

NO. A11-2220

State of Minnesota
In Court of Appeals

Big Lake Lumber, Inc.,

Respondent,

vs.

Security Property Investments, Inc. et al.,

Defendants,

21st Century Bank,

Appellant,

Wright Lumber & Millwork, Inc., Pearson Plumbing Corp.,

J. DesMarais Construction, Inc.,

Respondents.

RESPONDENT BIG LAKE LUMBER, INC.'S BRIEF

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STATEMENT OF THE LEGAL ISSUE

Whether the District Court did not clearly err in concluding after a bench trial that Big Lake Lumber's mechanic's lien had priority over 21st Century Bank's mortgage because Big Lake Lumber's lien relates back to actual and visible work on the Property performed prior to the Bank's mortgage and that the work was part of the same continuous construction improvement.

Following a two day bench trial, the District Court made factual findings and concluded that Big Lake Lumber's mechanic's lien had priority over 21st Century Bank's mortgage. The District Court ruled that Big Lake Lumber's lien relates back to 2005 excavation work that was performed at the Property prior to the Bank's mortgage, that this work was an actual and visible improvement to the Property, and that this work was part of the same continuous construction improvement—the building of a house on the Property.

Most Apposite Authority:

Minn. Stat. § 514.05

National Lumber Company v. Farmer & Son, Inc., 251 Minn. 100, 87 N.W.2d 32 (1957).

Witcher Construction Co. v. Estes II Ltd. Partnership, 465 N.W.2d 404 (Minn. Ct. App. 1991).

STATEMENT OF THE CASE

Plaintiff/Respondent Big Lake Lumber, Inc. (“Big Lake Lumber”) commenced this mechanic’s lien foreclosure action after it was not paid for lumber and building materials that it furnished for the construction of a house located on real property in Zimmerman, Minnesota (the “Property”). (Complaint) Big Lake Lumber also asserted claims for unjust enrichment and quantum meruit against the property owners, Defendants Security Property Investments, Inc. (“Security Property”) and Christopher Schonning. (Complaint) Big Lake Lumber also initially sought injunctive relief to postpone the Sheriff’s Sale that Defendant/Appellant 21st Century Bank (the “Bank”) had scheduled as part of the Bank’s mortgage foreclosure proceedings. (Complaint; Motion for Temporary Restraining Order) The parties subsequently stipulated to allow the Bank to proceed with the foreclosure and the Bank agreed that Big Lake Lumber’s mechanic’s lien would not be extinguished as a result. (Add 6.)¹

Defendants/Respondents Pearson Plumbing Corporation (“Pearson Plumbing”) and J. DesMarais Construction Company (“DesMarais”) sought to foreclose their respective mechanic’s liens against the Property. (Joint Answer, Counterclaims and Crossclaim) Pearson Plumbing and DesMarais also asserted claims against Security Property and Mr. Schonning for breach of contract, unjust enrichment, and accounts stated. (Joint Answer, Counterclaim and Crossclaim) Like Big Lake Lumber, Pearson Plumbing and DesMarais also sought to enjoin the Sheriff’s Sale that had been scheduled

¹ “Add” refers to the pages in Appellant’s Addendum. “App” refers to the pages in Appellant’s Appendix.

pursuant to the Bank's mortgage foreclosure proceedings. (Joint Answer, Counterclaim and Crossclaim)

Although Defendant Wright Lumber and Millwork, Inc. served and filed an Answer, it did not assert any cross-claims to enforce any mechanic's lien against the Property. (Answer) The Property owners, Security Property and Mr. Schonning, answered the Complaint and denied Big Lake Lumber's claims. (Answer) The Bank also answered, denying the various claims of the parties and asserting that its mortgage was prior and superior to all of the mechanic's liens, including Big Lake Lumber's mechanic's lien. (Answer)

After conducting discovery, the parties filed cross-motions for summary judgment. Add 28.) On summary judgment, the primary issue for the District Court to decide was whether the Bank's mortgage, which was recorded after excavation work was performed by Wruck Excavating, was prior and superior to the mechanic's liens. (Add 28-29.) Big Lake Lumber and the other mechanic's lien claimants argued that their mechanic's liens had priority over the Bank's mortgage because actual and visible improvements had been made to the Property by Wruck Excavating in 2005, well before the Bank recorded its mortgage in October 2006. (Add 29.) DesMarais moved for summary judgment, arguing that Wruck Excavating's excavation work performed on the Property during 2005 was an actual and visible improvement to the Property, that the work was furnished as part of the same, continuous project—the construction of a house on the Property, and that the construction project had not been abandoned. (Add 29.) Therefore, the mechanic's lien claimants argued they were entitled to relate their work on the house back to the 2005

excavation work, and thus their liens enjoyed priority over the Bank's subsequently recorded mortgage. (Add 29.) Big Lake Lumber joined in DesMarais' motion for summary judgment. [edit] (original appeal (App 169-175)

