

NO. A10-1607

State of Minnesota
In Court of Appeals

Brickwell Community Bank,

Appellant,

vs.

Hunter Construction, Inc., and
Verde General Contractor, Incorporated,

Respondents,

Kevin Lam, Lee-Tzong Chen, Ming-Mei Chen, Karl L. Kruse,
Starbound St. Paul Hotel, LLC, a Minnesota limited liability
company, Wing-Heng, Inc., a Minnesota corporation,
Brickwell Community Bank, a Minnesota corporation,
Integrity Works Construction, Inc., a Wisconsin Corporation,
City of Saint Paul, John Doe, Mary Roe, ABC Corporation
and XYZ Partnership,

Defendants,

JZ Electric, Inc., a Minnesota Corporation,
Hamline Construction, Inc., a Minnesota Corporation,
Hunter Construction, Inc., a Minnesota Corporation,
Verde General Contractor Incorporated, a Minnesota
Corporation, Midwest Building Maintenance, L.L.C., a Minnesota
limited liability company, Winrock Corporation, a Nevada
Corporation, Sheik A.N. Azizudin, All Floors Plus, Inc., a
Minnesota Corporation,

Additional Defendants.

JOINT BRIEF AND APPENDIX OF RESPONDENTS HUNTER CONSTRUCTION, INC.
AND VERDE GENERAL CONTRACTOR, INCORPORATED

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE PRESENTED

Did the legislature require service of a mechanic's lien statement to be in the same manner as a summons in a civil action?

The Honorable John D. Van de North correctly ruled three (3) times below that section 514.08 does not require a mechanic's lien claimant to serve is lien statement in the same manner as a service of a summons. Thus, Ken Hunter's personal delivery of Hunter Construction and Verde's mechanic's lien statement to both Wing-Heng, Inc. (the owner of the Subject Property) and Appellant Brickwell Community Bank (Wing-Heng's construction lender) on February 21, 2008 perfected both mechanic's liens.

Apposite Cases and Statutes:

National Dispatchers, Inc. v. Hastings Motel Ltd. Liability Partnership, WL 21652262 (Minn.App. 2003).

Pella Prods., Inc. v. Arvig Telephone Co., 488 N.W.2d 316 (Minn. App. 1992)

Eischen Cabinet Co. v. Hildebrandt, 683 N.W.2d 813 (Minn. 2004)

MINN. STAT. § 514.08.

STATEMENT OF THE CASE

Respondents Hunter Construction, Inc. and Verde General Contractor, Incorporated (collectively referred to as “Lien Claimants”) adopts Appellant’s Statement of the Case.

STATEMENT OF FACTS

The sole issue on this appeal is interpretation of section 514.08’s requirement that mechanic’s lien statements be “served personally or by certified mail on the owner.” Appellant does not challenge the district court’s finding that Ken Hunter hand delivered Hunter Construction and Verde’s mechanic’s lien statements on Wing-Heng, Inc., the owner of the Subject Property on February 21, 2008. There are no other relevant facts.

ARGUMENT

I. STANDARD OF REVIEW

Statutory interpretation presents a question of law subject to *de novo* review. *E.g.*, *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn. 1990).

II. THE COURT OF APPEALS SHOULD AFFIRM JUDGE VAN DE NORTH’S JUDGMENT BECAUSE THE LIEN CLAIMANTS PROPERLY SERVED THEIR MECHANIC’S LIEN STATEMENTS ON WING-HENG, INC.

Mechanics’ liens are “creatures of statute and only exist because of the statute creating them.” *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982). Appellant

correctly notes that once they attach, mechanics' liens "should be liberally construed so as to protect the rights of workmen and materialmen who furnish labor and material in the improvement of real estate." *E.g., Armco Steel Corp. v. Chicago & N.W. Ry.*, 276 Minn. 133, 137-38, 149 N.W.2d 23, 26 (1967); *see also Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004) (mechanic's lien statute "is remedial in nature and its essential purpose is to reimburse laborers and material providers who improve real estate and are not paid for their services").

