

FILED

APR 23 2010



STATE OF MINNESOTA

CARVER COUNTY COURTS

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT

Court File No. 10-CV-09-284

Pioneer Engineering, P.A.

Plaintiff,

vs.

Sienna Corporation; Charles Cudd, LLC, Wooddale Builders, Inc.; Land Hold Co., LLC; Spec Hold, LLC; The Lakeside Master Association; Lawrence D. Waldron and Emily P. Waldron; Eagle Crest Capital Bank; Eagle Valley Bank, N.A.; Commerce Bank; Michael Holdings of Hawaii, LLC; Home Federal—Private Banking; Home Federal Savings Bank; Alliance Bank; Voyager Bank; Builders Development & Finance, Inc.; DNK Management, Inc.; Alpine Capital, LLC; Weis Builders, Inc.; New Prague Custom Woodworks, Inc.; Automated Building Components, Inc.; Automatic Garage Door & Fireplaces, Inc.; Greystone Masonry, Inc.; Lyman Lumber Co.; Village Bank; XYZ Corporation; John Doe and Mary Roe,

Defendants.

**ORDER & MEMORANDUM
GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND DENYING MOTION FOR
APPORTIONMENT**

The above-entitled matter came on before the Honorable Kevin W. Eide, Judge of District Court, on February 25, 2010, at the Carver County Courthouse in Chaska, Minnesota, on Defendant Home Federal Savings Bank's Motion for Partial Summary Judgment and Defendants Alliance Bank, Builders Development & Finance, Eagle Valley Bank, Commerce Bank, Michael Holdings of Hawaii, LLC, DNK Management, Inc. Alpine Capital, LLC and Wooddale Builders, Inc.'s Motion for Summary Judgment seeking apportionment.

Vincent J. Fahnländer, Esq., appeared on behalf of Plaintiff Pioneer Engineering, P.A. David J. Krco, Esq., appeared on behalf of Defendant Home Federal Savings Bank. Patrick B. Steinhoff, Esq., appeared on behalf of Defendants Land Hold Co., LLC and Spec Hold, LLC. Karla M. Vehrs, Esq., appeared on behalf of Defendants Alliance Bank, Builders Development

& Finance, Eagle Valley Bank, Commerce Bank, Michael Holdings of Hawaii, LLC, DNK Management, Inc. Alpine Capital, LLC and Wooddale Builders, Inc.

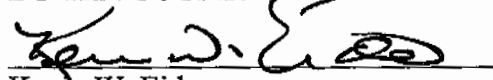
Now, therefore, based upon the arguments of counsel, the file and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant Home Federal Savings Bank's Motion for Partial Summary Judgment is GRANTED.
2. The mortgage given by Sienna Corporation to Eagle Crest Capital Bank, a division of Home Federal Savings Bank, in the original principal amount of \$10,100,000.00, dated June 28, 2006 and recorded July 6, 2006 with the Carver County Recorder as document number A444832 is prior and superior to the mechanic's lien of Plaintiff Pioneer Engineering as to the following described properties located in Carver County, Minnesota:
 - Lots 4, 5, 6, 7, 8, 9, 10, and 11, Block 2, Lakeside;
 - Lot 1, Block 3, Lakeside;
 - Outlots A, B, D, E, I and J, Lakeside;
 - Outlot A, Lakeside Second Addition; and
 - Outlots A, B, C, D and E, Lakeside Third Addition.
3. Defendants Alliance Bank, Builders Development & Finance, Eagle Valley Bank, Commerce Bank, Michael Holdings of Hawaii, LLC, DNK Management, Inc. Alpine Capital, LLC and Wooddale Builders, Inc.'s Motion for Summary Judgment seeking apportionment is DENIED.
4. Defendants Alliance Bank, Builders Development & Finance, Eagle Valley Bank, Commerce Bank, Michael Holdings of Hawaii, LLC, DNK Management, Inc. Alpine Capital, LLC and Wooddale Builders, Inc.'s motion for a determination that Plaintiff's lien is void for overstatement is DENIED.
5. Any other motions not specifically granted are DENIED.
6. The attached memorandum is incorporated by reference.