The Bank argued that its mortgage enjoyed priority over the mechanic's liens, claiming that none of the mechanic's lien claimants had furnished lienable work until after the Bank had recorded its mortgage in October 2006. (Add 28-29.) The Bank also contended that the work performed by Wruck Excavating in 2005 was part of a separate and distinct improvement than the construction of the house on the Property. (Add 28-29.) The Bank also claimed that the project to build a house on the Property had been abandoned in 2005 and then restarted again in 2006, and therefore the mechanic's lien claimants could not relate their liens back to Wruck Excavating's work performed in 2005. (Add 28-29.)

During the District Court's hearing on the parties' cross-motions for summary judgment, the Bank's counsel also "agree[d]" with the mechanic's lien claimants that "the house [built on the property] never changed from the plans" in place in 2005. (6/5/2008 Hearing Transcript p. 15.) Further, the Bank's attorney admitted that, because "the trees had been removed" by Wruck Excavating in 2005, "someone inspecting the Property [at the time of the Bank's mortgage] would see there's a building pad cleared." (*Id.* p. 18)

In an Order dated September 17, 2008, the District Court granted DesMarais' motion for summary judgment, determining that DesMarais' mechanic's lien enjoyed priority over the Bank's mortgage. (Add 9, 29) The District Court concluded that there

had been an actual and visible improvement on the Property prior to the Bank's mortgage in October 2006, based on Wruck Excavating's work performed in 2005. (Add 9, 29) The District Court also ruled that the construction project had not been abandoned. [edit] (original appeal (Add 2-8) As a result, the District Court concluded that the mechanic's lien claimants enjoyed priority over the Bank's mortgage since their work could relate back to Wruck Excavating's work performed in 2005. (Add 9)

Following the District Court's decision, the Bank entered into various stipulations with the various mechanic's lien claimants, including Big Lake Lumber, regarding the amount and validity of their respective mechanic's liens. (App 9) The parties also stipulated that the mechanic's liens of Pearson Plumbing and Wright Lumber and Millwork were void and had no affect against the Property, and the District Court awarded various costs, disbursements and attorney's fees to Big Lake Lumber and DesMarais. (Add 9-10)

The Bank then appealed the District Court's summary judgment order to this Court. (Add 27 -31) This Court reserved and remanded the case for trial, ruling there were genuine issues of material fact concerning whether the 2005 excavation work performed on the Property prior to the Bank's mortgage was part of one continuous improvement allowing Big Lake Lumber's and DesMarais' mechanic's lien to relate back to that initial work and take priority over the Bank's mortgage. (Add 27, 31) In particular, this Court explained: "Here, the parties primarily dispute whether the work performed by Wruck prior to [the Bank's] mortgage is part of the same continuous improvement as the work performed by [Big Lake Lumber and DesMarais] after [the

Bank's] mortgage. According to our caselaw, this is a factual determination.” (Add 30) This Court determined that there were “close, disputed facts” demonstrating that “there is a genuine issue of material fact as to whether Wruck’s initial clearing work and [Big Lake Lumber’s and DesMarais’] work were performed as part of the same improvement.” (Add 31)

Following this remand by this Court, the District Court held a bench trial on May 4 and 5, 2012 on these disputed issues of material fact regarding priority. (Add 2) The District Court filed its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment on August 15, 2011. (Add 2-18) The District Court concluded that Big Lake Lumber’s mechanic’s lien was prior and superior to the Bank’s mortgage. (Add 17) In doing so, the District Court reasoned that Wruck’s excavation work in 2005 at the Property was the first actual and visual improvement to the Property and it was performed as part of the single improvement of constructing a house on the Property. (Add 13) In particular, the District Court found that Wruck’s 2005 excavation work included hauling dirt to the Property, cutting down trees and underbrush to clear a path from the road to the proposed building pad for the home, clearing and removing the trees and brush to clear a rough driving path and building pad at the Property, hauling away trees and stumps cleared from the Property and designing the septic system for the home that was to be built on the Property. (Add 3-4) The District Court found that that this “work performed by Wruck in 2005 resulted in an open, obvious, and noticeable clearing upon which a driveway and residential home could be, and later were, built.” (Add 4) The District Court also found that at some point prior to the Bank’s filing of its mortgage,

