

NO. A08-1883

State of Minnesota
 In Court of Appeals

Imperial Developers, Inc.,

Plaintiff,

vs.

Calhoun Development, LLC; Lind Homes, Inc.; Minnesota State Gurb & Gutter,
 a division of AVR, Inc.; Thompson Plbg Corp.; Great Northern I, Inc.;
 Bank First; and The Woodshop of Avon, Inc.,

Respondents,

Regal Custom Homes, Inc.; Guaranteed Mortgage of Minnesota;
 Jeremy J. Roseth; JMA Builders, Inc.; Prime Security Bank (Shakopee);
 and First Commercial Bank (Bloomington),

Defendants,

Southview Design & Construction, Inc.,

Appellant,

and

Scherer Bros. Lumber Co.,

Appellant,

vs.

Matthew Lind and Kristen K. Lind,

Third Party Defendants,

and

Simonson Lumber of Ham Lake, Inc.,

Third Party Plaintiff,

vs.

Contractors Capital Corporation, R&J Insulation, Inc., Automated Building
 Components, Inc.; J. Roux Interior Design, Inc., Merit Drywall, Inc.,
 and Tricolor Heron, LLC,

Third Party Defendants,

and

DJ's Companies, Inc.,

Intervenor and Fourth Party Plaintiff,

vs.

ORO Holdings, Gemini Equity Group, L.L.C. and Alliance Bank,

Fourth Party Defendants.

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INTRODUCTION

Appellants Southview Design & Construction, Inc. (“Southview”) and Scherer Bros. Lumber Co. (“Scherer”) (collectively “Appellants”) respectfully submit this Reply Brief in support of their appeal. The parties agree that the material facts of this case are not in dispute.¹ At the time that Appellants’ Mechanic’s Liens attached (October 13, 2005, and May 17, 2006, respectively), the mortgages of Respondent Bank First (“Bank First”) and Calhoun Development, LLC (“Calhoun”) (“Mortgages”) did not appear of record as memorials on the certificate of title to the Property, and Southview had no actual notice of either Mortgage. Applying the law to the undisputed facts mandates the reversal of the district court’s issuance of summary judgment in favor of Bank First and Calhoun, and the entry of judgment declaring Appellants’ Liens prior and superior to the Mortgages.

ARGUMENT

Appellants and Respondent agree that the issue of priority is dictated by the mechanic’s lien statute, Minn. Stat. § 514.05, subd. 1, which provides that mechanic’s liens attach and take effect from the date the first item of material or labor is furnished, “and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof.” *Id.* (emphasis added.)

¹ Throughout Respondent’s Statement of the Case and Statement of Facts (Respondent’s Brief pp. 3-8), Respondent alleges that the Mortgages were “registered” by the Hennepin County Registrar of Titles on June 28, 2005. This is not a statement of fact, but rather a central question of law in dispute in this case. Accordingly, for Respondent to represent, as a statement of fact, that the Mortgages were anything more than filed on June 28, 2005, was improper.

Accordingly, the issues before the Court are simply: (1) whether the Mortgages were of record on the Torrens Property at the time Appellants' Mechanic's Liens attached; and (2) whether Appellants had actual notice of those Mortgages when their Liens attached. The indisputable answer to both questions is no. Appellants' Mechanic's Liens are prior to the Mortgages, and the district court's ruling on priority must be reversed.

I. TO BE "OF RECORD" UNDER MINN. STAT. 514.05, SUBD. 1 AND THE TORRENS ACT, THE MORTGAGES HAD TO APPEAR AS MEMORIALS ON THE PROPERTY'S CERTIFICATE OF TITLE AT THE TIME APPELLANTS' MECHANIC'S LIENS ATTACHED.

While the act of "registration" of an interest in Torrens property and the moment in which an interest becomes "of record" under Minn. Stat. § 514.05, subd. 1 are related concepts, they are nonetheless distinct terms. Respondent concedes that to be "of record" on Torrens property, a mortgage must be "registered." (Respondent's Brief, p. 9). Respondent, however, argues that to be "registered" with respect to Torrens property, a mortgage must merely be filed with the registrar of titles, and that memorialization of the mortgage on the property's certificate of title is not required. (*Id.*) Absent authority supporting its interpretation of the statutes, Respondent erroneously asserts that the act of "registration" is completed when a document is filed, date stamped, and assigned a document number, and that memorialization of the interest by the registrar on the certificate of title is unnecessary for registration. (*Id.*) Respondent relies upon provisions in the Minnesota Recorder's Act and the laws applying to abstract property.

Respondent's argument, however, ignores the fundamental differences between abstract and Torrens property and the clear dictates of the Torrens Act.

Because this case involves Torrens property, the Torrens Act and case law involving Torrens property are controlling and dictate the outcome of this case. According to the plain text of the Torrens Act and the case law applying the Act, to be "of record" under Minn. Stat. § 514.05, subd. 1, a mortgage must not only be filed with the registrar of titles, it must also appear as a memorial on the certificate of title, giving notice to all the world of the interest so asserted.

