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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**A09-2275**

**A09-2277**

84 Lumber Company, Limited Partnership,  
Appellant,

vs.

Dan Happe Construction, Inc.,  
Respondent,

Dan Happe,  
Respondent,

Construction and Development Finance, LLC,  
Respondent (A09-2277),

Excell Drywall, Inc.,  
Respondent,

Kuechle Underground, Inc., et al.,  
Defendants,

Excel Custom Painting, Inc.,  
Respondent,

Distinctive Cabinet Design, LLC,  
Respondent,

North Anoka Plumbing, Inc.,  
Respondent,

John Oliver and Associates, Inc.,  
Respondent,

Ahern Painting, Inc.,  
Respondent,

Becker Development, LLC,  
Respondent,

Eischen Cabinet Company,  
Respondent (A09-2277),

Maverick Electric, Inc.,  
Respondent (A09-2277),

A Plus Heating & Cooling, Inc.,  
Respondent (A09-2277),

Morgan Contracting, Inc.,  
Respondent (A09-2277).

**Filed August 3, 2010**  
**Affirmed**  
**Willis, Judge\***

Sherburne County District Court  
File Nos. 71-CV-07-1365 & 71-CV-07-1143

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\*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Willis, Judge.

## **UNPUBLISHED OPINION**

**WILLIS, Judge**

These are consolidated appeals from the district court's summary judgments regarding the priority of liens on portions of a real-estate development. Appellant, a mechanic's lienor, argues that its liens are senior to a mortgage because the development was a single, continuous improvement of the property, and therefore the priority of the mechanic's liens relates back to work done before the mortgage was recorded. In ruling that the mechanic's liens are junior to the mortgage, the district court did not err in applying the law. Nor did it err in ruling that no genuine issue of material fact existed. Therefore, we affirm.

## **FACTS**

By November 2004, Boone Family Investments, LLC (BFI) had completed its acquisition of approximately 40 acres of raw land in Sherburne County that BFI intended to develop as the River Bend Development. The project was proposed to consist of approximately 150 lots and was to be developed in three phases. On the advice of the Boone family's attorneys, the Boones established Becker Development, LLC to develop River Bend. BFI then sold the River Bend land to Becker.

The first phase of River Bend was to include 52 improved lots, including both single-family homes and two quad homes. On April 20, 2006, Becker contracted with Kuechle Underground, Inc. to act as the general contractor to clear and grade the land;

install storm sewers, sanitary sewers, roads, and sidewalks; and install a storm-retention pond. Kuechle then subcontracted the clearing, grubbing, and common excavation to Thielen Construction, Inc. Thielen started work on October 3, 2005.

After Thielen installed building pads for two quad homes that were to be built in phase I of the project, Becker conveyed the land for those two quad homes to Dan Happe Construction, Inc., which Becker had selected to build the quad homes. Closing on the sale occurred on May 9, 2006. Happe entered into a contract with 84 Lumber Co., Limited Partnership, for 84 Lumber to supply Happe with construction materials. Construction & Development Finance (C & DF) financed Happe's construction of the quad homes and recorded a mortgage, a security agreement, and a fixture-financing statement relating to the quad-home parcels on May 11, 2006. On June 21, 2006, 84 Lumber started supplying materials to Happe for construction of the quad homes. During the summer and fall of 2006, Happe built the quad homes. 84 Lumber stopped supplying materials to Happe on November 15, 2006.

Happe did not pay 84 Lumber for the materials it supplied. 84 Lumber served and filed mechanic's lien statements on February 5, 2007, and, on August 28, 2007, foreclosed on each of its two liens by filing lawsuits against C & DF, Kuechle, and others having interests in the quad-home properties. In its suits, 84 Lumber disputed the priority of its liens with C & DF, asserting that the priority of its liens should be measured from October 3, 2005, the date that Kuechle's subcontractor, Thielen, started work. Therefore, 84 Lumber concluded, its mechanic's liens had priority over C & DF's mortgage. C & DF argued that its May 11, 2006 mortgage should have priority over all other

interests in the quad homes, except for Kuechle's interest, because construction of the quad homes was a project separate from the rest of River Bend and therefore, none of the non-Kuechle interests in the quad homes could relate back to the site-preparation work.