silt fencing was installed on the Property. (Add 4) The Property was also staked in July 2006, before the Bank's mortgage was filed. (Add 4) In addition, the District Court found that prior to October 2006, miscellaneous construction materials, including drain tile and a sump basket, were delivered to the Property. (Add 4) As a result, the District Court concluded that "inspection of the Property shortly before [the Bank] recorded its mortgage would have shown the actual and visible signs that a project was underway and would not have revealed any signs that the project had been abandoned." (Add 15) The District Court also concluded that "continuation of the project throughout 2006 was objectively demonstrated through engineering, staking, purchasing and building of silt fencing, drawing of building plans and other miscellaneous work on the project. At no time was there an objective manifestation of an attempt by any other involved parties to abandon the project of building a home on the Property." (Add 15)

The District Court also concluded that Wruck's excavation work in 2005 "was performed for the undisputed purpose of clearing the Property to create a home site." (Add 13) As a result, the District Court concluded that Wruck's 2005 excavation work, together with the work of Big Lake Lumber, DesMarais, and other subcontractors, was part of the "single improvement of constructing a home on the Property." (Add 13) The District Court acknowledged that there was an approximately 14 month delay between Wruck's work in 2005 and the filing of the Bank's mortgage in 2006, but the Court correctly noted that "during that time the Property was engineered, staked, soil borings were taken, building materials were purchased, building plans were drawn, and silt fencing was installed. All staking and installation of silt fencing alone cannot constitute

the *first* visible sign of improvement, such work does serve to demonstrate the continuity of the project and the overall consistent intent of the parties to build a home on the Property.” (Add 13)

On September 23, 2011, the District Court entered a separate order and amended judgment awarding costs and disbursements, including attorneys’ fees, to Big Lake Lumber and DesMarais. (Add 20-23) The Bank does not challenge the District Court’s award of costs and disbursements, including attorneys’ fees in this appeal.

In September 2011, the Bank moved for amended findings of fact or for a new trial. (Add 25) After hearing the Bank’s motion on October 5, 2011, the District Court denied the Bank’s motion in an Order filed October 10, 2011. (Add 25-26) The Bank then appealed to this Court. (App 1)

STATEMENT OF THE FACTS

This action involves real property located in Sherburne County, Minnesota, located at “ Zimmerman, Minnesota, legally described as Lot 1, Block 1, Fox Hollow (the “Property”). (Add 3) M&L Cabinets and Countertops, Inc. (“M&L Cabinets”) purchased the Property in 2005. (Add 3) When M&L Cabinets purchased the Property, it was a heavily wooded lot not improved for residential construction. (Trial Tr. 27-30; Trial Ex. 3; Add 3) Mark Hilde, as an officer of M&L Cabinets, intended to build a house on the property. (Trial Tr. 31; Add 3)

In 2005, M&L Cabinets took steps in preparation for building a home on the Property. (Add 3) In particular, M&L Cabinets had a survey performed to determine whether the Property was suitable for construction of a home (Add 3; Trial Tr. 31); soil

samplings (borings) were taken to determine whether the Property was suitable for construction of a home (Add 3; Trial Tr. 31); trees, shrubs and vegetation were cleared to allow engineering, including staking, was performed (Add 3; Trial Tr. 31); and a blueprint of the home to be built on the Property was drawn by Big Lake Lumber (Add 3; Trial Tr. 32; Trial Ex. 8).

In August 2005, Wruck Excavating (“Wruck”) was hired by M&L Cabinets to perform preparation of the Property to build a home. (Add 3; Trial Tr. 33-34, 124, 145-146; Trial Exs., 1, 2) The work performed by Wruck included the following: hauling dirt to the Property (Add 3; Trial Tr. 34); cutting down trees and underbrush to clear a path from the road to the proposed building pad for the home (Add 3; Trial Tr. 33); clearing and removing the trees and brush to clear a rough driveway path and building pad at the Property (Add 3; Trial Tr. 33-34; Trial Ex. 3); hauling away trees and stumps cleared from the Property (Add 3; Trial Tr. 33-34, 124; Trial Ex. 2) and designing a septic system for the home that was to be built on the Property. (Add 4; Trial Tr. 145-146; Trial Ex. 1)