A. The Interplay Between the Mechanic's Lien Statute (Minn. Stat. § 514.05) and the Torrens Act (Minn. Stat. Chap. 508) Determines the Priority of Appellants Mechanic's Liens in this Case.

Generally, an interest in Torrens property is established upon the registration of that interest. Minn. Stat. § 508.47, subd. 1 ("The act of registration shall be the operative act to convey or affect the land."); *Fingerhut Corp. v. Suburban Nat'l Bank*, 460 N.W.2d 63, 65-66 (Minn. 1990). The mechanic's lien statute provides an exception to that general rule. Under Minn. Stat. § 514.05, subd. 1, a mechanic's lien attaches and takes effect from the date the first item of material or labor is furnished on the property and shall be preferred to any mortgage not then of record, unless the lienholder had actual notice thereof. Unlike other property interests (such as mortgages), a mechanic's lien takes effect upon the property before any instrument documenting the mechanic's lien (e.g., the mechanic's liens statement) is recorded (for abstract property) or registered (for Torrens property) against the property. *Id.* See also Minn. Stat. § 508.25(7). Thus, regardless of the type of property affected, a mechanic's lien takes effect (and thus has

priority) from the date of the first item of material or labor furnished. Minn. Stat. § 514.05, subd. 1.

In contrast, the date on which a mortgage takes effect upon real property is dictated by the specific type of property to be affected (abstract vs. Torrens). *Fingerhut*, 460 N.W.2d at 65 (citations omitted). Like other interests, a mortgage on Torrens property only becomes effective against the property when that mortgage is registered. Minn. Stat. § 508.47, subd. 1 (“The act of registration shall be the operative act to convey or affect land.”); Minn. Stat. § 508.54 (A mortgage “shall be registered and take effect upon the title only from the time of registration.”)

In *Fingerhut*, the Minnesota Supreme Court concretely held that the act of registration of the mortgage was the operative act which created the interest in the property for purposes of priority. 460 N.W.2d at 65-66. Accordingly, until a mortgage is properly registered, it is not effective against the property, but only as a private contract between the mortgagee and mortgagor. *Id.* at 66. Notably, the Court held that “[t]he necessity of registration to create an interest *in land* is what distinguishes registered, or Torrens property, from abstract property.” *Id.* at 65 (emphasis added). The Court affirmed that the process of “registration” of an interest in Torrens property is different and unique from the process of filing and “recording” an interest for abstract property. Consequently, the process used to make an interest “of record” in abstract property (i.e., the mere filing of the interest with the county recorder’s office) is different from the process used to make an interest appear “of record” in Torrens property (i.e., the filing and registration of an interest with the registrar’s office).

B. The Torrens Act Expressly Sets Forth a Two-Part Process for Registration of a Mortgage

To determine what is necessary to make a mortgage appear “of record” under the Torrens Act, the Court must look to the Act itself and the requirements for registration of a property interest under the Act. Respondent concedes that once a mortgage is “registered” under the Torrens Act, it becomes “of record.” Thus, the analysis begins with a determination of what is required to “register” an interest under the Torrens Act. The Torrens Act expressly sets forth a two-part process for the registration of property interests (Minn. Stat. § 508.49) and mortgages specifically (Minn. Stat. § 508.55).

Pursuant to Minn. Stat. § 508.49, all interests in Torrens property (including mortgages) shall be registered by: (1) filing with the registrar the instrument which creates the interest; and (2) the insertion of a brief memorandum or memorial of the interest by the registrar on the certificate of title (i.e., memorialization). (Emphasis added.) Consequently, the registration of a mortgage is not complete until the registrar of titles enters a memorial of the instrument filed upon the certificate of title.

Similarly, pursuant to Minn. Stat. § 508.55, the registration of a mortgage shall be completed as follows: (1) The mortgage shall be presented to the registrar (i.e., filed by the interest holder); and (2) the registrar shall enter a memorial of the instrument upon the certificate of title. (Emphasis added.) As with § 508.49, the registration of a mortgage under § 508.55 requires two separate actions: filing of the instrument by the interest holder and memorialization of the interest on the certificate of title holder by the registrar of titles. (emphasis added). *See also* Minn. Stat. § 508.48 (showing the distinction

between the steps by providing that every instrument “which would affect the title to unregistered land under existing laws, if recorded...shall, in like manner, affect title to registered land if filed *and* registered”) (emphasis added.) Accordingly, filing alone is insufficient and is merely the first part of the registration process.

As these provisions expressly provide, the “registration” of a mortgage interest requires both the filing of the mortgage instrument and the entry of a memorial of that mortgage on the certificate of title. In other words, the isolated act of filing an instrument with the registrar of titles is insufficient in itself to register a mortgage interest in property. Rather, it is the entry of a memorial of the mortgage on the certificate of title, following an instrument’s filing, which actually registers the interest.

