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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1730**

Breidenbach Company, LLC (dba A.J. Wismin Homes),  
Appellant,

vs.

Prosperity Real Estate Investments, LLC,  
Respondent,

R. E. Palmen, Inc.,  
Respondent,

Signature Bancshares, Inc. (dba Signature Bank),  
Respondent,

Midtown Rowhomes Homeowners Association, Inc.,  
Respondent,

Lampert Yards, Inc.,  
Respondent,

Centraire Heating & Air Conditioning, Inc.,  
Respondent,

ABC, Inc., et al.,  
Defendants

**Filed July 20, 2010  
Affirmed  
Worke, Judge**

Hennepin County District Court  
File No. 27-CV-08-20983

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Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Worke, Judge.

## **UNPUBLISHED OPINION**

**WORKE**, Judge

On appeal in this lien-priority dispute, appellant-lienholder argues that the district court: (1) erred by granting summary judgment in favor of respondent-bank because first improvements were made to the property prior to the bank recording its mortgage or, alternatively, the mortgage was a split-priority mortgage susceptible to prioritization behind the mechanic's lien; and (2) abused its discretion by denying appellant's motion to amend its complaint to add five additional claims. We affirm.

### **FACTS**

Appellant Breidenbach Company, LLC ("Breidenbach") entered into a construction contract with respondent Prosperity Real Estate Investments, LLC ("Prosperity") for the development of a residential property in Minneapolis in April 2007. The project called for Breidenbach to demolish and remove an existing structure on Prosperity's property, followed by the construction of two multi-unit residential units. Prosperity obtained a construction loan from respondent Signature Bancshares, Inc.

("Signature") to finance the project. The construction loan closed on June 15, 2007, at the selected closing company, Stewart Title, with representatives from Signature, Prosperity, and Breidenbach in attendance. Three documents were signed by Signature and Prosperity at the closing: a mortgage securing the bank's interest in the property; a construction loan agreement providing the terms of the loan agreement, including disbursement provisions; and a disbursement agreement setting forth the requirements for the release of the mortgage proceeds. The terms of the mortgage provided that "[Signature] will disburse loan proceeds under such terms and conditions as [Signature] may deem reasonably necessary to insure that the interest created by this [m]ortgage shall have priority over all possible liens, including those of material suppliers and workmen." The initial disbursement was made on the closing date, and nine subsequent draws were disbursed on or after August 10, 2007.

Signature recorded the construction mortgage against the property on June 18, 2007. Contemporaneous with the recording, Signature took "priority photographs" illustrating that Breidenbach had not yet begun the demolition of the existing structure on the premises and had not made any visible improvement to the lot. The evidence of no visible improvements being made to the property was consistent with Breidenbach's assertion at the closing that it had not yet begun the demolition of the existing structure on the property.

Construction began behind schedule and over budget. Disputes arose between Breidenbach and Prosperity, and Breidenbach quit the project before completion, making its last improvement on July 3, 2008. Breidenbach filed a mechanic's lien on July 22,

2008, and filed a complaint on August 18, 2008, listing three causes of action: (1) breach of contract and (2) unjust enrichment against Prosperity; and (3) a mechanic's-lien-foreclosure claim. Signature answered the complaint, conducted discovery, and moved for summary judgment in February 2009, seeking a declaration that its mortgage had priority over Breidenbach's mechanic's lien. Signature foreclosed its mortgage, purchased the property, and no other lienholder redeemed. Breidenbach moved for summary judgment against Prosperity and partial summary judgment against Signature on March 9. Breidenbach also moved to amend its complaint on April 27, seeking to add claims for promissory estoppel, unjust enrichment, and quantum meruit against Signature, and a claim to pierce the corporate veil against Prosperity.

After hearings on May 12 and 29, the district court issued a summary-judgment order on July 23, 2009. The district court denied Breidenbach's motions for summary judgment and granted Signature's summary-judgment motion, concluding that no visible improvements had occurred when Signature recorded its mortgage. The district court also denied Breidenbach's motion to amend its complaint. This appeal follows.

## **DECISION**

### ***Summary Judgment***

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment is appropriately granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* at 77.