As the District Court specifically found, this work performed by Wruck in 2005 “resulted in an open, obvious and noticeable clearing upon which a driveway and residential home could be, and later were, built.” (Add 4; Trial Ex. 3; Trial Tr. 33-34, 49) In fact, the Wruck excavation work is clearly visible in an aerial photograph of the Property dated April 23, 2006 (Trial Ex. 3) and, as the District Court noted, “inspection of the Property shortly before [the Bank] recorded its mortgage [on October 27, 2006] would have shown the actual and visible signs that a project was underway, and would not have revealed any signs that the project had been abandoned.” (Add 15)

Wruck designed a septic system in 2005 that was the system that was eventually installed in the home on the Property. (Add 4; Trial Tr. 145-146)

On July 6, 2006, M&L Cabinets entered into a purchase agreement with Jason Shackelton, whereby M&L Cabinets agreed to sell the land only of the Property to Mr. Shackelton for \$142,000. (Add 4)

Also in July 2006, M&L Cabinets purchased \$26.70 of silt fencing from Big Lake Lumber, which is the equivalent of approximately 100 feet of silt fencing for use on the Property. (Add 4; Trial Tr. 82, 127) At some point prior to October 26, 2006, Mr. Hilde personally installed this silt fencing on the Property. (Add 4; Trial. Tr. 42, 79 & 86)

In July 2006, M&L Cabinets sent out requests for proposals to contractors regarding work necessary to construct the home. (Add 4; Trial Tr. 54; Trial Ex. 6) On July 28, 2006, MLH Construction, Inc., a company also owned by Mr. Hilde, had the Property staked by Bogart Pederson & Associates to facilitate installation of silt fencing and final location of the home site within the Property. (Add 4; Trial Tr. 44; Trial Exs. 9 & 10)

Prior to October 2006, miscellaneous construction materials, including drain tile and a sump basket, were delivered to the Property. (Add 4; Trial Tr. 42) Also prior to October 2006, Wruck returned to the Property to perform additional clearing of the Property (Trial Tr. 43-44, 82)

On or about October 4, 2006, the purchase agreement between Mr. Shackelton and M&L Cabinets was modified so that Mr. Schonning was substituted as purchaser in place of Mr. Shackelton, and the purchase price was increased to \$389,596, which included

construction of a house on the Property by MLH Construction. (Add 4; Trial Ex. 7) At the closing of the sale on October 26, 2006, M&L Cabinets conveyed the Property to Mr. Schonning by warranty deed dated October 26, 2006, recorded by the Sherburne County Recorder on October 27, 2006 as Document Number 636168. (Add 4; Trial Ex. 35) Mr. Hilde executed the warranty deed as vice-president of M&L Cabinets. (Add 4; Trial Ex. 35) Mr. Schonning granted a mortgage on the Property to the Bank in the amount of \$290,000, recorded by the Sherburne County Recorder on October 27, 2006 as Document Number 635169. (Add 5; Trial Ex. 36) The mortgage financed Mr. Schonning's purchase of the Property and the construction of the house on the Property. (Add 5)

Big Lake Lumber is the holder of a mechanic's lien against the Property in the original principal amount of \$43,475.01, which was recorded with the Office of the Sherburne County Recorder on March 5, 2007 as Document Number 644425 (Add 5; Trial Ex. 40) All of the mechanic's lien claimants performed work on the Property after the Bank recorded its mortgage. (Add 5, 12) However, the work done by Wruck Excavating in 2005 predates the Bank's filing of its mortgage in October 2006. (Add 12-14)

Wruck was paid for the 2005 design and 2006 installation of the septic system from the construction loan draw from the Bank's mortgage. (Trail Tr. 145-146; Trial Ex. 50) This draw was submitted to the Bank on the date of the closing on the loan, October 26, 2006. (Trial Ex. 50)

Construction of the home on the Property accelerated in November 2006, including further excavation, framing of the home, and other improvements to the

Property. (Add 5) Much of the work performed in November 2006 and thereafter had been put out for bid in July 2006 by M&L Cabinets. (Add 5)

In May 2008, the Bank proceeded to foreclose its mortgage by advertisement against the Property after Mr. Schonning defaulted on his mortgage. (Add 6; Trial Ex. 41) This action then followed.

