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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1544**

Hart Foundations, Inc.,
Plaintiff,

vs.

Shane A Christensen, et al.,
Defendants,

Americana Community Bank,
Respondent,

Consolidated Lumber Company,
Appellant.

**Filed July 11, 2011
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-08-20767

Justin P. Weinberg, Gislason & Hunter, LLP, New Ulm, Minnesota (for respondent)

Alan T. Tschida, Shoreview, Minnesota (for appellant)

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

UNPUBLISHED OPINION

PETERSON, Judge

On appeal in this dispute about the priority of a mechanic's lien and a mortgage, appellant mechanic's lienor argues that its lien is prior to the mortgage because the record shows that the work that was the actual beginning of the improvement to which appellant contributed was visible before respondent mortgagee recorded its mortgage. We affirm.

FACTS

On June 30, 2006, Shane Christensen purchased lakeshore property with an existing house, located at 1188 Wayzata Boulevard West in Long Lake. Sometime later, while visiting the construction site of a home that Christensen's brother was building, Christensen met with Dan Richmann, a project manager for StrongArm Construction Services (StrongArm), and asked him to remove some dead or diseased trees from the backyard of Christensen's property. Richmann agreed and hired a local farmer who removed eight to twelve trees from the property before September 5, 2006. While removing the trees, the farmer also removed some grass and left some bare dirt exposed in the backyard. Richmann personally paid the farmer approximately \$8,000 for removing the trees.

Around September 5, 2006, Christensen's neighbor complained to the City of Long Lake about someone knocking down trees and brush on his property. In response to the complaint, the city sent David Abel and Marv Wurzer to view Christensen's property on September 5, 2006. During the visit, Abel took pictures of Christensen's

backyard. The pictures show that some trees had been removed and also show some bare dirt.

Less than two weeks later, Richmann had the tree stumps removed. Soon after, the city directed Richmann to erect a silt fence in the backyard of the property to keep surface dirt from washing into the lake. Richmann complied with the city's directive and erected a silt fence in the backyard.

In October 2006, Richmann put Christensen in contact with Dan Bengston, a mortgage broker, to explore the possibility of obtaining a construction loan to build a new house on the property. After meeting with Bengston, Christensen applied for construction financing, and Bengston placed his loan application with Investment Lending Group, LLC (Investment Lending). On November 30, 2006, in connection with the loan application, Tim McCollow and Jeff Anderson of Investment Lending visited the property. During the visit, they walked the entire property, including down by the lake, and viewed the backyard. At the time, McCollow, who was serving as Christensen's loan officer and had significant experience in construction financing, saw no evidence of the tree removal and saw nothing indicating that any improvement had been started on the property.

On November 24, 2006, Christensen entered into a contractor agreement with StrongArm to demolish the existing house and build a new house on the property. The agreement provided that "[t]he work will start as soon as construction financing is in place" and the city issues demolition and building permits for the property.

Sometime between November 30 and December 4, 2006, Investment Lending approved Christensen's loan application. On December 4, 2006, American Residential Title conducted the closing for the construction loan. At the closing, Christensen granted Investment Lending a mortgage on the property as security for the construction loan. Before recording the mortgage, on December 11, 2006, Bengston took two photographs of the property and inspected the property to determine if there was any actual and visible beginning of any improvement on the property. When Bengston did not see any evidence of actual or visible improvement to the property, he informed American Residential Title that the mortgage in favor of Investment Lending should be recorded. The mortgage was recorded in Hennepin County on December 11, 2006. That same day, Investment Lending assigned the mortgage to respondent Americana Community Bank (Americana). The assignment was also recorded on December 11, 2006.

On December 27, 2006, Christensen and StrongArm applied for a demolition permit, which the city granted on January 4, 2007. A day or two later, demolition of the existing house began. On January 28, 2007, Christensen and StrongArm submitted plans for a new house to the city, and a building permit was issued on February 12, 2007. StrongArm contracted with several subcontractors, including appellant Consolidated Lumber Company d/b/a/ Arrow Building Center (Consolidated), to supply the necessary labor and materials to construct the new house. Consolidated began providing StrongArm materials for the new house on March 6, 2007. Consolidated filed a mechanic's-lien statement on October 12, 2007, but it continued to periodically provide

materials through March 14, 2008, and filed an amended mechanic's-lien statement on March 19, 2008.