Although it has attached (and is therefore subject to a liberal construction) a contractor's lien ceases to exist unless -- at the end of 120 days after performing the last of the work -- a mechanic's lien statement is "served personally or by certified mail on the owner or the owner's authorized agent or the person who entered in to the contract with the contractor." MINN. STAT. § 514.08 (2008). Here, it was undisputed that the Lien Claimants' last contributions to the improvement took place in January 2008. (T.62:5-25; Trial Exs. 100, 200, 300.) Judge Van de North correctly found that Ken Hunter personally served Kevin Lam (owner of Wing-Heng, Inc., which owns the subject property), Najib Mailagyar (Wing-Heng, Inc.'s general manager) and Brickwell Community Bank itself with Hunter Construction and Verde's mechanic's lien statements on February 21, 2008. (T.146:9-25, 147:1-3, 181:3-12, 589:1-8; Trial Ex. 402; Add 11) Thus, the only issue¹ is whether Mr. Hunter's hand delivery of the Lien Claimants' mechanic's lien statements satisfied Section 514.08's requirements.

¹ Appellant spends an incredible amount of its brief second guessing Judge Van de North's credibility determinations. Yet, tellingly, Appellant's sole issue on appeal is interpretation of Section 514.08 not Judge Van de

A. This Court Has Already Determined that Section 514.08 does not Require Service Like a Summons.

In 2003, this Court decided the exact issue it faces in this case:

Appellants argue that the AM-TECHS lien is defective because the lien statement was not served by a person not a party to the action, as appellants argue is required by Minn.Stat. § 514.08. The statute, however, does not explicitly require such service and, while Minn. R. Civ. P. 4.02 prohibits service of a “summons or other process” by someone who is a party to the action, appellants cite no authority for the proposition that a mechanic's lien statement is a “summons or other process.”

National Dispatchers, Inc. v. Hastings Motel Ltd. Liability Partnership, WL 21652262, *5 (Minn.App. 2003) (RA-8 – RA-15).

As this Court found in *National Dispatchers*, Judge Van de North correctly concluded that “[s]ection 514.08 and Rule 4.02 are inconsistent because a mechanic’s lien statement does not constitute a summons or ‘other process’ within the meaning of Minn. R. Civ. P. 4.02.” (Add. 18). No further analysis is required.

B. The Minnesota Legislature did not Intend for a Mechanic’s Lien Statement to be Served in the Same Manner as a Summons.

Appellant’s entire position is based on the premise that “by requiring the lien claimant to have its mechanic’s lien statement ‘served personally’ on the property owner, the legislature contemplated and required something more than simple ‘delivery’ of the lien statement.” (Appellant’s Brief, p. 10-11) However, the legislature knows how to require “service like a summons” when that is its goal:

North’s factual findings. Thus, Appellant’s entire recitation of the facts is an apparent attempt to impugn Ken Hunter, whom Judge Van de North found credible.

- “Six weeks’ published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises. . .” MINN. STAT. § 580.03 (2010).

Furthermore, various provisions of Minnesota’s statutes require “personal service as in a district court civil action:”

- “‘Serve’ means (1) personal service as in a district court civil action. . . .” MINN. STAT. § 583.22 Subd. 8 (2010).
- “The subpoenas may be served upon any person named therein anywhere in the state by any person authorized to serve subpoenas or other processes in civil actions of the district courts.” MINN. STAT. § 144E.30 Subd. 5 (2010);
- “The subpoenas may be served upon any person named therein anywhere in the state by any person authorized to serve subpoenas or other processes in civil actions of the district courts.” MINN. STAT. § 144.054 Subd. 1 (2010);
- “and each process shall extend to all parts of the state and may be served by any person authorized to serve processes of courts of record.” MINN. STAT. § 216B.28 (2010);
- “The subpoenas may be served anywhere in the state by any person authorized to serve processes of courts of record.” MINN. STAT. § 216C.29 (2010).

- “The board shall personally serve a copy of its resolution on the owner in the same manner as personal service of process in a civil action.” MINN. STAT. § 306.242 Subd.2 (2010).