SUMMARY OF THE ARGUMENT

The District Court correctly ruled that Big Lake Lumber's mechanic's lien was prior and superior to the Bank's mortgage because its mechanic's lien relates back to the 2005 excavation work performed prior to the recording of the Bank's mortgage. None of the District Court's factual findings are clearly erroneous, and therefore they should be affirmed by this Court on appeal. The District Court's factual findings support the District Court's legal conclusions that the 2005 excavation work was an actual and visible improvement to the Property and that the 2005 excavation work was part of one continuous improvement to the Property—the construction of a home on the Property. Indeed, this Court expressly held in its previous opinion in this very case that the determination of whether the 2005 excavation work was part of one continuous construction improvement is a factual determination that could not be decided as a matter of law for either Big Lake Lumber or the Bank. After conducting a trial on that issue, the District Court found the relevant facts showing that the 2005 excavation work and related work were part of one continuous construction improvement to the Property, and therefore this Court should affirm the District Court's conclusion.

ARGUMENT

I. Standard of Review.

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01.

In applying Rule 52.01, this Court “view[s] the record in the light most favorable to the judgment of the district court.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). “The decision of a district court should not be reversed merely because the appellate court views the evidence differently.” *Id.* “Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Id.* (quotation omitted). “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). And “[i]f there is reasonable evidence to support the district court’s findings, [this Court] will not disturb them.” *Rogers*, 603 N.W.2d at 656.

In the mechanic’s lien context, this Court has recognized that the “question whether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact, and the reviewing court need only determine if the evidence reasonably supports the lower court’s finding that the improvement was continuous.” *Witcher Construction Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404 (Minn. Ct. App. 1991). Indeed, this Court quoted this passage from *Witcher* in its 2010 opinion remanding this very case for a trial to determine whether the

2005 excavation work performed at the property was part of one continuous improvement. (Add 30) In its previous opinion in this case, this Court explained: “Here, the parties primarily dispute whether the work performed by Wruck prior to [the Bank’s] mortgage is part of the same continuous improvement as the work performed by [Big Lake Lumber and DesMarais] after [the Bank’s] mortgage. According to our caselaw, this is a factual determination.” *See Witcher*, 465 N.W.2d at 406.” (Add 30)

Likewise, this Court has held that whether work beginning an improvement to real property is visible is a question of fact. *Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 249 (Minn. Ct. App. 1990).

Here, after this Court remanded the case for a trial to make these factual determinations, the District Court held a bench trial and ruled, based on the evidence presented and its factual findings, that Big Lake Lumber contributed labor to one continuous improvement—the building of a home on the Property. The District Court also found that the 2005 excavation work was the first visible and actual improvement to the Property. These findings of fact, are not clearly erroneous and are fully supported by the evidence in the record. Thus, even if this Court would have viewed the evidence differently had it been the fact-finder, this Court should affirm the District Court’s findings, conclusions and judgment. *Witcher*, 465 N.W.2d at 406; *Rogers*, 603 N.W.2d at 656.

II. The District Court correctly ruled that Big Lake Lumber's Mechanic's Lien has priority over the Bank's Mortgage.

The Bank's arguments on appeal are all based on its erroneous claims that the 2005 excavation work on the Property was not part of the one continuous construction improvement project—to build a house on the Property—and that the 2005 excavation work did not constitute the first actual and visible improvement to the Property. As explained below, the Bank is wrong for numerous reasons. In sum, this Court should reject the Bank's arguments and affirm the District Court's rulings because its findings of fact are not clearly erroneous and it correctly applied well established mechanic's lien law to those facts in ruling Big Lake Lumber's mechanic's lien has priority over the Bank's mortgage. The facts in the record support the District Court's factual finding that the 2005 excavation work constituted an actual and visible improvement to the Property. The evidence produced at trial also supports the District Court's factual finding that the 2005 excavation work and related work performed before the Bank's mortgage were part of one continuous construction improvement—the construction of a home on the Property. Therefore, this Court should affirm the District Court in all respects.

A. The District Court's Factual Finding that the 2005 Excavation Work was an Actual and Visible Improvement to the Property is not Clearly Erroneous.

The mechanic's lien statute provides that whoever contributes to the improvement of real estate by performing labor or furnishing materials shall have a lien on the improvement and upon the land upon which the improvement is situated. Minn. Stat. § 514.01. With respect to the owner of the land, all liens attach and take effect from the

time the first item of material or labor is furnished on the premises for the beginning of the improvement and are preferred over any mortgage not then of record, unless the lien holder had actual notice of the mortgage. Minn. Stat. § 514.05, subd. 1.