Respondent concedes that Section 508.55 establishes the process by which a mortgage is registered, but argues that merely filing the instrument is enough because Section 508.55 refers to the “instrument registered” in the past tense. What Respondent ignores is that before the words “instrument registered” are the words “the registrar shall enter upon the certificate of title a memorial of the instrument registered.” *Id.* Thus, once the memorial is entered, the instrument is “registered.” *Id.*

Section 508.55 dictates the manner of registration and expressly includes a memorialization requirement. Respondent’s theory that the existence of the word “registered” in the statute stands for the rule that memorialization is not a requirement of the registration process ignores the express language of Section 508.55. Following Respondent’s interpretation of this statute, the only act necessary to perfect registration would be to present a document to the registrar. If this were the rule, even documents

rejected by the registrar would be “registered” so long as the document had been presented. This conclusion is illogical and is clearly contrary to the principles underlying the Torrens Act.

What separates the Torrens property registration system from the abstract property recording system is the issuance of a certificate of title upon which all interested parties may rely without further inquiry into the property records. *United States v. Ryan*, 124 F.Supp. 1, 6 (D. Minn. 1954). If filing, date-stamping, and a document number alone perfected registration in Torrens property (as with abstract property), then there would be no difference between abstract and Torrens property, and no one could ever rely upon a certificate of title to contain all interests that may exist affecting the property. *Id.* As with abstract property, a party dealing with Torrens property would have to undertake a complete title and tract index search to ensure that no other interests had been filed and were not appearing on the certificate of title.

Memorialization of an interest on the certificate of title is precisely what separates abstract from Torrens property. *Id.* at 6; *Fingerhut*, 460 N.W.2d at 65-66. It is for this reason that registration cannot be complete without memorialization of the interest on the certificate of title. For this Court to hold, as Respondent contends, that filing, date-stamping, and assignment of a document number to an instrument accomplishes registration of an interest -- irrespective of memorialization on the certificate of title -- would be to completely gut the Torrens Act and render certificates of title “meaningless,” or at best unreliable. *See Ryan*, 124 F.Supp. at 6.

The controlling case involving the two-part requirement for registration under the Torrens Act continues to be *Ryan*. The central issue in *Ryan* was whether tax liens that had been filed with the registrar of titles but which the registrar did not memorialize on the certificate of title were effective against the property. The court expressly held:

The mere filing of a notice, by debtor's name only, in the office of the register of deeds cannot, and does not, create a lien on registered land. It is plainly evident to this Court that the liens authorized by M.S.A. § 272.48, to be filed with the register of deeds, must, in the case of registered property, be filed with the register of deeds in his capacity as registrar of titles, and to be effective, they must be noted as memorials on the certificate of title covering the specific parcel of registered land intended to be affected by such filing.

Id. at 6 (*citing* Minn. Stat. §§ 508.48 and 508.64) (emphasis added).

In reaching its decision, the court noted the important difference between abstract and Torrens property and the differentiating element in Torrens which requires memorialization on the certificate of title as a part of the registration process:

When a statute authorizes the recordation of an instrument in the office of the register of deeds it can only be interpreted as meaning that as to all properties unregistered the recording can be accomplished by simply filing the document with the register of deeds in his capacity as such, but if the property is registered, it must be filed with the register of deeds in his capacity as registrar of titles, and to effect a lien thereby, the instrument must be noted as a memorial on the specific certificate of title outstanding for the property intended to be affected, otherwise the filing of the instrument does not create a lien. The method of filing documents intended to affect registered property was, by statute, made definite and certain.

Id. at 6-7 (emphasis added).

Ryan confirms the “dual requirements” for registration under the Torrens Act: that in order for an interest in Torrens property to be registered, and “of record,” such interest must be both filed with the registrar and memorialized on the certificate of title. *Id.*

Unable to distinguish its case, and in an attempt to obscure the controlling effect of *Ryan*, Respondent alleges that Appellants “mislead” the Court and “misquote” the decision.² Appellants offer a simple response to the allegation made by Respondent: Appellants are confident that the case confirms Appellants’ interpretation and the baseless nature of Respondent’s accusations. First, the case was not misquoted. The brackets Appellants placed around the concluding words of the quotation expressly denote that the words were inserted by Appellant. Second, the bracketed language succinctly summarizes what the court meant by “so registered.”³ *Id.* at 9. As the Court will note, *Ryan*’s holding is that an interest in Torrens property is not effective against the property until it is noted on the property’s certificate of title, and that filing of the interest with the registrar of titles alone is insufficient to create the interest. *Id.* at 6. *Ryan* specifically negates Respondent’s argument that merely filing its Mortgage was sufficient to establish its interest and make it appear of record on the Property. *Id.*

² Respondent similarly alleges that Appellants took “extreme liberties” with *In re Collier*, 726 N.W.2d 799 (Minn. 2007), and “completely misconstrue[ed] the holding” of the case. (Respondent’s Brief at 16-17.) Appellants’ cited the court’s description of the difference between abstract and Torrens property in its brief. (Appellant’s Brief at 18-19.). The holding of the *Collier* case was discussed, in detail, in Appellants’ Brief on pages 39-40. Again, Respondent’s accusations are baseless.