As Appellant correctly points out, “[t]he goal of statutory interpretation is to ‘ascertain and effectuate’ the legislature’s intent.” (Appellant’s Brief, p. 11) Comparing the above provisions to section 514.08 clearly demonstrates that the legislature did not intend for a mechanic’s lien statement to be served “in the same manner as personal service of process in a civil action.” *Compare* MINN. STAT. § 306.242 Subd.2 (2010) with MINN. STAT. § 514.08 (2008). All twenty-three (23) pages of Appellant’s brief are spent ignoring these provisions of Minnesota Law, their stark contrast to section 514.08 and this Court’s *National Dispatchers* decision. Appellant wants this Court to believe that the Minnesota Legislature just *forgot* to expressly require service of a mechanic’s lien statement in the same manner as “service of process in a civil action” as it did in the provisions quoted above. However, the legislature’s omission in section 514.08 is significant. *See State v. Moseng*, 254 Minn. 263, 269, 95 N.W.2d 6, 11-12 (1959) (“[w]here failure of expression rather than ambiguity of expression concerning the elements of the statutory standard is the vice of the enactment, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature”).

C. Appellant's Reliance on Minn. R. Civ. P. 4.02 Is Ill-Founded Because the Minnesota Rules of Civil Procedure do not Govern Service of a Mechanic's Lien Statement.

“These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81.” MINN. R. CIV. P. 1 (2010). It can hardly be argued that a construction project is a “suit of a civil nature” “in the district courts.” Accordingly, it is hard to conceive how Appellant can rely on the Minnesota Rules of Civil Procedure.

Even if Appellant could get around the scope provisions of Rule 1, Rule 81.01(a) provides that the Minnesota Rules of Civil Procedure do not govern the procedures in sections 514.01-514.17 of the Mechanic's Lien Statute to the extent that “they are inconsistent or in conflict with” the general rules of civil procedure. Appellant's argument is flawed because Minn. R. Civ. P. 4.02 conflicts with section 514.08:

Unless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not **a party to the action**, may make service of **a summons or other process**.

(Emphasis added.) Thus, while section 514.08 pertains to service of a mechanic's lien statement (which is really a last demand for payment of services previously rendered), Rule 4.02 pertains to serving a summons or “other process.” Appellant ignores this key difference by assuming that a “Summons” is the same as a “Mechanic's Lien Statement” *without any authority whatsoever* and contrary to this Court's previous decisions. The plain language of Rule 4.02 shows that it pertains to parties to a civil action. However, a

contractor seeking to serve a mechanic's lien statement is not "a party," and "no civil action" or lawsuit is commenced by serving a lien statement (or before, generally). A **mechanic's lien statement is not a summons. Nor does a mechanic's lien statement constitute "other process,"** a term referring to subpoenas and to "various extraordinary writs: *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and similar process." David F. Herr & Roger S. Haydock, 1 *Minnesota Practice* § 4:5 (5th ed.) at 45.

Because Rule 4.02 pertains to service of a summons, subpoena, or extraordinary writ – all documents requiring responsive action in a litigation context – it conflicts with section 514.08, which pertains to service of a lien statement (i.e., a mere notice that payment is past due). Notably, when defining "personal service" as used in section 514.08, this Court did not refer to Rule 4.02, but rather, employed the definition set forth in Black's Law Dictionary. *Pella Prods., Inc. v. Arvig Telephone Co.*, 488 N.W.2d 316, 318 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). There, in concluding that receipt of a lien statement by first-class mail does not constitute personal service, this Court made no mention of any requirement that personal service be accomplished by a non-party. **Simply put, no such requirement is possible since service of a lien statement does not commence a lawsuit; no parties and no "action" exist.**

The *Pella* decision also brings to light another conflict or distinction between section 514.08 and the more general rules of civil procedure – the former provides for service by certified mail, while Rule 4.05 allows for service of the summons and complaint to be accomplished through first-class mail by acknowledgment. *Pella*, 488 N.W.2d at 318 (finding service by first class mail did not constitute personal service or

service by certified mail *pursuant to section 514.08*. Significantly, the Minnesota Supreme Court has further noted that pursuant to Rule 81.01(a), **the rules of civil procedure “are not binding” as to determining whether service of a mechanic’s lien statement by certified mail is effective upon mailing.** *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 818 n. 6 (Minn. 2004); *see also* David F. Herr & Roger S. Haydock, 1 *Minnesota Practice* § 4:24 at 136 (5th ed.) (“[a]s is true for many procedural questions in proceedings governed by specific statutory provisions, service by mail in mechanics’ lien actions is governed by different rules”).