Minn. Stat. § 514.05 provides as follows:

Subdivision 1. Generally. All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lien holder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material, or machinery for the improvement, may file for record with the county recorder of the county within which the premises are situated, or, if claimed under section 514.04, with the secretary of state, a brief statement of the nature of the contract, which statement shall be notice of that person's lien only.

Minn. Stat. § 514.05.

The statute, therefore, provides that a mechanic's lien on a construction project generally attaches to the land "from the time of the first item of material or labor is furnished upon the premises for the beginning of the improvement." *Id.* Once attached, the mechanic's lien "shall be preferred to any mortgage ... not then of record," unless the lien-claimant has actual notice of the mortgage. *Id.* Thus, a mechanic's lien has priority over a mortgage if, prior to the filing of the mortgage, there was an "actual and visible beginning of the improvement on the ground." *Id.*

Although the statute serves the purpose of protecting mortgagees without notice of the improvement, the statute also serves “the equally important purpose of protecting the rights of workers and suppliers who furnish the labor and material necessary to the improvement project by charging the mortgagee with notice of the liens as of the beginning date of the actual and visible improvement.” *Carlson-Greife Construction, Inc. v. Rosemount Condominium Group Partnership*, 474 N.W.2d 405, 408 (Minn. Ct. App. 1991).

In other words, these “statutory principles ‘balance the policy of protecting mortgagees who inspect the property and discover no actual and visible improvements against the policy of safeguarding the rights of persons who furnish labor and material to the improvement.’” *Superior Construction Services, Inc. v. Belton*, 749 N.W.2d 388, 391 (Minn. Ct. App. 2008) (quoting *Suburban Exteriors, Inc. v. Emerald Homes, Inc.*, 508 N.W.2d 811, 813 (Minn. Ct. App. 1993)). This dual purpose is “best served when the rights of both mortgages and lien claimants are fixed with definiteness and certainty.” *Id.* (internal quotations omitted).

As a result, Minn. Stat. § 514.05 “in effect imposes a duty on a purchaser or encumbrancer to examine the premises for the beginning of any actual and visible improvements before a sale or mortgage transaction is completed.” *Kloster-Madsen, Inc. v. Tafi’s Inc.*, 303 Minn. 59, 226 N.W.2d 603, 607 (1975). Improvements are visible if “the person performing the duty of examining the premises to ascertain whether an improvement has begun is able in the exercise of reasonable diligence to see it.” *Northwest Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 249 (Minn. Ct. App.

1990). The mortgagee, such as the Bank in this case, is therefore “chargeable with constructive notice of the attachment of a lien when the actual beginning of visible improvements occurs prior to the mortgage transaction.” *Kloster-Madsen*, 226 N.W.2d at 608.

Accordingly, construction on a site does not need to have progressed to any particular stage, so long as some visible beginning of the work has occurred. In *Northwest Wholesale Lumber*, for example, the Minnesota Court of Appeals affirmed the trial court’s finding that evidence of digging and tree clearing, including using a backhoe to excavate a tree, was a sufficient beginning to the improvement. *Northwest Wholesale Lumber*, 457 N.W.2d at 250.

Likewise, in *Kloster-Madsen*, the Minnesota Supreme Court affirmed the trial court’s decision that, on a remodel project, visible improvement had commenced where one electric employee spent an eight hour day working on the premises, had removed four light fixtures, cut four new holes in the ceiling, placed the removed light fixtures in the new holes, cut a crawl hole in the ceiling, and removed two electrical outlet receptacles from a partition. 226 N.W.2d at 606. This work in *Kloster-Madsen* constituted the beginning of the visible improvement despite the fact that the work was commenced without the actual knowledge or authorization of mortgagee. *Id.*

Similarly, in *R.B. Thompson, Jr. Lumber Co. vs. Windsor*, 383 N.W.2d 362 (Minn. Ct. App. 1986), the Court of Appeals reversed a trial court’s finding that a mortgage had priority over the mechanic’s liens where an excavator testified that he cut down the level of the lot three to five feet, pushed the dirt onto adjoining lots, and the building pad had

been constructed. *Id.*, at 365; *see also* Minn. Stat. § 514.01 (listing “clearing” and “grubbing” as work that “contributes to the improvement of real estate,” giving rise to a right to a mechanic’s lien); *In Re Zachman Homes, Inc.*, 47 B.R. 496, 514 (D. Minn. 1984) (clearing, grubbing and rough grading are sufficient to place mortgagee on notice that work had commenced); *Jadwin v. Kasal*, 318 N.W.2d 844, 846 (Minn. 1982) (visible improvement to the property began no later than the date of first delivery of materials to the site).