In August 2008, one subcontractor, Hart Foundations, Inc., commenced this action seeking foreclosure of its mechanic's lien. Hart Foundations, Inc., also named several potential lienholders as defendants in the suit, including Consolidated. Consolidated filed an answer, counterclaim, and cross-claim, asserting a mechanic's-lien claim against the property and that its mechanic's lien had priority over Americana's mortgage. In August 2009, Americana foreclosed on its mortgage and became the owner of the property in October 2009 when the redemption period expired.

A court trial in the mechanic's-lien action was held on January 25 and 27, 2010. At trial, Consolidated argued that its mechanic's lien had priority over the mortgage because the improvement on the property began in September 2006 with the tree removal and the resulting disturbance of the dirt and erection of the silt fence. Americana argued that its mortgage recorded on December 11, 2006, was superior because the improvement on the property began on January 5, 2007, with the demolition of the house. The district court found that the improvement on the property began with the demolition of the existing house and the construction of the new house, which began sometime after the demolition permit was issued on January 4, 2007. The court, therefore, determined that Americana's mortgage had priority over Consolidated's mechanic's lien. Consolidated moved for amended findings or, in the alternative, a new trial. The district court denied both motions. This appeal followed.

DECISION

Consolidated argues that the district court erred in determining that Americana's mortgage, which was recorded on December 11, 2006, has priority over its mechanic's lien.

Minn. Stat. § 514.05 addresses priority disputes and provides that, as against a bona fide mortgagee without notice, no lien attaches "prior to the actual and visible beginning of the improvement on the ground." Minn. Stat. § 514.05, subd. 1 (2010). "The underlying policy of the statute enables property owners and developers to procure financing by granting mortgagees priority against lien claimants filing claims after the mortgage is recorded, so long as the mortgagee's inspection of the property does not reveal the actual and visible beginning of the improvement on the ground." *Carlson-Grefe Constr., Inc. v. Rosemount Condo. Grp. P'ship*, 474 N.W.2d 405, 408 (Minn. App. 1991), *review denied* (Minn. Oct. 31, 1991).

Determining when a mechanic's lien attaches under this statute involves a two-step analysis: first, the court must "identify the improvement to which the labor or material contributed"; and second, the court must "determine what item of labor or material constituted the actual and visible beginning of that improvement." *Thompson Plumbing Co. v. McGlynn Cos.*, 486 N.W.2d 781, 786 (Minn. App. 1992).

"[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 [district] court's finding." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn. App. 1991) (citing

Kahle v. McClary, 255 Minn. 239, 242, 96 N.W.2d 243, 246 (1959)), *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.” *Id.* at 407. “A project consists of separate improvements if there is little or no interrelationship between the contracts under which the project was performed.” *Id.* “[T]he 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.” *Nat’l Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957).

The district court found that the improvement in this case was “the demolition of the existing house and the construction of a new house on the Wayzata Boulevard Property.” Consolidated asserts that “‘the improvement’ in this case actually involved the overall substantial alteration of the very Lot in question,” which began with the removal of the trees, disturbance of the dirt, and the erection of the silt fence on the property. But “[t]he improvement referred to in the statute is the specific improvement to which subsequent suppliers or laborers contributed.” *Thompson Plumbing Co.*, 486 N.W.2d at 787.

The district court found that the removal of the trees, the disturbance of the dirt, and the erection of the silt fence had no direct bearing on the demolition of the existing house or construction of the new house, and, therefore, did not constitute part of the improvement. The record shows that Richmann testified that the trees did not need to be removed in order to demolish the existing house or construct the new house on the property. He further testified that the silt fence was erected only because it was required

by the city after the trees were removed. Finally, Richmann testified that the dirt disturbance was not related to the demolition of the existing house or construction of the new house and that no grading or site preparation occurred on the property before the demolition permit was issued. The district court found this testimony to be credible. Therefore, the district court's finding that the tree removal, disturbance of the dirt, and erection of the silt fence had no direct bearing on the demolition of the existing house or construction of the new house is reasonably supported by the evidence. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations).

Because the tree removal, the dirt disturbance, and the silt fence had no direct bearing on the demolition of the existing house or the construction of the new house, the tree removal was not the actual beginning of the improvement to which Consolidated contributed. Consequently, the district court did not err in concluding that Consolidated's mechanic's lien, which is for materials supplied to build the new house, cannot relate back to the tree removal and, therefore, does not have priority over Americana's mortgage, which was recorded before demolition of the existing house began.

Affirmed.