Date: April 13, 2010

BY THE COURT:



Kevin W. Eide
Judge of District Court

MEMORANDUM

Factual Background & Procedural History

This matter involves property in Chanhassen, Minnesota known as the Lakeside subdivision. Defendant Sienna Corporation (hereafter "Sienna") acted as the developer of the Lakeside subdivision, obtaining \$10,100,000.00 in financing for the project from Defendant Home Federal Savings Bank (hereafter "Home Federal"). In connection with the development financing, Sienna gave Home Federal a mortgage on the property dated June 28, 2006. The mortgage was recorded with the Carver County Recorder on July 6, 2006. There were no visible improvements for construction of the Lakeside project at the time the mortgage was recorded; however Home Federal was aware that engineering services had been provided to Sienna in connection with the subdivision prior to the recording of Home Federal's mortgage.

Sienna commenced development of Lakeside in the fall of 2006, with the first visible improvements occurring with the demolition of an existing apartment home complex on or about November 3, 2006. The development was approved to include up to 210 housing units, a mixture of townhomes, twin homes and condominiums. Before the project could be completed however, Sienna defaulted in its agreement with Home Federal and Home Federal foreclosed on the remaining parcels. Home Federal was the successful bidder at the sheriff's sale which was held on March 16, 2009, acquiring the following parcels:

- Lots 4, 5, 6, 7, 8, 9, 10, and 11, Block 2, Lakeside;
- Lot 1, Block 3, Lakeside;
- Outlots A, B, D, E, I and J, Lakeside;
- Outlot A, Lakeside Second Addition; and
- Outlots A, B, C, D and E, Lakeside Third Addition.

To date, only 29 units have been completed, all of which are either townhomes or twinhomes.

Plaintiff Pioneer Engineering (hereafter "Pioneer") provided engineering services for the project, commencing with design work as early as May 6, 2005 and continuing through October 29, 2008. Pioneer was paid for its work on the Lakeside project as invoices were submitted through Home Federal's title insurance company. Based on the partial lien waivers and accounting details presented to the Court, Pioneer was paid for all its work invoiced from July 31, 2005 through September 30, 2007, with the last payment received on or about December 17, 2007. In connection with each payment, Pioneer executed a partial lien waiver for the amount received. Pioneer continued to work on the project through October 29, 2008. On September

30, 2008, Pioneer recorded a mechanic's lien with the Carver County Recorder in the amount of \$39,386.10 against the following parcels:

Lots 1, 2, 3, 4 and 5, Block 1;
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, Block 2;
Lot 1, Block 3;
Outlots A, B, D, E, I and J;
all in Lakeside; and

Lots 1, 2, and 3, Block 1;
Lots 1 and 2, Block 2;
Lots 1 and 2, Block 3;
Lots 1 and 2, Block 4;
Lots 1 and 2, Block 5;
Lots 1 and 2, Block 6;
Lots 1 and 2, Block 7;
Lots 1 and 2, Block 8;
Lots 1, 2 and 3, Block 9;
Lots 1 and 2, Block 10;
Lots 1 and 2, Block 11;
Lots 1 and 2, Block 12;
Lots 1 and 2, Block 13;
Lots 1 and 2, Block 14;
Lots 1 and 2, Block 15;
Lots 1, 2, 3 and 4, Block 16;
Lots 1, 2 and 3, Block 17;
Outlot A;
all in Lakeside Second Addition; and

Outlots A, B, C, D and E, all in Lakeside Third Addition.