84 Lumber and C & DF made cross-motions for summary judgment. After a hearing, the district court granted two partial summary judgments that recognized that mechanic's liens take priority from the date of the first work on the premises if the work is part of a single, continuous improvement. But the district court noted that BFI's principal stated in a deposition that the Boone entities had no intention of building the quad homes and that the quad homes were to be built "by a separate, independent entity from the Boone Entities"; ruled that the quad homes were not part of a single, continuous development of River Bend; and granted C & DF's motion for summary judgment. The district court held that C & DF's interests were superior to all interests in the quad-home properties, except those of Kuechle. The parties stipulated in the district court to the amounts of 84 Lumber's liens and final judgments were entered. 84 Lumber appealed from both final judgments, and this court consolidated the appeals.

## **DECISION**

"On appeal from summary judgment, [appellate courts] review de novo whether a genuine issue of material fact exists, and whether the district court erred in its application of the law. [Appellate courts] view the evidence in the light most favorable to the one against whom summary judgment was granted." *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009) (citations and internal quotations omitted).

**1. The district court did not misapply the law in determining that the quad homes were not part of a single, continuous improvement of River Bend.**

The supreme court has stated:

Minn. Stat. § 507.34 (1994) establishes mortgage priority from the date of recording with the county recorder or the registrar of titles. Minn. Stat. § 514.01 (1994) grants a mechanic[']s lien to anyone who contributes to the improvement of real estate by performing labor or furnishing skill, material or machinery. A mechanic[']s lien attaches, takes effect, and is preferred to any mortgage not then of record from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, unless the lienholder had actual notice thereof. Minn. Stat. § 514.05, subd. 1 (1994).

*Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995). Here, it is undisputed that Kuechle's subcontractor, Thielen, started site-preparation work on October 3, 2005; that C & DF recorded its mortgage on the Happe properties on May 11, 2006; and that, when Happe built the quad homes in the summer and fall of 2006, it used the building pads installed by Thielen. It is also undisputed that 84 Lumber, under its contract with Happe, supplied materials to Happe between June 21, 2006, and November 15, 2006, and that Happe did not pay 84 Lumber.

When, as here, a development project involves multiple contracts, this court has noted that "[c]ontracting separately for different stages of a construction project does not, by itself, divide the project into separate improvements. Division occurs when the facts surrounding the work done under the separate contracts indicate that they were separate improvement projects." *Witcher Const. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). "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[,]” but “[a] project consists of separate improvements if there is little or no interrelationship between the contracts under which the project was performed.” *Witcher*, 465 N.W.2d at 406.

In evaluating whether projects constitute improvements that are separate or single and continuous, courts “focus on 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); *see Kahle v. McClary*, 255 Minn. 239, 241-42, 96 N.W.2d 243, 246 (1959) (stating, in the context of an appeal involving whether multiple projects were a single improvement for purposes of deciding the timeliness of the filing of a lien notice, that “[f]actors tending to the conclusion that separate contracts are involved are a long lapse of time following the last major work, the fact that the subsequent work involved a trifling amount, and the general circumstances under which the work was done”) (footnotes omitted). Also, generally,

[w]hether 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. But findings of fact that are influenced by an error of law may be set aside by the reviewing court.

*Witcher*, 465 N.W.2d at 406.

Here, the district court noted that whether work is one continuous improvement is “typically a question of fact” but granted summary judgments that the site preparation

was “separate and distinct from the building [and] construction of improvements of all other mechanic’s lien claimants,” such that “all other mechanic’s liens do not attach and take effect from the time” of the site preparation and that C & DF’s interests were prior to and superior to the interests of all others, except Kuechle. 84 Lumber argues that “[t]he district court erred when it concluded that the materials 84 Lumber provided were part of a separate and distinct improvement that was limited to [the quad homes], and which did not ‘relate back’ to the earlier work by [Kuechle] and [Thielen].”

There is no genuine issue of fact that precludes granting a summary judgment if “the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). For the reasons stated below, we conclude that, on this record, reasonable minds cannot draw different conclusions regarding the facts critical to application of the *Poured Concrete* factors. We also conclude that the district court did not err in its application of those factors.

**A. Intent**

The intent factor of the continuous-improvement analysis addresses whether the parties had a single goal in developing the property in question. *See Poured Concrete*, 529 N.W.2d at 510 (noting that “the parties’ unity of purpose and planning when developing [the land in question]” and concluding that the parties “intended one continuous project from excavation to construction of the home”). Here, 84 Lumber alleges that in *Poured Concrete*, intent weighed “heavily” in the court’s analysis and that



the intent factor should be “nearly dispositive” of this appeal. But *Poured Concrete* does not give intent greater weight than any of the other factors. See *Poured Concrete*, 529 N.W.2d at 510-11. Nor does *Witcher*, 465 N.W.2d at 407, which *Poured Concrete* cites as the source of the four factors, suggest that intent is of greater weight than the other factors. See *Poured Concrete*, 529 N.W.2d at 510 (citing *Witcher*).