³ Notably, Respondent chose to omit the last sentence of the passage from its quotation: “It [the law] provides that the holder of a certificate of title to registered land ‘shall hold the same free from all encumbrances, and adverse claims, excepting only’ those noted on the last certificate of title and certain other specified rights or claims not important here.” *Id.* at 9. This sentence, and *Ryan*’s earlier discussion of the memorialization requirement, that explain that by “so registered,” the court meant on the certificate. *Id.*

C. Consistency With the Minnesota Real Property Electronic Recording Act is Critical in Determining What Constitutes Registration Under the Torrens Act.

While the Minnesota Real Property Electronic Recording Act, Minn. Stat. § 507.0943(e), does not control this case,⁴ it provides important guidance regarding the definition of “registered” as it relates to Torrens property. Section 507.0943(e) specifically provides that, irrespective of the time of delivery, a document is “registered” under the Torrens Act when the electronic document is “memorialized or otherwise noted on the certificate of title.” In this way, the Electronic Recording Act confirms what acts constitute “registration.” *Id.* As Section 507.0943(e) illustrates, the Legislature adopted a definition of “registered” for electronic filings consistent with the text of Minn. Stat. §§ 508.48, 508.49 and 508.55, as well as case law addressing registration for paper filings. *See Ryan*, 124 F.Supp. at 6.

Under established rules of statutory construction, “[w]hen a statute does not expressly define a term, but the term is defined in a related statute, the statutes are in *pari materia*⁵ and should be construed together.” *In re Comm’n Investigation of Issues Governed by Minn. Stat. § 216A.036*, 724 N.W.2d 743, 746 (Minn. Ct. App. 2006). In other words, when a term is not expressly defined in a statute being interpreted, it is appropriate for the court “to consider other statutes relating to the same subject matter as

⁴ Appellants have never claimed that Minn. Stat. § 507.0943(e) controls this case. Rather, the statute provides guidance for the Court and further support for *Ryan*’s construction of the laws defining “registration” under the Torrens Act.

⁵ “Statutes ‘in *pari materia*’ are those relating to the same person or thing or having a common purpose.” *Apple Valley Red-E-Mix, Inc. v. State by Dep’t of Public Safety*, 352 N.W.2d 402, 404 (Minn. 1984) (*citing* Black’s Law Dictionary (rev. 5th ed. 1979)).

far as they shed light on the question” before the court. *Carlson v. Dep’t of Employment and Econ. Dev.*, 747 N.W.2d 367, 372 (Minn. Ct. App. 2008) (quotation omitted). Interpreting related statutes in this manner ensures consistency. *See Id.* at 372-73.

The Legislature is presumed to have acted with full knowledge of Minn. Stat. §§ 508.49, 508.55, and *Ryan’s* interpretation of them, when it enacted the Electronic Recording Act. *See Rockford Tp. v. City of Rockford*, 608 N.W.2d 903, 908 (Minn. Ct. App. 2000). The definition of the term “registered” in § 507.0943(e) reflects this presumption.

If this Court were to adopt Respondent’s proposed definition of “registration” (i.e., filing, date-stamping, and issuance of a document number), it would directly conflict with the rules of electronic filing and cause confusion in the law. Paper filings for Torrens property would be considered “registered” (and thus effective) upon filing, whereas electronic filings would be “registered” (and thus effective) only upon memorialization on the certificate of title. Such inconsistency is nonsensical and directly conflicts with the provisions regarding the registration requirements under Minn. Stat. §§ 508.49 and 508.55. Accordingly, this Court should construe “registration,” as set forth in §§ 508.49 and 508.55, consistent with § 507.0943(e), and hold that the Mortgages were not “registered” (and thus not “of record”) until they appeared as memorials on the certificate of title to the Property on September 20, 2006.

D. The Recorder's Act and the Laws Applying to Abstract Property are Not Controlling for Torrens Property Where the Torrens Act and Case Law Interpreting the Act Provides Specific Guidance.

Respondent argues that Appellants' reliance on the Torrens Act is "misplaced" and "demonstrates a misunderstanding of its true purpose." (Respondent Brief p. 10). It is curious how Respondent can argue that a case involving Torrens property is not controlled by the Torrens Act. Nonetheless, Respondent's argument underscores the fundamental issue in this case – whether the requirements for an interest appearing "of record" in Torrens property are any different from the requirements for an interest appearing "of record" in abstract property. Under Respondent's theory of the case, there would be no difference and the entire foundation of the Torrens Act would be rendered meaningless.

In searching for some support for its definition of "registration," Respondent essentially ignores the Torrens Act and instead relies on the Recording Act (Minn. Stat. Chap. 507), the County Recorder's Act (Minn. Stat. Chap. 386), and laws applying strictly to abstract property.