Minn. Stat. § 514.05, subd. 1 (2008) governs the priorities of competing mechanics’ liens and mortgages:

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.

Thus, a mortgage will be prioritized over a mechanic’s lien “if either (1) the mortgage[] [was] ‘of record’ prior to appellants first furnishing material or labor to the property, or (2) the mortgage[] [was] not of record when appellants began working on the property but appellants had actual notice of the mortgages.” *Imperial Developers, Inc. v. Calhoun Dev., LLC*, 775 N.W.2d 895, 899 (Minn. App. 2009), *review granted*. Only the first prong of this test is at issue in this case.

#### *Date of First Improvement*

Breidenbach argues that the district court erred in determining the date of first improvement to the property for two reasons. First, Breidenbach asserts that material

facts remain in dispute regarding whether it confirmed at closing that construction had not yet begun. Second, Breidenbach argues that the boarding up of the doorways and detachment of the exterior stairwell of the existing structure constituted first improvements occurring prior to the recording of the mortgage.

Both arguments are unconvincing. The district court did find that “Mr. Allan Breidenbach . . . attended the closing on the construction loan/mortgage on June 15, 2007. At the closing, Mr. Breidenbach orally confirmed that no work had started on the subject property.” But even if this was an issue of material fact in dispute, the district court primarily relied on “priority photographs of the subject property, establishing that the first visible improvement had not occurred before Signature’s mortgage was recorded on June 18, 2007.” Thus, even assuming Breidenbach is correct and that the district court erred by determining that the oral assertion was made, the photographic evidence confirming the alleged assertion is sufficient to support the district court’s conclusion. *See Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (stating that this court may affirm summary judgment if it can be sustained on any ground), *review denied* (Minn. Feb. 13, 1996).

Similarly, the argument that the boarding-up of the windows and detachment of the exterior stairwell of the existing structure constitutes the beginning of construction also fails. Breidenbach alleged at summary judgment that it “removed the . . . front door [from the existing structure], boarded up the front door, removed an exterior staircase, and boarded up a second door and window sometime between April and May 2007,” and claimed these actions constituted viable improvements. Breidenbach’s own affidavit

undercuts this argument, however. Breidenbach asserted that the front door was removed per the request of the previous owner, and that the other work was preformed “to secure the property” from people breaking in and vandalizing the interior. This work was unrelated to the demolition and construction process, and therefore does not constitute a first improvement on the ground of the site under Minn. Stat. § 514.05, subd. 1. The district court therefore did not err in concluding that the first improvement of the property did not occur prior to Signature recording its mortgage.

### *Split-Priority Mortgage*

Breidenbach alternatively argues that Signature’s mortgage is actually a split-priority mortgage treated differently under the recording statute than traditional mortgages. A mortgage distributing funds by future advances or draws is prioritized in its entirety over a mechanic’s lien when the advances are obligatory under the loan agreement and the loan is recorded before the mechanic’s lien attaches to the property. *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 874 n.1 (Minn. 2002); *Axel Newman Heating & Plumbing Co. v. Sauers*, 234 Minn. 140, 145, 47 N.W.2d 769, 772 (1951). However, if the future loan advances are optional, rather than obligatory, under the language of the contract, the mechanic’s lien takes priority over any mortgage advances made after the mortgagee receives actual notice of the mechanic’s lien. *Axel Newman Heating & Plumbing Co.*, 234 Minn. at 145, 47 N.W.2d at 772.

Whether future advances under a mortgage agreement are optional or obligatory is a question of law reviewed de novo. *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995). The determinative inquiry of whether the future

advances are optional or obligatory is made solely by reference to the terms of all the documents controlling the disbursements of the loan proceeds. *Id.* The advances are considered optional if the lender has the right to decline to make the advances under the terms of the contract. *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 451, 214 N.W.2d 503, 506 (1927).