D. Service of a Lien Statement Does not Confer Jurisdiction Over a Defendant, but Rather, Merely Continues an Attached Lien.

The substantive purposes belying a summons and a mechanic’s lien statement explain why different methods of service were intended. A summons (or other process) is designed to confer a court with personal jurisdiction over a person. *See* David F. Herr & Roger S. Haydock, 1 *Minnesota Practice* § 4:5 (5th ed.) at 44. In *Landgren v. Pipestone County Bd. of Comm’s*, this Court underscored that proper service by a non-party pursuant to Rule 4.02 is a jurisdictional requirement. 633 N.W.2d 875, 878-79 (Minn. App. 2001) (service by non-party is designed to eliminate bias and acrimony inherent in litigation); *see also* *Ryan Contracting, Inc. v. JAG Investments, Inc.*, 634 N.W.2d 176, 186-87 (Minn. 2001), *overruled on other grounds by* *Mavco v. Eggink*, 739 N.W.2d 148 (Minn. 2007). **In stark contrast, section 514.08 has absolutely nothing to do with conferring personal jurisdiction over anyone. Its sole purpose is to dictate the procedure for filing and serving a mechanic’s lien statement so that a given**

contractor's lien does not expire 120 days after the making of his last improvement.

Accordingly, Appellant's argument has no merit and this Court should affirm the district court's decision.

E. The Applicability of Rule 4 Is Only Triggered Upon the Commencement of a Mechanic's Lien Foreclosure Action Pursuant to Minn. Stat. § § 514.11-12.

Ryan confirms that Rule 4 of the Minnesota Rules of Civil Procedure only comes into play once a mechanic's lien foreclosure action is commenced. 634 N.W.2d at 186-87 (relying upon service requirements of Rule 4 for **acquiring jurisdiction** over defendant when commencing mechanic's lien foreclosure action pursuant to sections 514.11-12). Moreover, the plain language of section 514.11 indicates that a mechanic's lien foreclosure action may be commenced by a lienholder who has filed the mechanic's lien statement and served a copy of the statement upon the owner "pursuant to section 514.08" -- not pursuant to Rule 4 of the Minnesota Rules of Civil Procedure.

Ignoring the dispositive authority cited above, Appellant fails to recognize the distinction between serving a lien statement and commencing a lien foreclosure action and relies instead on inane lexical observations. Specifically, Appellant argues that the Mechanic's Lien Statute uses the words "serve," "served," or "service" when describing how to provide a copy of a mechanic's lien statement to the owner, but that the terms "delivered" or "delivery" are used in section 514.011 governing the provision of a pre-lien notice to the owner. (Appellant's Brief, pp. 16-17) This analysis is far from compelling when one considers that pursuant to Rule 4.03, **service** takes place "by **delivering** a copy to the individual personally" (emphasis added) and this Court's

decision in *Pella*: “[p]erson service generally has been defined as actual delivery of process to person to whom it is directed.” 488 N.W.2d at 318. Moreover, in the portion of the Minnesota Attorney General’s website addressing consumer housing issues, the attorney general explains “When and Where Liens are Filed” as follows:

If a lien is filed against your property (in the form of a lien statement), it must be filed with the county recorder and a copy **delivered** to you, the property owner, either personally or by certified mail

(RA-5) (emphasis added). Given that (1) the rules of civil procedure (2) the attorney general’s website (3) this Court and (4) Black’s Law Dictionary all define “service” as delivery, Appellant’s argument is devoid of substance..