First, Respondent cites to Minn. Stat. § 386.31 in support for its position that the assignment of a document number by the registrar is sufficient to establish registration under the Torrens Act. (Respondent's Brief p. 13.) What Respondent fails to acknowledge is that § 386.31 is wholly inapplicable to Torrens Property – § 386.31 is specific to county recorder's offices (not registrars of titles) and applies solely to abstract property. Minn. Stat. Chap. 386 is entitled, "County Recorder; Abstracter." Obviously, county recorders cannot assign document numbers to instruments filed against Torrens

property. Accordingly, Minn. Stat. § 386.31 is not applicable to the Property in this case.

In a similarly flawed analysis, Respondent relies upon *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. Ct. App. 2002) and *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302 (Minn. 1995) as support for its assertion that the assignment of a document number to an instrument is sufficient to register an interest in Torrens property and establish priority. As the Court will note upon reading the cases, neither *Ocwen* nor *Home Lumber* is applicable to the issues of this case, which is why they were not addressed in Appellant's Brief.

In *Ocwen*, two mortgages were contemporaneously filed with the registrar of titles and both had met all registration requirements under Torrens law. 649 N.W.2d at 855-856 (emphasis added). As a result, neither party claimed that either mortgage failed to meet the Torrens registration requirements. The sole issue for this Court in that case was which properly-registered mortgage had priority.

Because no registration requirements were at issue, and because the Torrens Act was silent as to priority under those specific conditions, this Court looked to the document number stamped on each mortgage to determine their filing order, and thus, their priority. *Id.* at 857. A wholly different situation exists where, for example, one of the mortgages was memorialized on the certificate of title and thus properly registered, and the other was not. That second mortgage would not meet the requirements of registration under the Torrens Act, and would not, by application of the Torrens Act, be effective against a party without notice of the same. *See Ryan*, 124 F.Supp. at 6, 7.

In this case, the question is the priority of Mortgages which were filed but not memorialized on the certificate of title, and thus not registered until well after Appellants' Mechanic's Liens attached. In this case, neither Mortgage completed the registration process until September 20, 2006. Accordingly, at the time Appellants' Mechanic's Liens attached, neither Mortgage was properly registered or appearing on the certificate of title. Because *Ocwen* did not involve an unmemorialized mortgage, it is *Ryan*, not *Ocwen*, that is the controlling authority on the issue of priority in this case. As the court in *Ryan* concretely held, where one of the Torrens registration requirements was lacking (i.e., memorialization of the interest on the certificate of title), filing the document alone and obtaining a registration number is insufficient to establish priority. *Id.* at 6, 7.

Home Lumber is similarly inapplicable to the case at hand.⁶ First, *Home Lumber* involves abstract property, not Torrens property.⁷ Accordingly, the court's application of Minn. Stat. § 507.34 in that case was appropriate, as § 507.34 is a statute applying specifically to abstract property, not Torrens property.

In *Home Lumber*, the question before the court was whether a mortgage, which was "duly recorded" against abstract property prior to the attachment of mechanic's liens, took priority over the mechanic's liens where disbursements under the loan were not made until after the attachment of the mechanic's liens. 535 N.W.2d 302, 302-303. The

⁶ The same fault is true of *Ripley v. Piehl*, 700 N.W.2d 540 (Minn. Ct. App. 2005), which cited the statement from *Home Lumber* while dealing with abstract property and not the effect of incomplete registration. *Id.* at 544.

⁷ The court in *Home Lumber* repeatedly refers to the recording of the mortgage. *Id.* at 302, 303, 304, and 306. It is thus apparent that the property at issue was abstract property.

central issue in the case was whether the loan disbursements were discretionary or obligatory, not whether the mortgage was first recorded. *Id.* at 304-305. In its preliminary discussion of the recording of the mortgage, the court looked to Minn. Stat. § 507.34 for guidance and stated in dicta that a mortgage establishes priority from the date of recording with the county recorder. *Id.* at 304 (emphasis added). Because the property was abstract property, the filing of the mortgage alone was sufficient to establish priority of the mortgage under § 507.34.

Section 507.34 is not, however, applicable to this case. The statute provides “[e]very conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated” (emphasis added). As the Court will note, § 507.34 does not mention or even apply to the registration of mortgages with the registrar of titles or Torrens property. *Id.*

It is apparent that Respondent is relying upon an obviously erroneous sentence fragment in *Home Lumber* where the court states, “Minn. Stat. § 507.34 (1994) establishes mortgage priority from the date of recording with the county recorder or the registrar of titles.” *Id.* at 304. The fragment “or the registrar of titles” is an obvious misstatement of law because § 507.34 makes no mention whatsoever to the registrar of titles and is not applicable to Torrens property. Because *Home Lumber* involved abstract property and the filing of a mortgage with a county recorder, the error in the court’s mention of the registrar of titles was not significant to the court’s decision in that case. Nonetheless, the court’s apparently inadvertent inclusion of “the registrar of titles” in its recitation of § 507.34 should not be used as authority for the proposition that the date of

the filing of a mortgage with the registrar of titles establishes priority in Torrens property, as Respondent urges the Court to do in this case. Such an application of *Home Lumber* would not only be contrary to the express language of § 507.34, it would be contrary to the Torrens Act, which requires the registration of mortgages in order to be effective. See Minn. Stat. §§ 508.49, 508.54, 508.55.