An inspection by the Bank here, prior to its mortgage filing in October 2006, would have revealed obvious actual and visible improvements on the property under the statute and the above cases. Indeed, the District Court expressly found this was true. (Add 15) (“[I]nspection of the Property shortly before [the Bank] recorded its mortgage would have shown the actual and visible signs that a project was underway.”) However, the Bank failed to produce any evidence or testimony at trial that it took any steps to investigate the property to determine if work had begun. If the Bank had taken such steps, it would have determined that prior to the filing of the Bank’s mortgage on October 27, 2006, the following visible and actual improvements to the property had already occurred: 1) the lot had been cleared and graded, and trees had been removed; 2) a visible path for a driveway and a building pad for the home had been cleared and graded on the property; 3) silt fencing had been installed for erosion control; 4) the property had been staked; and 5) Big Lake Lumber had supplied the silt fencing for the project.

In particular, work performed by Wruck in 2005 included hauling dirt to the Property; cutting down oak trees, pine trees and underbrush to clear a path; clearing and

removing trees and brush to create a rough driveway and building pad at the Property; 9. hauling away trees and stumps cleared from the Property; designing a septic design system for the home which was to be built on the Property. This work was performed by Wruck in 2005 resulted in an open, obvious and noticeable clearing upon which a driveway and residential home could be, and later were, built.

In addition, in July 2006, before the Bank's mortgage was recorded, M & L Cabinets purchased \$26.70 of silt fencing from Big Lake Lumber, which is the equivalent of approximately 100 feet of silt fencing. Prior to October 2006, Mr. Hilde installed the silt fencing at the Property. Also prior to October 2006, construction materials, such as drain tile, a sump basket and various other miscellaneous construction materials, were delivered to the Property. And prior to October 2006, Wruck returned to the Property to perform additional clearing of the Property. (Trial Tr.43-44 and 82)

This work is more than sufficient to constitute the first visual and actual improvement to the property. There is certainly no requirement that any structure be erected on the site, nor even that the foundation or footings be poured. It is more than sufficient that some grading of the site or excavation is apparent to an observer. The Minnesota Supreme Court has explained that "where excavation is involved, it appears that the excavation itself or something directly connected therewith ... constitutes the beginning of the visible improvement" to the property under Minn. Stat. § 514.05, such that mechanic's liens will relate back to the time of the excavation work. *National Lumber Company v. Farmer & Son, Inc.* 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957); *see also Brettschneider v. Wellman*, 230 Minn. 225, 232, 41 N.W.2d 55, 260 (1950).

Here, by October 27, 2006, the date the Bank's mortgage was recorded, there had been significant ground clearing and excavation work. Trees had been cleared. A path that would become the driveway had been cleared. A building pad on which the home would be built had been cleared. Silt fencing was present. This work was clearly visible in the aerial photograph of the property taken in April 2006, before the Bank's October 2006 mortgage. (Trial Ex. 3) The sum of this work is more than sufficient to constitute actual and visible improvement of the Property. The District Court's factual finding that this work constituted an actual and visible improvement to the Property is not clearly erroneous and should be affirmed by this Court.

B. The District Court's Factual Finding that the 2005 Excavation Work and Related Work Performed before the Bank's Mortgage Were Part of One Continuous Improvement is not Clearly Erroneous.

The District Court correctly found that the 2005 excavation work and related work performed before the Bank's mortgage was recorded were part of one continuous construction improvement to the Property, namely the building of a house on the Property. This factual finding by the District Court is not clearly erroneous and should be affirmed by this Court.

"Construction work is considered to be a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." *Witcher Construction Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404, 407 (Minn. Ct. App. 1991) (citing *Kahle v. McClary*, 255 Minn. 239, 241, 96 N.W.2d 243, 245 (1959)). As this Court has recognized, the Minnesota Supreme Court "has consistently held that separate construction phases of the same overall construction

project constitute one continuous improvement.” *Id.* (citing *Rochester’s Suburban Lumber Co. v. Slocumb*, 282 Minn. 124, 128-29, 163 N.W.2d 303, 307 (1968); *Barrett v. Hampe*, 237 Minn. 80, 82, 53 N.W.2d 803, 805 (1952)). The Minnesota Supreme Court’s decision in *Barrett* stands for the proposition that “when determining whether a project was a single improvement, the type of contract is not dispositive; the question asked is whether the materials furnished or work performed were all pursuant to one job as a continuous undertaking.” *Id.*

The only time a construction project will be determined to consist of separate improvements is when “there is little or no relationship between the contracts under which the work was performed.” *Id.* When evaluating whether a project is separate and distinct or part of a continuous project, this Court examines the entire project, including the parties’ intent, what the contracts covered, the time lapse between projects and financing. *Poured Concrete Foundation, Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. Ct. App. 1995).

