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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1571**

McCarron's Building Center,
Appellant,

vs.

Titus Construction, Inc.,
Respondent,

Earley Lake Office Park, LLC,
Respondent,

Equity Properties, LLC, et al.,
Respondents,

Sela New Construction,
Respondent,

Installed Building Solutions,
Respondent.

**Filed June 15, 2010
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Dakota County District Court
File No. 19HA-CV-08-608

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Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

This case arises from an office-building development in the city of Burnsville. McCarron's Building Center (MBC) supplied the project with building materials but did not receive payment for materials worth approximately \$208,000. Thus, MBC commenced this action to foreclose its mechanic's lien. The district court concluded that MBC's mechanic's lien has priority over a lender's mortgage liens against two units of the office building but is junior in priority with respect to a different lender's mortgage liens against the other six units. The district court also made additional rulings that hinder MBC's ability to enforce its mechanic's lien. MBC appeals, raising five issues. We conclude that the district court did not err with respect to one issue, but we agree with MBC on all other issues. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Some of the parties to this case attempted to develop suburban real estate by constructing, among other things, an eight-unit office building. The undeveloped land was owned by Equity Properties, LLC, which sold it to Earley Lake Office Park, LLC, in December 2005. Earley Lake intended to develop the site into five office buildings, with multiple office units in each building. In the purchase agreement, Earley Lake agreed to give Equity Properties a favorable purchase price for a unit in Building 1, which was

planned for Lot 1 of the development. Earley Lake hired Titus Construction to be the general contractor for the project. Todd Johnson owned Titus Construction and also owned 50% of Earley Lake. Johnson gave deposition testimony prior to trial but since has died.

In the spring of 2006, Titus Construction hired G.F. Jedlicki, Inc., to install certain utilities on the five building sites. In April 2006, Jedlicki installed sanitary cleanout pipes for each of the five proposed buildings. Jedlicki also installed a sewer system for Building 1. Titus Construction paid Jedlicki in full by June 6, 2006.

Titus Construction obtained a permit for the construction of Building 1 on July 21, 2006. MBC made multiple deliveries of building materials between August 8, 2006, and April 19, 2007. On July 26, 2007, MBC filed a blanket mechanic's lien against all of the units in Building 1.

Earley Lake's early-stage development was financed by Wells Federal Bank. On January 20, 2006, Earley Lake gave a mortgage on the undeveloped land to Wells Federal in exchange for a loan of \$1,987,500. Wells Federal recorded the mortgage on January 24, 2006. Earley Lake sold Lot 1 to Titus Construction on June 20, 2006. At that time, Wells Federal released Lot 1 from Earley Lake's mortgage. On June 21, 2006, Titus Construction gave four mortgages on Lot 1 to Professional Finance, Inc., to secure a construction loan. These four mortgages -- each of which was secured by two units of the eight-unit building -- were recorded on June 23, 2006, and later were assigned to Bank Cherokee.

In April 2007, Equity Properties purchased Unit 102. That same month, Titus Construction and Earley Lake completed a series of transactions by which Titus Construction transferred Unit 101 to Earley Lake and later repurchased it. At approximately the same time, Bank Cherokee released the mortgage on Units 101 and 102. Titus Construction gave Wells Federal a new mortgage secured by Unit 101; that mortgage was recorded on May 11, 2007. Equity Properties later gave Wells Federal a mortgage secured by Unit 102; that mortgage was recorded on March 11, 2008.

Although the record is unclear, it appears that the entire development was not commercially successful but that the construction of Building 1 was completed. It further appears that MBC did not get paid for building materials it supplied because, in April 2008, it commenced this action to foreclose its mechanic's lien. Bank Cherokee and Wells Federal jointly answered the complaint and alleged that their respective mortgage liens on Units 101 through 108 are superior to MBC's mechanic's lien.