84 Lumber also argues that “Steve Boone, chief manager of [Becker], testified in his deposition that it was his intention, from the time [BFI] purchased the raw land for River Bend, to include [quad homes] in the development.” But Boone’s deposition is unambiguous that at no point was it ever intended that any Boone entity would have anything to do with the construction or sale of the quad homes and that the separation of the quad-home portion of the project from the rest of the project was to be accomplished by selling the land designated for quad homes to a separate developer who was to be responsible for the design, building, and sale of those homes. In his deposition, Boone repeatedly makes these points. Thus, even if intent is given disproportionate weight when addressing whether a development is continuous, this factor would not favor 84 Lumber.

84 Lumber further argues that because River Bend had a single plat, single developer, and single infrastructure system, River Bend was intended to be a single, continuous project. In light of Boone’s repeated and unambiguous statements about separating the construction and sale of the quad homes from the rest of the project, we reject this assertion. And while there is a single plat and a single infrastructure system for River Bend, this court has rejected the notion that a lien on a specific building must

relate back to the date of general infrastructure work. *E.H. Renner & Sons, Inc. v. Sherburne Homes Inc.*, 458 N.W.2d 177, 180 (Minn. App. 1990). In *Renner*, a mechanic’s lienor asserted that its lien on two buildings in a new subdivision should have related back to the date of work on the subdivision’s streets, and curbs and gutters, but this court rejected what it perceived as an “attempt[] to define ‘improvement’ as the building of the entire subdivision[,]” stating:

The Minnesota Supreme Court stated, “the line of distinction is whether or not the improvement bears directly on the construction of the building rather than whether it is part of the overall project involved.” *National Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957). The paving of streets, curbs and gutters does not directly relate to the construction of the two dwellings.

*Renner*, 458 N.W.2d at 179. Under *Renner*, and especially in light of Boone’s deposition testimony, we reject 84 Lumber’s claim that because there was a common plat and common infrastructure system for River Bend, the district court misapplied the law when it concluded that construction of the quad homes was intended “to be a separate project by a separate, independent entity from the Boone Entities otherwise involved in the building of River Bend.”

## **B. Contracts**

The contracts factor of the continuous-improvement analysis examines the extent of the interrelationship of the contracts for the work generating the improvement: the less interrelationship among the contracts, the more likely it is that a court will deem the projects separate. See *Poured Concrete*, 529 N.W.2d at 510 (stating that “[t]he court considers construction projects separate improvements if ‘little or no relationship’ exists

between the underlying contracts” (quoting *Witcher*, 465 N.W.2d at 407)). In resolving a dispute about whether mechanic’s liens arising out of the construction of a model home related back to the excavation of the property, this court held that they did, noting that the developer’s contract with the excavator was for both excavation of the land and installation of the building pad. *Poured Concrete*, 529 N.W.2d at 510. Citing this aspect of *Poured Concrete*, 84 Lumber argues that because Becker’s contract with Kuechle and Kuechle’s subcontract with Thielen resulted in the building pads on which Happe built the quad homes, *Poured Concrete* requires a similar result here. We reject this argument because *Poured Concrete* is factually distinguishable. There, “[f]rom the outset, Andron, who was the property owner, developer, architect, and builder, planned to build the home on lot 7 as a model home for the sale and development of the other lots in the subdivision.” *Id.* Thus, in *Poured Concrete*, the owner and builder that contracted for installation of the building pad was the same owner and builder that was responsible for building the home on the building pad. Here, however, Becker, the pre-building-pad owner, never intended to build the quad homes and sold the quad-home land and building pads to Happe. Happe then entered its own contract with 84 Lumber for materials to build the quad homes. Thus, the contracts in *Poured Concrete* provided that the same entity would act as the owner, developer, architect, and builder of the home, consistent with that entity’s original intent for that project. The contracts here, however, accomplished the opposite: Becker, consistent with its original intent, divested itself of all aspects of the quad-home portion of the project after installation of the building pads.