This Court has made clear that a District Court’s determination of whether labor was performed as part of one continuous improvement or as part of separate, distinct improvements is a question of fact. “The question whether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact, and the reviewing court need only to determine if the evidence reasonably supports the lower court’s finding that the improvement was continuous.” *Witcher*, 465 N.W.2d at 406 (citing *Kahle v. McClary*, 255 Minn. 239, 242, 96 N.W.2d 243, 246 (1959)).

Here, the evidence and testimony adduced at trial fully supports the District Court's factual finding that the work performed by Wruck in 2005 and other related work performed before the Bank's mortgage were part of one continuous improvement—the building of a home on the Property. The record reflects that Mr. Hilde intended to build a home for himself and his wife, but decided against building a home for his personal use and, instead, decided to build a spec house for sale. There is no dispute that a home was built on the Property, just as it was intended in 2005, and that the home was built on the building pad and site upon which Wruck performed work in 2005.

In August 2005, and continuing thereafter, Wruck began clearing the heavily wooded lot and began creating a building pad for the home which was eventually constructed. Wruck also cleared and prepared a path for the driveway and hauled in fill to the Property. Additionally, silt fencing was installed in furtherance of the construction of the building site, and the site was staked and engineered prior to the Bank's mortgage being funded or recorded. After August 2005, Wruck performed additional excavating, clearing, soil borings, backfill and installation of the septic system. After footings were installed, DesMarais began to frame the house, and DesMarais eventually took over as general contractor.

If Wruck's excavation work and the final home were somehow two separate improvements, as argued by the Bank, it is incomprehensible that work other than the initial clearing of the land would have been performed. Yet, the evidence in the record is clear that additional work was performed, evidencing that the construction project continued beyond Wruck Excavating's work and prior to the Bank's filing of its

mortgage. As such, the record shows continuous work, and work forming one continuous project to build a house on the property.

Importantly, although there was a delay of approximately fourteen months between the initial excavation work by Wruck Excavating in August 2005 and the Bank's mortgage in October 2006, during that time work was done on the Property. The Property was staked, engineered, and silt fencing was installed. All of this work shows an objective manifestation by the parties to continue the project, not to abandon the project in any way. Indeed, an inspection of the Property shortly before the Bank recorded its mortgage would have shown the actual and visible signs that a project was under way, and would *not* have revealed any signs that the project had been abandoned or that it was not continuing.

Further, the record shows that the work performed by Wruck in 2005 was part of a unified plan to build a home on the Property and that there was no abandonment of that construction project. Mr. Hilde planned to build a home on the Property when he purchased the lot in 2005. A house was, in fact, constructed on the Property on the same building pad as set by Wruck in 2005, with a driveway built on the same path cleared by Wruck in 2005. Although there may have been a modification in who would ultimately occupy the house to be built—it changed from personal use by the owner to a spec house to be sold—the plan to build a house, on the building pad cleared by Wruck in 2005, with a driveway located on the path cleared by Wruck in 2005, did not change.

Accordingly, the District Court did not clearly err in finding there was one continuous construction improvement project. Accordingly, this Court should affirm the

District Court's ruling that Big Lake Lumber's mechanic's lien has priority over the Bank's mortgage.

CONCLUSION

The District Court did not clearly err in finding, after a bench trial, that the 2005 excavation work performed at the Property prior to the Bank's mortgage was the first actual and visible improvement to the Property. The District Court also did not clearly err in finding that the 2005 excavation work and related work performed at the Property prior to the Bank's mortgage was part of the same continuous construction improvement—the building of a house on the Property—to which Big Lake Lumber contributed. Accordingly, the District Court correctly ruled that Big Lake Lumber's mechanic's lien had priority over the Bank's mortgage and this Court should affirm the District Court's rulings in all respects.

Respectfully submitted,

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Dated: April 23, 2012

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,820 words. This brief was prepared using Microsoft Word 2007.

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