The district court conducted a one-day bench trial in December 2008 and issued findings of facts, conclusions of law, and an order for judgment in April 2009. The district court concluded that MBC's mechanic's lien does not have priority over the mortgages of Bank Cherokee against Units 103 through 108 because MBC supplied materials to Titus Construction after Bank Cherokee's mortgages were recorded. The district court rejected MBC's argument that Jedlicki's utilities work and the construction later performed by Titus Construction were one continuous improvement such that, for purposes of determining priority, MBC's deliveries of materials relate back to the time of Jedlicki's utilities work. The district court also apportioned MBC's mechanic's lien to all

eight units of the building so that each office unit is encumbered by only one-eighth of the amount of the lien. The district court further ruled that Wells Federal and Bank Cherokee are entitled to have mortgaged office units released from MBC's mechanic's lien by paying MBC the amount apportioned to each unit. The district court applied the statutory interest rate of 6% to MBC's mechanic's lien rather than a contractual interest rate of 18%. In May 2009, MBC moved for amended findings or a new trial. In June 2009, the district court summarily denied the motion and ruled that MBC is not entitled to an award of attorney fees. MBC appeals, raising five issues.

D E C I S I O N

I. Lien Priority

MBC first argues that the district court erred by determining that Bank Cherokee's mortgages on Units 103 through 108, which were recorded on June 23, 2006, have priority over MBC's mechanic's lien, which was recorded on July 26, 2007.

The relevant statute provides that, as against a mortgagee that does not have notice, a mechanic's lien attaches and takes effect at the time of the commencement of the improvement to which the mechanic's lien relates:

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 lienholder 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

Minn. Stat. § 514.05, subd. 1 (2008). Determining when a mechanic's lien attaches under this statute requires a two-step analysis. First, the court must "identify the improvement to which the labor or material contributed." *Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992). Second, the court must determine "what item of labor or material constituted the actual and visible beginning of that improvement." *Id.* Improvements are considered 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." *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975).

A mechanic's lien for labor or material contributed at different stages of a construction project will attach and relate back to the visible commencement of the project only if the labor or material contributed was part of a single improvement. *Langford Tool & Drill Co. v. Phoenix Biocomposites, LLC*, 668 N.W.2d 438, 446 (Minn. App. 2003). "Construction work is considered a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 407 (Minn. App. 1991) (citing *Kahle v. McClary*, 255 Minn. 239, 241, 96 N.W.2d 243, 245 (1959)), *review denied* (Minn. Mar. 15, 1991). "A project consists of separate improvements if there is little or no interrelationship between the contracts under which the project was performed." *Id.* In determining whether a project consists of a single improvement or separate improvements, this court focuses on four factors: "the parties' intent, what the contracts covered, the time lapse between projects, and financing." *Poured Concrete*

Found., Inc. v. Andron, Inc., 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Whether an improvement to real property is part of one continuous improvement or is a separate improvement is a question of fact. *Witcher Constr.*, 465 N.W.2d at 406. On appeal, this court determines whether “the evidence reasonably supports the lower court’s finding.” *Id.* “But findings of fact that are influenced by an error of law may be set aside by the reviewing court.” *Id.* (citing *Olson v. Olson*, 236 Minn. 363, 365, 53 N.W.2d 29, 31 (1952)).

In this case, the district court found that MBC’s and Jedlicki’s respective contributions were not parts of a single continuous improvement. It is undisputed that Jedlicki’s work on the utilities for Building 1 began before Bank Cherokee’s predecessor, Professional Finance, recorded its mortgage on the property. In addition, the district court found that the cleanout pipe for Building 1 was visible on April 26, 2006, and this finding is supported by the evidence. The district court’s determination of the priority issue also was based on the following findings:

23. The subdivision project was conducted by Earley Lake and financed by Wells Federal. The building construction project was conducted by Titus Construction and financed by Professional Finance.

24. The purpose of the two projects were distinct and different. The subdivision project was intended to turn undeveloped land into platted, buildable lots. The building construction project was to erect a building on one of the lots.