In sum, the statutes and case law cited by Respondent are inapplicable to this case and are generally inapplicable to Torrens property. The court looks to the Recording Act with respect to registered property only when the Torrens Act fails to specify otherwise. See Minn. Stat. § 508.02; *Armstrong v. Lally*, 209 Minn. 373, 375-76, 296 N.W. 405, 405-06 (1941). Because the Torrens Act provides specific guidance as to what is required to register an interest and make such interest appear “of record” for Torrens property, there is no need to look to the Recording Act or case law applying to abstract property. To determine what was and was not “of record” for Torrens property at the time Appellants’ Liens attached, this Court must look to the Torrens Act and cases involving Torrens property. See Minn. Stat. §§ 508.49; 508.55; *Ryan*, 124, F.Supp. at 6-7).

E. It is Established Law That the Purpose of the Torrens Act is to Provide Anyone Dealing with Torrens Property With the Assurance that Only Those Interests Noted as Memorials on the Certificate of Title Shall be Binding Against the Property.

Respondent contends that the purpose of the Torrens Act is solely to protect owners and good faith purchasers from encumbrances not appearing on the certificate of title and is not meant to apply to or protect other interested parties. (Respondent’s Brief

pp. 10-11.)⁸ Such a contention could not be further from the true state of the law. As far back as 1929, the Minnesota Supreme Court declared:

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 any one may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered. The law was framed to accomplish that purpose; and it establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land.

In re Juran, 178 Minn. 55, 58, 226 N.W.2d 201, 202 (1929) (emphasis added). The Court went on to add that “all instruments of every kind and nature purporting to affect the title ‘shall be notice to all persons from the time’ they are registered with the registrar.” *Id.* (citations omitted) (emphasis added). “In other words, it is expected that anyone dealing with registered land need look no further than the certificate of title for any transactions that might affect the land.” *Mill City Heating & Air Conditioning v. Nelson*, 351 N.W.2d 362, 364-5 (Minn. 1984) (emphasis added).

While the Torrens Act certainly protects good faith purchasers and owners, its protection is not limited to only those groups. Rather, the protection extends to all persons dealing with Torrens property. *Id.*; *Juran*, 226 N.W. at 202. It is the fundamental theory of Torrens law that a certificate of title shall be conclusive evidence of all matters contained therein, such that anyone dealing with Torrens property may rely upon the certificate without having to perform extensive title searches or other

⁸ Respondent also claims that the purpose of Minn. Stat. § 508.25 is to protect only the interests of property owners, not the priority of a lien claimant. (Respondent Brief, p. 11.) However, Section 508.25(7) includes a specific exception for mechanic’s liens, such that the priority of a mechanic’s lien is specifically protected under the statute.

investigation into the state of title (as is required with abstract property). See Minn. Stat. § 508.36 (“The certificate of title...shall...be conclusive evidence of all matters and things contained in it.”); Minn. Stat. § 508.22 (“...every decree of registration shall bind the land described in it, forever quiet title to it, and be forever binding and conclusive upon all persons...” (emphasis added)); *Juran*, 226 N.W. at 202. Accordingly, the protection, purpose, and scope of the Torrens Act is not limited to good faith purchasers or owners alone, and any such limitation would defeat the true purpose and effectiveness of the Act.⁹

II. IT IS UNDISPUTED THAT APPELLANTS HAD NO ACTUAL NOTICE OF THE MORTGAGES RENDERING APPELLANTS’ MECHANIC’S LIENS PRIOR AND SUPERIOR TO THE MORTGAGES.

Because the Mortgages in this case were not properly registered and appearing of record on the certificate of title to the Property at the time Appellants’ Liens attached, the only way that they can take priority over the Liens under Minn. Stat. § 514.05, subd. 1, is if Appellants had actual notice of the Mortgages. The facts are clear and undisputed that Appellants had no actual notice of the Mortgages. It is undisputed that the Mortgages were not memorialized on Certificate of Title No. 1144974 when Southview’s Lien

⁹ Respondent erroneously states that Appellants “rely heavily” on *Juran*, *Collier*, *Kane*, *Willmus*, and *In re Petition of Walther*, 2005 WL 3470490 (Minn. Ct. App. Dec. 20, 2005) (unpublished) as authority for Appellants’ argument that their Mechanic’s Liens have priority over the Mortgages because the Mortgages were not memorialized on the certificate of title until after Appellants’ Liens attached. (Respondent’s Brief, at 10-11.) While still instructive, these cases were cited to define actual notice.

attached or was registered.¹⁰ Consequently, Respondent's only argument is that Appellants "should have inquired" or "should have known" that the certificate was inaccurate. Contrary to Respondent's flawed analysis, the fact that the certificate of title listed Calhoun as the owner of the Property at the time the Liens arose did not impose actual notice of the Mortgages upon Appellants. The uncontroverted facts are that Southview had no actual knowledge or notice of the Mortgages. Accordingly, Appellants are entitled to judgment declaring their Liens prior to the Mortgages.

