to the order was immediately appealable as a final judgment even though the district court had expressly reserved the determination of actual attorney fees for later consideration. The court reasoned that because attorney fees in a mechanic's lien case are costs, Rule 58.01 of the Minnesota Rules of Civil Procedure and Rule 104.02 of the Minnesota Rules of Civil Appellate Procedure governed and rendered the December 13, 2007 judgment final and immediately appealable.

The court's decision is premised on the erroneous belief that as costs, an award of attorney fees in a mechanic's lien case may be taxed and inserted into the judgment at any time pursuant to Minn. R. Civ. P. 58.01. But unlike other civil cases, the mechanic's lien

statute limits the time a successful lien claimant has to tax costs, including attorney fees, and have them inserted into the judgment.

The rules of civil procedure do not provide a time limit as to when a party must tax costs and disbursements, or when they must be inserted into the judgment. Minn. R. Civ. P. 54.04 allows for the taxation of costs and disbursements as provided by statute. Minn. R. Civ. P. Rule 58.01 provides that the entry of judgment "shall not be delayed for the taxation of costs and the omission of costs shall not affect the finality of the judgment."

In contrast, Minn. Stat. § 514.14 specifically states that in a mechanic's lien action, "[j]udgment shall be given for the amount of demanded and proved, with costs and disbursements to be *fixed* by the court *at the trial*." In this instance, the term "fixed" means to "decide; settle; specify." See THE OXFORD DICTIONARY AND THESAURUS 551 (Am. Ed. 1999). The phrase "at the trial" necessarily refers to the time of the actual trial of the mechanic's lien claim. Thus, unlike Minn. R. Civ. P. 54.04 and 58.01, the plain and unambiguous language of Minn. Stat. § 514.14 requires that costs in a mechanic's lien be taxed and included in the judgment at the time of trial and not subsequent to the entry of judgment.

This interpretation finds support in the three seminal cases from this court addressing the issue of attorney fees in the context of mechanic's lien cases. The court first addressed the issue of attorney fees under the mechanic's lien statute in *Schmoll v. Lucht*, 106 Minn. 188, 118 N.W. 555 (1908). In ruling that a successful lien claimant is entitled to recover attorney fees as costs under the mechanic's lien statute (based on

language nearly identical to the present day Minn. Stat. § 514.14), the court noted that the statute had been amended to remove the limitation on the amount the district court may, in its discretion, award for attorney fees, stating:

The only practical change made by the substitute was that the express limitation on the discretion of the court was removed, leaving the amount of costs to be allowed to the lien holder to the discretion of the court, to be exercised at the trial according to the circumstances of each particular case

106 Minn. at 191, 118 N.W. at 556 (emphasis added). The court also observed that the evidentiary issues relating to the award of attorney fees had been decided at trial, commenting that, "[n]o question is urged as to the reasonableness of the allowance, as the defendant admitted on the trial that the value of the services of the plaintiffs' attorney in the action was at least \$25." *Id.* 106 Minn. at 190, 118 N.W. at 555 (emphasis added).

In the next case in the trilogy, *Barrett v. Hampe*, 237 Minn 80, 89, 53 N.W 2d 803, 808 (1952), this court ruled that Minn. Stat. § 514.14 did not allow a lien claimant to recover attorney fees incurred on appeal. In rejecting the lien claimant's claim for attorney fees on appeal, this court construed the language of Minn. Stat. § 514.14 to require that an award of attorney fees under the mechanic's lien statute was to be made at trial, stating: "[t]his court has interpreted this provision to include attorneys' fees at the trial. . . . [W]e have said that the allowance of attorneys' fees is - 'to be exercised at the trial according to the circumstances of each particular case'" *Id.* at 88, 53 N.W 2d at 808 (quoting *Schmoll*, 106 Minn. at 191, 118 N.W. at 556) (citations omitted) (emphases added).

Finally, this court established the standard for determining the reasonableness of attorney fees awarded at trial pursuant to Minn. Stat. § 514.14 in *Obraske v Woody*, 294 Minn. 105, 199 N.W.2d 429 (1972). Like *Schmoll* and *Barrett*, this court drew heavily from the testimony presented at the trial in the matter, noting a claim for attorney fees for services not yet rendered:

There was no testimony by Mr. Smith as to the amount of time spent by him on these services he had performed for Obraske. Smith testified that the reasonable value of his services up to the drawing of findings of fact, conclusions of law, and order for judgment was \$4,500. He further testified as to the legal services he expected to perform in the future in completing the matter and stated that, in his opinion, the reasonable value of those services was \$1,500. He testified that actual costs incurred by Obraske were in the amount of \$211. There was no cross-examination of his testimony by opposing counsel nor was any evidence of any kind introduced at the trial to contradict or otherwise contest Smith's testimony.