25. There was a lapse of time between the two projects. Jedlicki was paid in full by June 6, 2006, and construction of the building began after July 21, 2006.

MBC contends that these findings are clearly erroneous because they are influenced by an error of law. To analyze MBC's argument, we apply the four-factor framework of *Witcher Construction* and *Poured Concrete*.

First, we consider "the parties' intent." *Poured Concrete*, 529 N.W.2d at 510. The district court found that there were "two projects" -- a "subdivision project" and a "construction project" -- and that the purposes of the two projects were "distinct and different." This finding is not supported by the evidentiary record, which, considered as a whole, clearly depicts a single project. By necessity, the process of turning undeveloped land into completed office buildings consists of various steps, which often must be completed in series. That some utilities were installed on the sites of the proposed buildings before the buildings were constructed does not change the fact that the ultimate goal of all work performed was to achieve the construction of office units that were ready for sale and occupancy. This overall purpose is evidenced by a Wells Federal loan committee report, prepared before the first loan, which expressly states, "The proposed loan will be used to develop the site into 20 office condo lots." It is immaterial that the excavation and site-preparation work was performed by Earley Lake but that the construction was performed by Titus Construction. The two companies are related entities, and that sequence of work was Johnson's intent from the beginning of the project. Furthermore, as MBC points out, whether a single entity or multiple entities own the property is not a consideration identified in *Witcher Construction* and *Poured Concrete*. Thus, the first factor supports an ultimate finding that there was a single continuous improvement.

Second, we consider “what the contracts covered.” *Id.* The district court did not expressly consider this factor. In fact, there are no contracts in the evidentiary record, other than the contract between MBC and Titus Construction. Bank Cherokee contends that Jedlicki and MBC contributed to separate improvements because they are separate entities. But the caselaw provides that “[c]ontracting separately for different stages of a construction project does not, by itself, divide the project into separate improvements.” *Witcher Constr.*, 465 N.W.2d at 406. Thus, the second factor does not favor either party.

Third, we consider “the time lapse between projects.” *Poured Concrete*, 529 N.W.2d at 510. The district court found that there was a six-week lapse of time between the date on which Jedlicki received full payment and the date on which Titus Construction obtained a building permit. At most, four or five months separated Jedlicki’s utilities work and MBC’s delivery of building materials. From either standpoint, the lapse in time was not significant as a matter of law. The lapse in time in this case was considerably shorter than the two-year lapse in *Poured Concrete*, where this court reversed the district court and held that there was a single continuous improvement. *See* 529 N.W.2d at 512; *see also Kahle*, 255 Minn. at 240, 242, 96 N.W.2d at 245, 247 (holding that single continuous improvement existed despite one-year lapse in time). Thus, the third factor supports an ultimate finding that there was a single improvement.

Fourth, we consider the nature of the “financing.” *Poured Concrete*, 529 N.W.2d at 510. The district court found that the two phases of the project had separate financing. The record supports the district court’s finding. We have stated, however, that this factor “does not weigh heavily” in the overall analysis. *Id.* at 511. Thus, this factor supports

the district court's ultimate finding that there was *not* a single improvement but only slightly.

In sum, two of the four factors weigh in favor of a conclusion that MBC's and Jedlicki's contributions to Building 1 were part of a single continuous improvement. One factor is neutral. The remaining factor does not weigh heavily in our analysis. *See id.* Most importantly, Jedlicki's work and MBC's deliveries of materials "serve[] the same general purpose." *Id.* at 510. Accordingly, the district court erred as a matter of law by finding that there were separate improvements. *See Witcher Constr.*, 465 N.W.2d at 406 (citing *Olson*, 236 Minn. at 365, 53 N.W.2d at 31). Therefore, the district court erred by concluding that MBC's mechanic's lien is junior in priority to the mortgages held by Bank Cherokee.