A. The Fact That Calhoun was Listed as the Fee Owner on the Certificate of Title does not Impose Actual Notice of the Mortgages on Appellants.

Minnesota Statutes § 514.05, subd. 1 unambiguously provides the Appellants' Liens "shall be preferred to any mortgage...not then of record, unless the lienholder had actual notice thereof." (Emphasis added.) "Thereof" refers to the mortgage, not to notice of any other defect in the certificate of title. The uncontroverted facts are that Southview had no actual knowledge or notice of the Mortgages. (See Iverson Aff., ¶¶ 4, 7, Appellants' Appendix at 11-16.) Accordingly, Respondent's attempt to impose constructive notice of the Mortgages upon Appellants must fail.

It appears that Respondent has adopted the district court's flawed analysis of what constitutes actual notice in this case. According to Respondent's argument, because Certificate of Title No. 1144974 listed Calhoun as the owner of the Property, it "should have been enough to raise questions" and Appellants "had a duty...to inquire" if there were other interests in the Property not appearing on the certificate of title.

¹⁰ See Appellants' Appendix pp. 15-16 for a copy of Certificate of Title No. 1144974, as it appeared at the time Southview's Lien arose, attached, and was registered.

(Respondent's Brief at 27.) But "should have known" and "should have inquired" apply only to constructive notice, not actual notice; and Torrens law specifically abrogates constructive or implied notice except as to matters appearing on the certificate of title. *See, e.g., Juran*, 226 N.W. at 202. Actual notice is actual knowledge. *In re Petition of Alchemedes/Brookwood Limited Partnership*, 546 N.W.2d 41, 42 (Minn. Ct. App. 1996) (citation omitted). Here, it is undisputed that Appellants had no actual notice of the Mortgages. (Iverson Aff. ¶¶ 4, 7; Appellant's Appendix at 11-16.)

The fact that the certificate of title listed Calhoun as the owner does not, in any way, impose actual notice upon Appellants that the certificate was inaccurate, as Respondent contends. The fact that Southview contracted directly with Lind and included a pre-lien notice in its form contract with Lind does not mean that Southview knew or had actual notice that the certificate of title was inaccurate. Moreover, the fact that the certificate listed Calhoun as the owner does not give Appellants actual notice that there may be Mortgages on the Property not appearing on the certificate of title. Contrary to Respondent's argument, the law does not impose a duty upon Appellants to inquire if there were other interests that were filed but not appearing as memorials on the certificate of title. *See Kane v. State*, 237 Minn. 261, 268-70, 55 N.W.2d 333, 337-38 (1952); *In re Petition of Willmus*, 568 N.W.2d 722, 725-27 (Minn. Ct. App. 1997).

Finally, § 514.05, subd. 1 only provides an exception to priority when a lien claimant has actual notice of the mortgage over which it is claiming priority – not other matters that may appear (or fail to appear) on the certificate of title. Arguing that Appellants had "actual notice that the certificate of title may be inaccurate" is insufficient

under § 514.05, subd. 1 to defeat Appellants' priority. Accordingly, Appellants' Liens are entitled to priority over the Mortgages by operation of § 514.05, subd. 1.

B. By Stipulating to the Validity of Appellants' Mechanic's Liens, Respondent and Calhoun Waived Any Issue Regarding Appellants' Compliance with Statutory Pre-Lien Notice Requirements, Rendering Any Pre-Lien Notice Issues Moot on Appeal.

In lieu of a trial on the validity and amount of Appellants' Liens, the parties entered into an Amended Stipulation of Facts in which Respondent and Calhoun stipulated to the amount and validity of Appellants' Mechanic's Liens. (See Appellant's Addendum pp. 16-23.)¹¹ By stipulating to the validity of Appellants' Liens, Respondent and Calhoun waived all issues regarding Appellants' compliance with the prelien notice requirements on appeal.

It is established law that “[w]here the parties stipulate as to the facts, the effect of the stipulation is to take the place of evidence.” *Anderson v. Anderson*, 225 N.W.2d 837, 840 (Minn. 1975) (citations omitted). Courts accord stipulations the “sanctity of binding contracts.” *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). In civil matters, a party cannot repudiate its stipulation to a question of fact without the other party's consent, except by leave of the court for cause shown. *In re Commitment of Rannow*, 749 N.W.2d 393, 396 (Minn. Ct. App. 2008) (citation omitted).