Here, the construction loan also contained language pertaining to the disbursement of the loan, under the section titled “CONDITIONS PRECEDENT TO EACH ADVANCE”: “[Signature’s] obligation to make the initial [a]dvance and each subsequent [a]dvance under this [a]greement shall be subject to the fulfillment to [Signature’s] satisfaction of all of the conditions set forth in this [a]greement and in the [r]elated documents.” The most noteworthy of the “related documents” referenced in the construction loan agreement is the disbursement agreement. The disbursement agreement provided that “[p]rior to each [] disbursement of funds, [Stewart] shall be furnished with the following:” written draw requests and corresponding invoices; updated sworn construction statements, if needed; updated project costs statements, if needed; sufficient funds to cover the requested disbursements and extra costs accrued; funds to cover other unpaid charges; lien waivers, affidavits, and lien releases for prior draws; and an updated title search. The disbursement agreement continued to clarify that “[u]pon [Prosperity] complying, in the sole discretion of [Signature] and [Stewart], with all of the above conditions, [Signature] shall disburse to [Stewart] on behalf of [Prosperity] the funds requested in the [d]raw [r]equest.”

The district court determined that Signature was ultimately obligated to release the loan advances because “the language of the [c]onstruction [l]oan [a]greement unambiguously demonstrates that the advances were obligatory,” and further that “[t]he [d]isbursement agreement set forth the conditions precedent to Signature’s obligation to release each draw.” Breidenbach concedes that language of the construction loan agreement includes the reference to Signature’s “obligation” to release the advances. Nevertheless, Breidenbach challenges the district court’s determination on two separate grounds: (1) that the obligatory language was contained within a line of credit, and advances made pursuant to a credit line are traditionally considered optional by nature; and (2) the totality of the obligations are so onerous and burdensome that Signature’s obligation is effectively rendered meaningless due to the extent of the control the bank retained over the release of the advances.

Neither argument is persuasive. Breidenbach cites to this court’s decision in *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.* to support its argument that credit-line advances are traditionally considered optional by nature. 374 N.W.2d 493 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985) In *R.B. Thompson*, the loan at issue was a peculiar arrangement whereby the lender established a credit line for a developer in lieu of a traditional mortgage. *Id.* at 495-96. The lender agreed to advance funds from the credit-line at its sole discretion, upon a written request from the borrower. *Id.* at 496. There was no formal loan agreement, construction progress was not required to obtain an advance, the funds disbursed were not tied to one specific construction project, and the funds were not required to be paid directly to contractors or material providers. *Id.* This

court held that “[c]onstruction loan advances secured by mortgages were optional rather than obligatory where the lender retained sole discretion over payments *and was bound not by loan agreements on individual properties but by a line of credit* established for the developer.” *Id.* at 494 (emphasis added). This case is therefore inapposite.

Breidenbach also fails to cite to any caselaw supporting its contention that the obligations of a loan can be so strict that the obligation actually becomes an option for a lender. Conversely, Signature cites to a supreme court case involving similar obligations required by a lender as a condition of the advancement of funds that was deemed to be obligatory. In *Home Lumber*, the borrower was required to furnish the lender with the following prior to funds being advanced under the terms of the construction loan agreement: approved construction plans, specifications and itemized costs of the proposed building, all construction contracts, proof of insurance, a survey of the property, and signed invoices from suppliers and contractors. 535 N.W.2d at 305. The supreme court concluded that these conditions “clearly stated in the construction loan agreement . . . cannot reasonably be interpreted to create a mere option.” *Id.* at 306. Moreover, the court concluded that, although the record demonstrated that the lender departed from these conditions and advanced funds without complying strictly with the construction loan agreement, this discretionary disbursement did not alter the conclusion that the loan was obligatory under the plain terms of the construction loan agreement. *Id.*

Here, the disbursement agreement required extensive conditions precedent to obtain loan advancements fundamentally similar to the conditions precedent in *Home Lumber*. The principal difference between the disbursement requirements in this case

and the construction loan agreement in *Home Lumber* is the requirement that Prosperity ensure adequate security in the event that the project exceeds the budget. Based on the supreme court's decision in *Home Lumber*, this additional requirement cannot be reasonably read to render a more extensive list of conditions optional in nature.