On or about October 20, 2008, Pioneer received a check in the amount of \$4,762.50 in connection with the release of Lot 3, Block 16, Lakeside Second Addition. On or about November 6, 2008, Pioneer received a check in the amount of \$6,300.00 in connection with the release of the following eighteen lots:

Lots 3 and 4, Block 1;
Lots 1, 2 and 3, Block 2;
all in Lakeside; and

Lots 1 and 2, Block 2;
Lot 1, Block 3;
Lot 2, Block 4;
Lots 1 and 2, Block 5;
Lot 1, Block 6;
Lot 1, Block 7;
Lot 2, Block 11;
Lot 2, Block 15;
Lot 4, Block 16;

Lots 2 and 3, Block 17;
all in Lakeside Second Addition.

Pioneer applied the October and November 2008 payments to outstanding interest, attorney's fees and costs, leaving allegedly only \$401.29 available to reduce the principal balance of the mechanic's lien. Pioneer recorded an amended mechanic's lien with the Carver County Recorder in the amount of \$43,957.31 against the following parcels:

Lots 1, 2 and 5, Block 1;
Lots 4, 5, 6, 7, 8, 9, 10, 11, and 12, Block 2;
Lot 1, Block 3;
Outlots A, B, D, E, I and J;
all in Lakeside; and

Lots 1, 2, and 3, Block 1;
Lot 2, Block 3;
Lot 1, Block 4;
Lot 2, Block 6;
Lot 2, Block 7;
Lots 1 and 2, Block 8;
Lots 1, 2 and 3, Block 9;
Lots 1 and 2, Block 10;
Lot 1, Block 11;
Lots 1 and 2, Block 12;
Lots 1 and 2, Block 13;
Lots 1 and 2, Block 14;
Lot 1, Block 15;
Lots 1 and 2, Block 16;
Lot 1, Block 17;
Outlot A;
all in Lakeside Second Addition; and

Outlots A, B, C, D and E, all in Lakeside Third Addition.

Pioneer commenced this action to foreclose its mechanic's lien. Home Federal now moves the Court for partial summary judgment declaring the Home Federal mortgage to be prior to Pioneer's mechanic's lien. In addition, Defendants Alliance Bank, Builders Development & Finance, Eagle Valley Bank, Commerce Bank, Michael Holdings of Hawaii, LLC, DNK Management, Inc. Alpine Capital, LLC and Wooddale Builders, Inc. (hereafter "Alliance et. al") have moved the Court for a determination of the portion of Pioneer's mechanic's lien for which each unit is liable and a determination that Pioneer's lien is void for impermissible lien overstatement.

Standards of Law

I. Summary Judgment

Summary judgment should be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. A material issue of fact is one which would affect the outcome of the case. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974); *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. Ct. App. 1986).

Summary judgment is not a substitute for trial and may be granted only if, based on the entire record, no issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209,215 (Minn. 1985). Summary judgment is a “blunt instrument” that “should be employed only where it is perfectly clear that no issue of fact is involved in the cause of action.” *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). The burden is on the moving party to show that there is no genuine issue of material fact. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). When determining whether the moving party has sustained this burden, a court must view the evidence in a manner most favorable to the nonmoving party. *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110, 112 (Minn. Ct. App. 1984). All doubts and factual inferences must be resolved against the moving party and in favor of the nonmoving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). If the moving party has satisfied its burden to show the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Bixler*, 376 N.W.2d at 215. If the nonmoving party then fails to present specific facts indicating the existence of a genuine issue of material fact, summary judgment is proper. *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

In order to successfully oppose a motion for summary judgment, the nonmoving party cannot rely upon mere averments or denials set forth in its pleadings, but must present specific facts showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05; *see also Hunt*, 384 N.W.2d at 855, (the nonmoving party cannot rely on mere general statements of fact). “The court is not required to save the nonmoving party by drawing unreasonable inferences.” *City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. Ct. App. 1984).

Legal Analysis

I. Whether Home Federal is entitled to Summary Judgment Declaring Its Lien to be Prior and Superior to Pioneer's Mechanic's Lien.

Whoever performs engineering or land surveying services with respect to real estate, [...] whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated [...]. Minn. Stat. §514.01 (2009). 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. Minn. Stat. §514.05, Subd. 1 (2009). Where a mortgagee has notice of lienable work performed by engineers or surveyors, its interest is subordinated to these liens for the work completed by the engineers and surveyors up to the time of the actual and visible improvement on the ground. *Kirkwold Construction Company v. M.G.A. Construction, Inc.*, 513 N.W.2d 241, 245 (Minn. 1994).