In addition to binding each other, the parties' stipulations of fact are binding on both district and appellate courts. *State v. Litzau*, 377 N.W.2d 53, 55 (Minn. Ct. App. 1985) (citation omitted). When parties agree that a case can be decided on stipulated

¹¹ See also Transcript of Pretrial Hearing, May 6, 2008, pp. 17-18; and Judgment at Conclusions of Law ¶¶ 1, 2 (Addendum p. 29).

facts, these facts control the decision, and neither party can argue on appeal that the facts were anything other than what was stipulated or that any material fact was omitted. *Carey v Brown*, 194 Minn. 127, 141, 260 N.W. 320, 326 (1935) (quoting *In re Monfort's Estate*, 193 Minn. 594, 259 N.W. 554 (1935)) (“Where a case is submitted for decision upon stipulation of all facts, neither party will be heard on appeal to suggest that facts were other than as stipulated or that any material fact was omitted”).

It is well established that service of a pre-lien notice is a prerequisite to the validity of a mechanic’s lien, unless one of the exceptions enumerated in Minn. Stat. § 514.011 applies. *See Dolder v Griffin*, 323 N.W.2d 773, 780 (Minn. 1982); *Mill City*, 351 N.W.2d at 364 (citing Minn. Stat. § 514.011, subd. 2). In other words, for a valid mechanic’s lien to exist, there must necessarily have been compliance with the statutory pre-lien notice requirements. *See Id.* By stipulating to the validity of Appellants’ Liens, Respondent and Calhoun inherently stipulated that Appellants complied with the pre-lien notice requirements. *See Id.* As a result, Respondent is estopped from now arguing that Appellants failed to comply with Minn. Stat. § 514.011. *See Carey*, 260 N.W. at 326.

While the facts establish that Appellants, indeed, complied with Section 514.011, the issue of pre-lien notice is not properly before this Court and was rendered moot by the Amended Stipulation of Facts entered into among the parties in lieu of trial. If Respondent truly believed that Appellants failed to comply with the pre-lien notice requirements,¹² then Respondent should have proceeded to trial on the validity of the

¹² Contrary to Respondent’s claims, no pre-lien notice was required of Appellants in this case. *See* Minn. Stat. § 514.011, subd. 2(a). In situations where the lien claimant is in

Liens, specifically whether Appellants complied with Section 514.011. By stipulating to the validity of the Liens, Respondent prevented Appellants from obtaining an appealable order related to the issue of pre-lien notice. Accordingly, Respondent cannot now assert that the pre-lien notice requirements were not met, which would render invalid Liens that Respondent has already acknowledged as invalid.

In this case, the issues of priority and validity of the Liens were bifurcated. The issue of priority was argued at summary judgment, leaving for trial the issue of the validity of the Liens, including whether the pre-lien notice requirements were met. If Respondent sought to contest the validity of the Liens based upon Appellants' alleged failure to comply with Section 514.011, then it should have insisted on a trial on the issue of the validity of the Liens, rather than entering into a stipulation acknowledging their validity. By stipulating to the validity of the Liens, Respondent waived its right to contest the issue of compliance with the pre-lien notice requirements and the validity of the Liens. A party cannot stipulate to a material fact and then, upon appeal, dispute that same stipulated fact. *See, e.g., Carey*, 260 N.W. at 326.

direct contract with the owner of the property, no pre-lien notice is required. *Id. See also*, Minn. Stat. § 514.011, subd. 4a. The definition of "owner" is set forth in Minn. Stat. § 514.011, subd. 5. Here, Appellants contracted directly with the owner, Lind. Accordingly, no pre-lien notice was required. Respondent cannot, in good faith, argue that Lind was not the owner of the Property at the time Southview's pre-lien notice was served upon Lind. Pursuant to the Amended Stipulation of Fact, ¶ 4, Lind took title to the Property on June 27, 2005, and became the fee owner of the Property as of that date. (Appellants' Addendum at 16-23).

By stipulating to the validity of the Liens, Respondent waived any dispute it had with respect to Appellants' compliance with Minn. Stat. § 514.011. Accordingly, Respondent's argument regarding the sufficiency of pre-lien notice is moot.

CONCLUSION

For the aforementioned reasons, Appellants respectfully request that this Court reverse the district court's Amended Findings of Fact, Conclusions of Law, and Order for Summary Judgment and enter judgment declaring that Appellants' Mechanic's Liens are prior and superior to the Mortgages of Bank First and Calhoun.

Respectfully submitted,

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A-08-1883

STATE OF MINNESOTA

IN COURT OF APPEALS

Southview Design & Construction, Inc.,

and

Scherer Bros. Lumber Co.,

Appellants,

APPELLANTS' CERTIFICATION
OF BRIEF LENGTH

v.

Bank First; Calhoun Development, LLC;
Imperial Developers, Inc.; Thompson PLBG Corp.;
Great Northern I, Inc.; The Woodshop of Avon, Inc.;
Lind Homes, Inc.; and Minnesota State Curb & Gutter,
a division of AVR, Inc.,

Respondents.

I hereby certify that this Reply Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd.1 and 3, for a reply brief produced with a proportional font. The length of this Brief is 6,984 words. This Brief was prepared using Microsoft Word 2007.

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