### C. Time Lapse

The time-lapse factor of the continuous-improvement analysis addresses how much time passed between finishing work on one contract involved in the improvement and the start of work under another contract. *See Witcher*, 465 N.W.2d at 407 (stating that “[n]o time lapse occurred between the completion of the base building work and the beginning of the tenant improvement work”). In *Poured Concrete*, this court affirmed the district court’s finding that the time-lapse factor weighed in favor of allowing the mechanic’s liens to relate back to site-preparation work because “no substantial amount of time lapsed between initial grading of the subdivision and [the] excavation of the home site.” 529 N.W.2d at 510. 84 Lumber asserts that there was a similarly swift development of River Bend and, therefore, that, under *Poured Concrete*, the time-lapse factor should also weigh in favor of allowing 84 Lumber’s liens to relate back to October 3, 2005. The core of 84 Lumber’s argument is that work done by Kuechle and its subcontractors overlapped with that done by Happe. But this argument does not address the passage of time between the completion of the building pads and Happe’s start of construction of the quad homes on those pads. In his deposition, Boone testified that while the rest of River Bend was progressing on an accelerated schedule to be ready for the Parade of Homes Fall Showcase, he was concerned about Happe’s lack of progress on the quad homes:

[W]e were complete or 99.9 percent complete with our houses when [Happe] was just getting started.

....

But the houses were all complete, and if my recollection serves me right, I don't believe [Happe] had even started [the quad homes] at that point in time.

....

And [Happe] was doing two quad buildings and [Happe's principal] needed to get started and he assured me there would be no problem, he would have the houses up and done for the fall Parade of Homes.

Exactly when Happe started construction of the quad homes is unclear, but it is undisputed that closing on the Becker-Happe conveyance of the quad-home land occurred on May 9, 2006, and that, despite a May 10, 2006 contract for 84 Lumber to supply Happe with construction materials, Happe first received construction materials from 84 Lumber on June 21, 2006. Thus, despite the accelerated building schedule necessary to make the homes ready for the Parade of Homes Fall Showcase, there is an unexplained delay of almost six weeks between the Becker-Happe closing and 84 Lumber's first delivery of materials.

#### **D. Financing**

84 Lumber candidly admits that the financing of Happe's quad homes was distinct from the financing of the rest of the development and that the financing factor of the continuous-improvement analysis does not favor 84 Lumber's position. We therefore decline to further address this factor.

#### **2. C & DF has not shown that a genuine issue of material fact exists with respect to its mechanic's liens.**

As an alternative to seeking an outright reversal of the summary judgments granted to C & DF and an award of judgment to itself, 84 Lumber argues that it has

shown the existence of questions that preclude summary judgment and that a remand is required. C & DF responds that 84 Lumber's cross-motion for summary judgment in district court precludes it, on appeal, from seeking a remand based on the asserted existence of fact questions. C & DF's argument is inconsistent with caselaw. *See Nelson v. Holland*, 776 N.W.2d 446, 452 (Minn. App. 2009) (remanding a case after reversing a summary judgment granted on the parties' cross-motions for summary judgment because, in part, fact questions existed); *see also City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 14 (Minn. 2008) (reversing a summary judgment granted on cross-motions for summary judgment and remanding because the factual record was "insufficient"). Therefore, we reject C & DF's argument on this point.

Citing two affidavits of a project manager for Thielen, 84 Lumber asserts that it has "established a genuine issue of material fact whether [Thielen's] work was inextricably linked to the subsequent construction of the [quad homes]" because Thielen's installation of the building pads was "to specific measurements corresponding to the townhomes that the developer and [Happe] always intended to build there." We note initially that one of the affidavits that 84 Lumber cites merely identifies the date that Thielen started its site-preparation work and that this date is undisputed. The other affidavit states that "[t]he elevation and contour of [each] building pad was detailed by the plans provided to us by [Kuechle.]" The affidavits do not mention Happe. Even if the specifications for the building pads originated with Happe, that would not address the undisputed facts that, from the start of River Bend's development process, the Boone entities always intended that the design, construction, and sale of the quad homes was to

be separate from the rest of River Bend; that the quad-home parcels were, after installation of the building pads, sold to Happe; that Happe then obtained its own financing for construction of the quad homes by mortgaging the properties to a separate lender; and that Happe then proceeded on a construction schedule that was not the same as that for the rest of River Bend. 84 Lumber has not shown the existence of a genuine issue of material fact that affects the priority of its mechanic's liens.

**Affirmed.**