Home Federal argues that its mortgage has priority over Pioneer's mechanic's lien because (1) its mortgage was recorded prior to the first visible improvement and (2) Minn. Stat. §514.05 and the decision in *Kirkwold* do not give heightened priority to Pioneer's lien. In response, Pioneer argues that Home Federal had notice of Pioneer's engineering work prior to the recording of the Home Federal mortgage, therefore the Pioneer lien has priority over the Home Federal mortgage.

It seems apparent from the record that Home Federal was aware of engineering work done for the Lakeside project prior to the recording of their mortgage lien. As a result, Pioneer's lien for its engineering work was senior to the Home Federal mortgage at the time the mortgage was recorded. Pursuant to *Kirkwood*, however, Pioneer's priority extended only for work done up to the date of the first improvements to the property, on or about November 3, 2006. The record indicates that Pioneer was paid for all its work invoiced from July 31, 2005 through September 30, 2007, therefore it is also apparent that Pioneer was paid for all of its work on the Lakeside project up to the time of the first actual and visible improvements. Because Pioneer has been paid for all of its work up to the time of the actual and visible improvements on the project, Pioneer's lien is no longer prior to Home Federal's mortgage and Home Federal's

motion for summary judgment declaring its lien to be prior and superior to Pioneer's mechanic's lien must be granted.

II. Whether Pioneer's mechanic's liens should be apportioned under Minn. Stat. §515B.3-117 by the percentage of common expense liability attributable to each unit.

Alliance et al. argue that Pioneer's lien, if valid, should be apportioned and prorated among the 210 units approved for the Lakeside community. In support of their argument, they point to Minn. Stat. §515B.3-117 which reads, in relevant part, as follows:

"Except in a cooperative and except as otherwise provided in this chapter or in a security instrument, an 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. Upon the receipt of payment, the lienholder shall promptly deliver to the unit owner a recordable partial satisfaction and release of lien releasing the unit from the lien. The release shall be deemed to include a release of any rights in the common elements appurtenant to the unit. 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, or in the case of a lien under subsection (b), the units against which the lien is permitted or required to be recorded. At the request of a lien claimant or unit owners, the association shall provide a written statement of the percentage of common expense liability attributable to all units. After a unit owner's payment pursuant to this section, the association may not assess the unit for any common expense incurred thereafter in connection with the satisfaction or defense against the lien." Minn. Stat. §515B.3-117(a) (2009).

In response, Pioneer argues that Alliance et al.'s motion must be denied because (a) none of the moving parties have remedies under either Minn. Stat. §515B.3-117 or under the Declarations and (b) if the Pioneer lien is to be prorated at all, it should be prorated based on either the number of lots covered by the lien (38), the number of units constructed (29), or the number of units covered by the filed CIC Declarations (39). In addition, Pioneer argues that any pro-rating should also include sums for attorneys' fees, costs and interest.

(a) Whether the moving parties have recourse under Minn. Stat. §515B.3-117.

Pioneer argues that the moving parties are not unit owners, but mortgagee's, therefore they have no recourse under Minn. Stat. §515B.3-117 because the statute states that "...an 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." *Id.* Whether or not the moving parties are owners or mortgagees, however, is immaterial to the

issues presently before the court. The statute also provides that "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.* The moving parties are not seeking a release of the Pioneer lien as unit owners, merely a determination that the provisions of Minn. Stat. §515B.3-117 apply to Pioneer's lien. As interested parties, the Court finds that the moving parties do have standing to request a determination that Minn. Stat. §515B.3-117 applies to the circumstances in this matter.

(b) Whether Minn. Stat. §515B applies to this matter.