Breidenbach is correct that, as the drafter of the mortgage, construction loan agreement, and disbursement agreement, any question of intent should be construed against Signature. *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 698 (Minn. App. 2009). But a reviewing court enforces the plain meaning of an unambiguous contract and only looks to extrinsic evidence of intent where a contract is ambiguous. *Housing and Redevelopment Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 337 (Minn. 2005). “A contract is ambiguous if its language is reasonably susceptible to more than one interpretation.” *Brookfield Trade Ctr. Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Here, three different documents expressly convey Signature's responsibility under the mortgage agreement in compulsory language, using the terms “shall” or “will” on four occasions. Signature's obligation to advance funds pursuant to the conditions precedent is therefore unambiguous. Thus, the district court did not err in concluding that the mortgage, construction loan agreement, and disbursement agreement created an obligation for Signature to advance funds if the conditions precedent were satisfied. Because the loan advances were obligatory and not optional, the totality of the mortgage retains priority over Breidenbach's mechanic's lien. *See Home Lumber*, 535 N.W.2d at 305.

Signature's mortgage was recorded prior to Breidenbach's first improvement to the premises, and the mortgage was not a split-priority mortgage susceptible to the prioritization of Breidenbach's mechanic's lien over certain advances. Accordingly, the district court did not err in concluding that the mortgage was superior to the mechanic's lien. Summary judgment was therefore appropriately granted.

### ***Amended Complaint***

“The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion.” *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio*, 504 N.W.2d at 761). “Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling.” *Doe v. F.P.*, 667 N.W.2d 493, 500-01 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003).

The Minnesota Rules of Civil Procedure provide that after responsive pleadings have been served, “a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Minn. R. Civ. P. 15.01. “[A]mendment of pleadings should be liberally allowed unless the adverse party would be prejudiced.” *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). Generally, defending an additional claim is not sufficient prejudice to disallow amendment, but if the amendment will produce significant delay, it may be denied. *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 916 (Minn. App. 2009) (citing *Hughes v. Micka*, 269 Minn. 268, 275, 130 N.W.2d 505, 510-11 (1964)). In determining whether significant prejudice will be

incurred, courts may “consider the stage of the proceedings in deciding whether to allow an amendment.” *Taubman v. Prospective Drilling & Sawing, Inc.*, 469 N.W.2d 335, 338 (Minn. App. 1991).

Breidenbach’s original complaint contained three causes of action: (1) breach-of-contract and (2) unjust-enrichment claims against Prosperity; and (3) a mechanic’s-lien-foreclosure claim that implicated Signature. The district court denied Breidenbach’s motion to amend its complaint to include claims for promissory estoppel, unjust enrichment, and quantum meruit for two reasons: granting leave to amend the complaint “would result in prejudice to [Signature and Prosperity], whose discovery efforts and participation in this matter since its commencement in August 2008 have been limited to demonstrating the priority of its mortgage[] interest over [Breidenbach’s] mechanic’s lien interest”; and Breidenbach “failed to demonstrate that any of its proposed new claims present[] a genuine issue of material fact[] that could survive a motion for summary judgment.” Breidenbach argues that the district court erred in both respects.

Breidenbach argues that no prejudice existed because the claims included in the amended complaint were rooted in the same facts as the original complaint. But Breidenbach moved to amend its complaint on April 27, 2009—after discovery was completed, nearly three months after Signature moved for summary judgment, and almost four months before trial was scheduled to begin. The hearing was not scheduled until July 23, and thus a decision was not expected until roughly one month before trial. Breidenbach’s failure to bring the motion in a timely fashion likely would have unduly prejudiced Signature and Prosperity if granted.

Furthermore, while the facts of the other equitable claims listed in the original complaint may have been similar to the claims listed in the amended complaint, Breidenbach's claims for fraudulent misrepresentation and piercing the corporate veil raised wholly new legal issues that likely would have required reopening discovery. Original discovery was conducted within the scope of a traditional mechanic's-lien-foreclosure action and Signature and Prosperity would have been required to defend against completely different claims than were plead in the original complaint if the district court had granted leave to amend the complaint at this point in the proceedings. The district court did not abuse its discretion in determining that Signature would be prejudiced by granting Breidenbach leave to amend the complaint after discovery was completed and at such a late stage of the proceedings. Because we conclude that the denial of Breidenbach's motion was appropriate based on the resulting prejudice, we do not consider whether the amended complaints would have survived summary judgment.

**Affirmed.**