II. Lien Apportionment

MBC next argues that the district court erred by ordering that one-eighth of the amount of its blanket mechanic's lien may be enforced against each unit of Building 1. The district court essentially required apportionment of the mechanic's lien over MBC's objection. We apply a *de novo* standard of review to this issue, which concerns the interpretation of a statute. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 815 (Minn. 2004).

Mechanics' liens are creatures of statute and exist only because of the statute creating them. *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982). The relevant statute provides that a lienholder who, pursuant to one general contract, has contributed

to an improvement on one lot may file one lien statement to encumber the entire area improved:

A lienholder who has contributed to the erection, alteration, removal, or repair of two or more buildings or other improvements situated upon or removed to one lot, or upon or to adjoining lots, under or pursuant to the purposes of one general contract with the owner, may file one statement for the entire claim, embracing the whole area so improved; or, if so electing, the lienholder may apportion the demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each, respectively.

Minn. Stat. § 514.09 (2008). This statute “was originally intended to relieve a mechanic of the need to keep separate accounts when improving multiple contiguous lots.” *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 699 (Minn. App. 2009) (citing *Johnson v. Salter*, 70 Minn. 146, 151, 72 N.W. 974, 974-75 (1897)), *review granted* (Minn. Sept. 16, 2009). Nonetheless, under the statute, “a mechanic’s lienholder who has perfected a blanket mechanic’s lien may foreclose the entire lien amount against less than all the property subject to the lien, provided that the equities do not unfairly burden one owner or property over other owners or properties.” *Id.* at 702.

In *Premier Bank*, this court concluded that allowing a junior lienholder “to foreclose its entire lien claim on less than the entire property balances the equities and construes the lien laws liberally to effect their purpose.” *Id.* at 701. In this case, however, the district court did not balance the equities before ordering apportionment. More importantly, the district court required MBC to apportion its mechanic’s lien even

though the relevant statute states that MBC may elect to do so or not do so. *See* Minn. Stat. § 514.09.

Thus, in light of this court’s opinion in *Premier Bank*, the district court erred. Therefore, we remand to the district court for further consideration of this issue. If the supreme court issues an opinion in *Premier Bank* prior to the district court’s reconsideration, this opinion might not be considered the law of the case. *See McClelland v. McClelland*, 393 N.W.2d 224, 226 (Minn. App. 1986) (noting that law-of-the-case doctrine “must yield to an intervening change of controlling law”), *review denied* (Minn. Nov. 17, 1986).

III. Unit Release

MBC also argues that the district court erred by ruling that Wells Federal and Bank Cherokee are entitled to have any unit in which they have a mortgage interest released from the mechanic’s lien by paying MBC a proportionate amount of its mechanic’s lien. We apply a *de novo* standard of review to this issue, which concerns the interpretation of a statute. *Eischen Cabinet Co.*, 683 N.W.2d at 815.

“[A]n individual unit owner may have the unit owner’s unit released from a lien if the unit owner pays the lienholder the portion of the amount which the lien secures that is attributable to the unit.” Minn. Stat. § 515B.3-117(a) (2008).

The portion of the amount which a lien secures that is attributable to the unit shall be equal to the total amount which the lien secures multiplied by a percentage calculated by dividing the common expense liability attributable to the unit by the common expense liability attributable to all units against which the lien has been recorded

Id.

MBC contends that Wells Federal and Bank Cherokee cannot force a release under section 515B.3-117(a) because neither bank meets the definition of an “individual unit owner.” The term “unit owner” is defined by statute as follows:

“Unit owner” means a declarant or other person who owns a unit, a lessee under a proprietary lease, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common interest community, but does not include a secured party. In a common interest community, the declarant is the unit owner of a unit until that unit has been conveyed to another person.