Minn. Stat. §515B is entitled the "Minnesota Common Interest Ownership Act." Minn. Stat. §515B.1-101 (2009). Except as otherwise provided, the statute applies to all Minnesota common interest communities created on and after June 1, 1994. Minn. Stat. §515B.1-102 (2009). Therefore, Minn. Stat. §515B applies to the Lakeside project to the extent that it is a common interest community.

(c) Whether the Pioneer lien should be prorated on a per unit basis.

Alliance et al. argue that the Pioneer lien should be prorated among the 210 units approved in the original subdivision plans for the Lakeside project. Pioneer argues that if its lien is prorated at all, it should be prorated based on either the number of lots covered by the lien (38), the number of units constructed (29), or the number of units covered by the filed CIC Declarations (39).

While Minn. Stat. §515B.3-117 mandates apportionment of a lien against individual units in a common interest community, Minn. Stat. §514.09 allows a lienholder with a claim against multiple contiguous properties to file either one statement for its entire claim or to apportion the lien between the various properties. Minn. Stat. §514.09 (2009). No Minnesota statute deals specifically with the circumstances presented in this case where the project includes both common interest communities and undesignated parcels. Where statutes are ambiguous and there is no precedential case law, the court must examine and weigh the equities involved under the specific circumstances of the case at bar. *Premier Bank v. Becker Development, LLC*, 767 N.W.2d 691, 700 (Minn. Ct. App. 2009).

Lakeside is subject to a Master Declaration filed January 25, 2007 with the Carver County Recorder's office. The Master Declaration provides for the overall development of the Lakeside project and for the creation of five common interest communities within the

development. Pursuant to the Master Declaration, assessments for master common expenses are to be apportioned between the common interest communities based upon the number of units in each community. Of the five proposed common interest communities anticipated in the Master Declaration, only two have actually been formed – The Highlands at Lakeside and Liberty at Lakeside. The Highlands consists of 36 units. Liberty consists of 3 units, but may be expanded to add additional real estate and include a total of 28 units. While three other common interest communities are contemplated by the Master Declaration, they have yet to be formed or developed. Because the Master Declarant retained the right to modify the number of units within each common interest community until it is created, the number of units which will be constructed in the remaining communities, if they are constructed at all, cannot now be determined with any degree of certainty. The Master Declaration calls for 210 units, however significantly more or less may eventually end up being created. While the Court agrees that some manner of apportionment of Pioneer's lien would be equitable, questions of material fact remain as to the appropriate method of apportionment. The Court cannot therefore apportion Pioneer's lien on a per unit basis based upon a speculative total of 210 units, and Alliance et al.'s motion for apportionment must be denied. The Court invites the interested parties to schedule a review hearing to provide further argument as to apportionment and, if such a hearing is desired, to schedule a conference call with the Court in advance of the hearing to discuss specific details to be addressed.

III. Whether Pioneer intentionally overstated its lien.

Alliance et al. argue that Pioneer has overstated its lien and that the lien is therefore void. Minn. Stat. §514.74 provides that in no case shall a lien exist for a greater amount than the sum claimed in the lien statement, nor for any amount, if it be made to appear that the claimant has knowingly demanded in the statement more than is justly due. Minn. Stat. §514.74 (2009). Because Minn. Stat. §514.09 permits a lien claimant to file either one statement for their entire claim or to apportion their claim between impacted properties, the Court cannot find that Pioneer's lien is void for overstatement.

Conclusion

Because Pioneer has been paid for all of its work up to the time of the actual and visible improvements on the project, Pioneer's lien is no longer prior to Home Federal's mortgage and Home Federal's motion for summary judgment declaring its mortgage to be prior and superior to Pioneer's mechanic's lien must be granted. Because the Lakeside project contains a mix of

common interest communities and undeveloped parcels and the total number of units which will be constructed within the project has yet to be determined, Alliance et al.'s motion for apportionment must be denied. In addition, because a lien claimant may file one lien against all impacted properties pursuant to Minn. Stat. §514.09, Alliance et al.'s motion for a determination that Pioneer's lien is void for overstatement must also be denied.

K.W.E.