F. Appellant’s Recitation of the Legislative History of section 514.011 is Inapposite.

Appellant’s painstaking analysis of the legislative history of section 514.011(pertaining to pre-lien notices, not to lien statements) to find some support for its position yields nothing. In fact, Appellant’s position ignores that “service” and “delivery” are used interchangeably in Rules 3-5 of the Minnesota Rules of Civil Procedure. Much as Appellant would like to impose a requirement that lien statements must be served upon the owner by a “non-party,” this Court has held that, “[w]e are not, however, at liberty to disregard express statutory language.” *Berks v. Oberpriller*, 448 N.W.2d 883, 886 (Minn. App. 1989), *review denied* (Minn. Feb. 9, 1990) (*citing State v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 497, 78 N.W.2d 664, 670 (1956); MINN. STAT. § 645.16 (2010)). Moreover, the Minnesota Supreme Court has previously noted that the rules of civil procedure do not govern service of a lien statement, *Eischen*, 683

N.W.2d at 818 n. 6 (“civil rules are not binding in this case”), and that Rule 4 service rules are only triggered once a mechanic’s lien foreclosure action is commenced. *Ryan*, 683 N.W.2d at 818 n. 6.

G. The Lien Claimants, In Fact, Complied with Minn. R. Civ. P. 4.02 in Serving Their Mechanics’ Lien Statements.

Even if Rule 4.02 did apply to the lien statements, the Lien Claimants complied with the requirement that their lien statements be served by a “non-party.” As set forth above, Ken Hunter served both Hunter Construction and Verde’s mechanic’s lien statements upon Wing Heng, Inc., the owner of the Subject Property. Mr. Hunter is neither an employee nor owner of Respondent Verde. Hence, Verde complied with the “requirement” that a non-party serve the lien statement by having Mr. Hunter personally serve its lien statement upon Kevin Lam. As to Hunter Construction, the evidence at trial showed that Mr. Hunter is an employee of Hunter Construction. The law is clear that a natural person who is the employee or owner of a corporation constitutes an utterly distinct entity from the corporation itself. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (“[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status”); *Di Re v. Central Livestock Order Buying Co.*, 246 Minn. 279, 283, 74 N.W.2d 518, 523 (1956) (recognizing that as “an artificial person,” a corporation is a “distinct legal entity” from “natural persons composing the corporation”); *West Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 706 (Minn.

2009) (finding that a corporation constitutes a separate legal entity from its owners and shareholders).

Given that Ken Hunter – the natural person – constitutes a different legal entity from the Hunter Construction or Verde corporations, by having Mr. Hunter serve their lien statements, both Hunter Construction and Verde complied with Rule 4.02’s “requirement” that service be performed by a “non-party.”

While not binding precedent, Federal Courts have looked with liberal eyes on *pro se* parties when it comes to the technical acts of service:

Finally, while not individually dispositive, we take further note of plaintiff’s *pro se* status, which in this court’s opinion entitles him to a certain degree of leniency so as to ensure that his case is justly resolved on its merits rather than on the basis of procedural technicalities to the extent possible.

Poulakis v. Amtrak, 139 F.R.D. 107, 109 (N.D.Ill. 1991).

Here, the Lien Claimants were unrepresented as of February 21, 2008, relied upon the Minnesota Attorney General’s website and hand delivered their mechanic’s lien statements to both Wing-Heng, Inc. (the owner of the Subject Property) and Appellant, Wing-Heng’s lender. Accordingly, Appellant’s argument that the liens are invalid because they were not served by a “non-party” are devoid of merit and this Court should finally give the Lien Claimants the relief they have been seeking for almost three (3) years.

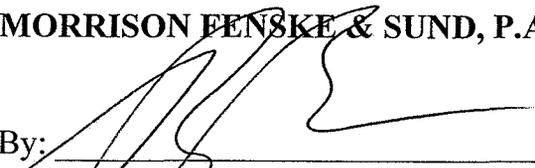
CONCLUSION

Respondents Hunter Construction, Inc. and Verde General Contractor, Incorporated respectfully request that this Court affirm Judge Van de North's ruling that they properly perfected their mechanic's liens against the subject property.

December 20, 2010

Respectfully submitted,

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