Id. 294 Minn. at 107, 199 N.W.2d at 430-31 (emphasis added).

These three cases all recognize that the amount of costs, including attorney fees, awarded pursuant to Minn. Stat. § 514.14 must be determined at the time of trial and not a later date after the trial has concluded. They demonstrate that Minn. Stat. § 514.14 places a procedural limitation on the timeframe for a court's determination of costs, including attorney fees, and the inclusion into a mechanic's lien judgment. This century-old interpretation and application of Minn. Stat. § 514.14 is inconsistent with an open-ended timeframe under Minn. R. Civ. P. 54.04 and Minn. R. Civ. P. 58.01.

Minn. Stat. § 514.14 requires that costs be determined by the district court at the time of trial. The statute further requires that these costs, if awarded by the district court,

must be included in the judgment awarded. This necessarily precludes the entry of a final judgment in a mechanic's lien action where the actual amount of those costs have yet to be determined. Thus, a mechanic's lien judgment entered pursuant to Minn. Stat. § 514.14 that does not include the actual amount of costs, including attorney fees, is not final and appealable, notwithstanding the language of Minn. R. Civ. P. 58.01. As it stands, this court's decision renders the language "fixed . . . at the trial" in Minn. Stat. § 514.14 superfluous and meaningless. See *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (holding courts should interpret statute whenever possible to give effect to all its provisions and no word, phrase or sentence should be deemed superfluous, void, or insignificant); see also, e.g., *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 155 (Minn. 2007) (giving purpose and effect to the words "and, as to" in Minn. Stat. 514.12, Subd. 3 to avoid an interpretation that would render statutory language purposeless).

This interpretation is consistent with and furthers the remedial purpose of the mechanic's lien statute because it requires courts to promptly address and determine the issue of costs, including attorney fees, so that final judgment determining the entire of the lien can be entered. By requiring courts to determine the amount of costs at trial, the language of Minn. Stat. § 514.14 ensures the complete resolution of mechanic's lien claims in a prompt and timely manner, and avoids unnecessary delays by the district court (or in some instances, by lien claimants themselves) in resolving the issue of costs. This, in turn, allows the successful lien claimant to more quickly recover on its lien claim.

Because Minn. R. Civ. P. 54.04 and 58.01 are inconsistent and conflict with the language of Minn. Stat. § 514.14, they do not govern in this case given this court's recognition of the statement found in Minn. R. Civ. P. 81.01(a) and accompanying Appendix A "that the Rules of Civil Procedure do not govern pleadings, practice and procedure in mechanic's lien proceedings under Minn. Stat. § 514.01-17 . . . insofar as the rules are inconsistent with the statutes." *Guillaume & Assocs., Inc. v. Don-John Co.*, 336 N.W.2d 262, 263 (Minn. 1983).

CONCLUSION

The language of Minn. Stat. § 514.14 is inconsistent and in conflict with Minn. R. Civ. P. 54.04 and 58.01 because it requires that a lien claimant tax its costs and disbursements at the time of trial and requires that they be inserted into the judgment at that time. Because the rules are inconsistent and in conflict with the language of Minn. Stat. § 514.14, they do not apply nor govern in this case. Premier Bank therefore respectfully requests that this court grant its petition for rehearing on the limited issue of when costs must be taxed under Minn. Stat. § 514.14, and the applicability of Rule 58.01 to mechanic's lien actions, and allow additional briefing and oral argument on this issue.

Respectfully submitted,

COLEMAN, HULL & VAN VLIET, PLLP

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By Stephen Buterin

Katherine M. Melander (A.R.# 180464)
Stephen F. Buterin (A.R. # 248642)
Brian W. Varland (A.R.# 339763)
8500 Normandale Lake Boulevard, Suite 2110
Minneapolis, Minnesota 55437
Telephone: (952) 841-0001
Facsimile: (952) 941-0041
Attorneys for Petitioner Premier Bank