Minn. Stat. § 515B.1-103(36) (2008). Wells Federal and Bank Cherokee are not “unit owners,” as that term is defined by the statute; rather, they are secured parties. Thus, the district court erred when it ruled that “Wells Federal and Bank Cherokee are entitled under Minn. Stat. 515B.3-117 to have any particular unit they have an interest in to be released from the [MBC] lien by paying the apportioned amount of the Mechanic’s Lien.” On remand, the district court shall not permit the lenders to obtain release of Units 101 and 102 in this manner.

IV. Attorney Fees

MBC next argues that the district court erred by refusing to award it attorney fees.

In a mechanic’s lien case, “[j]udgment shall be given in favor of each lienholder for the amount demanded and proved, with costs and disbursements to be fixed by the court at the trial.” Minn. Stat. § 514.14 (2008). In this context, “costs and disbursements may include attorney fees.” *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d

783, 788 (Minn. 2009). In determining whether to award attorney fees, a district court should consider the “time and effort required, novelty or difficulty of the issues, skill and standing of the attorney, value of the interest involved, results secured at trial, loss of opportunity for other employment, taxed party’s ability to pay, customary charges for similar services, and certainty of payment.” *Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982). “On review, this court will not reverse a trial court’s award or denial of attorney fees absent an abuse of discretion.” *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 661 (Minn. 1987); *see also Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001).

In this case, the district court concluded that MBC is entitled to costs and disbursements but declined to award attorney fees. The district court did not state its reasons for not awarding attorney fees, and the record does not reveal whether the district court considered the *Jadwin* factors. For this reason alone, we must reverse and remand. *See Richard Knutson, Inc. v. Westchester, Inc.*, 374 N.W.2d 485, 490 (Minn. App. 1985). In addition, in parts I, II, and III of this opinion, we have provided greater relief to MBC than was provided by the district court. On remand, the district court also shall reconsider the issue of attorney fees in light of the more favorable results secured by MBC after appeal and remand.

V. Interest Rate

MBC last argues that the district court erred by calculating the amount of interest due on its recovery with respect to Unit 101, which is owned by Titus Construction, and Units 103 through 108, which are owned by Earley Lake. The district court applied the

statutory interest rate of 6% to all units rather than the rate of 18%, which is contained in MBC's contract with Titus Construction. We apply a *de novo* standard of review to this issue, which concerns the interpretation of a statute. *Eischen Cabinet Co.*, 683 N.W.2d at 815.

The first of two relevant statutes provides:

Except as otherwise provided by contract, interest awarded on mechanics' lien claims shall be calculated at the legal rate, as provided in section 334.01, from the time the underlying obligation arises until the expiration of 30 days after the claimant's last item of labor, skill, or materials was furnished to the improvement and shall be calculated thereafter at the rate computed for verdicts and judgments, as provided in section 549.09.

Minn. Stat. § 514.135 (2008). But a second statute provides that if materials are supplied "under a contract with the owner and for an agreed price, the lien as against the owner shall be" for the contract price. Minn. Stat. § 514.03, subd. 1(a) (2008).

The statutory interest rate of 6% must be applied if a mechanic's lien is being enforced against a party "as owner of the encumbered property, not as a party to the construction contract." *Northwest Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 250 (Minn. App. 1990). But in *Northwest Wholesale*, the owner of the encumbered property was not a party to the construction contract, which is true here with respect to Unit 101, which is owned by Titus Construction. *See id.* It is immaterial that Titus Construction sold the property to a related entity and later repurchased it. To allow Titus Construction to avoid the 18% contractual rate on that ground would encourage

manipulation of contractual interest rates. Thus, we conclude that the contractual interest rate of 18% applies to the lien against Unit 101.

Earley Lake, however, is in a different position. It is related to Titus Construction, but it was not a party to the contract that provided for an interest rate of 18%. MBC has provided no caselaw stating that the contractual interest rate of 18% should apply to a related entity of a party to the contract. Thus, the district court did not err by concluding that the statutory interest rate of 6% applies to the liens against Units 103 through 108.

Affirmed in part, reversed in part, and remanded.