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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

Rick Snider and Janan Snider d/b/a RJ Snider Construction,

Plaintiffs/Appellant,

vs.

Dickinson Elks Building, LLC,

Defendant/Appellee.

Supreme Court Case No.:
20160145

Stark County District Court
No. 45-2015-CV-00134

BRIEF OF APPELLEE DICKINSON ELKS BUILDING, LLC

ON APPEAL FROM THE APPEAL FROM JUDGMENT ENTERED FEBRUARY 16, 2016 (DKT. NO. 76) AND AMENDED JUDGMENT ENTERED JUNE 1, 2016 (DKT. NO. 92), IN THE DISTRICT COURT, COUNTY OF STARK, CASE NO.: 45-2014-CV-00551, BY THE HONORABLE ZANE ANDERSON

Dated: January 19, 2016

BY: /s/ Chris Thompson

Chris Thompson (ID No. 07189)
GRANDE, FRISK & THOMPSON
2700 12th Avenue South, Suite A
Fargo, ND 58103
Telephone No: (701) 365-8088
chris@grandefrisk.com
Attorneys for the Appellee

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STATEMENT OF THE CASE

[¶1] This case involves a dispute between a contractor, Rick and Janan Snider d/b/a RJ Snider Construction (hereinafter "RJ Snider"), and a property owner, Dickinson Elks Building, LLC ("Dickinson Elks"), over the foreclosure of a construction lien. RJ Snider originally recorded a construction lien against Dickinson Elks' property in 2013. Dickinson Elks then served RJ Snider with a demand to commence a lawsuit and record a lis pendens within 30 days, as provided by N.D.C.C. § 35-27-25.

[¶2] RJ Snider commenced suit in a timely manner but failed to record a notice of lis pendens within 30 days. As a result, the district court dismissed RJ Snider's claim for foreclosure of the construction lien. The claim was dismissed pursuant to N.D.C.C. § 35-27-25, which states "that if suit is not commenced and a lis pendens recorded within the thirty days required under this section, the lien is forfeited."

[¶3] RJ Snider then recorded a second construction lien against Dickinson Elks' property for services that were previously included in the first construction lien. The second construction lien was recorded within three years after RJ Snider first provided services to the property, as required by N.D.C.C. § 35-27-14. After RJ Snider brought suit to foreclose the second construction lien, Dickinson Elks filed a motion for summary judgment. Dickinson Elks argued RJ Snider was not entitled to record a second construction lien after the first construction lien was forfeited under N.D.C.C. § 35-27-25. The district court agreed with Dickinson Elks and entered summary judgment in favor of Dickinson Elks on RJ Snider's claim for foreclosure of the construction lien in the second action.

[¶4] RJ Snider now appeals from the district court judgment. RJ Snider erroneously believes that recording a second construction lien for the same work after the first lien was deemed forfeited is permissible under N.D.C.C. § 35-27-25.

STATEMENT OF FACTS

[¶5] RJ Snider recorded a lien on January 16, 2013, as Document No. 3105028, against Dickinson Elks' property. App. 28. This lien was for construction materials and services RJ Snider provided for improvements to the property between the dates of December 26, 2011, and October 15, 2012, in the amount of $198,255.08. Id. On May 28, 2014, the Dickinson Elks Building sent a demand to RJ Snider to commence suit and record a lis pendens within 30 days under N.D.C.C. § 35-27-25. App. 70-71. RJ Snider did not file a lis pendens until 60 days later, on July 28, 2014. App. 72. On January 28, 2015, the court entered an order granting summary judgment against the Sniders for not recording a lis pendens within 30 days and declared RJ Sniders' lien on the property forfeited. Judgment was entered February 20, 2015. App. 119.

[¶6] RJ Snider recorded a second lien on February 26, 2015, as Document No. 3124753. App. 31-32. The second lien was against the Dickinson Elks Building's property for constructions materials and services provided for improvements to the property between March 12, 2012, and November 30, 2012, in the amount of $174,642.09. Id. The Sniders brought suit to foreclose the second-filed lien recorded on February 26, 2015. App. 5-9. On summary judgment, the court found that the labor and materials included in both liens were identical. App. 124. Furthermore, the court found that RJ Snider was barred, by res judicata, from bringing suit to foreclose on a second lien that covered identical labor and materials. App. 125. In coming to its conclusion, the court reasoned that RJ Sniders' lien rights for the labor and materials in both statements of lien were extinguished by the court in the first action. Id. RJ Snider has now appealed the district court's ruling regarding the filing of a second lien for the same labor and materials. It should be noted that, since RJ Snider has not appealed the

district court's factual findings in this matter, RJ Sndier has conceded that both statements of lien covered identical labor and materials.

STANDARD OF REVIEW

[¶7] Since this case was decided by summary judgment, the standard of review for summary judgment is applicable. Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Clausnitzer v. Tesoro Ref . & Mktg. Co., 2012 ND 172 (N.D. 2012). A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Richard v. Washburn Pub. Sch., 809 N.W. 2d 288 (N.D. 2011) (quoting Loper v. Adams, 795 N.W.2d 899) (N.D. 2011). If the moving party "meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact." Barbie v. Minko Constr., Inc., 2009 ND 99, P6 (N.D. 2009) (quoting Alerus Fin., N.A. v. Western State Bank, 750 N.W.2d 412 (N.D. 2008)).

[¶8] This appeal also involves the interpretation, and applicability, of a statute, N.D.C.C. 43-07-02. "Interpretation of a statute is a question of law, fully reviewable on appeal." Wheeler v. Gardner, 2006 ND 24, ¶ 10, 708 N.W.2d 908. When interpreting a statute, this Court seeks to ascertain the intent of the Legislature by giving the statute's language "its plain, ordinary, and commonly understood meaning." Id. A statute's

language must be interpreted in context, and this Court attempts to give "meaning and effect to every word, phrase, and sentence." Id. at ¶11. Further, "[s]tatutes must be construed to give effect to all of their provisions, so that no part of the statute is rendered inoperative or superfluous." Id. If a statute's language is clear and unambiguous, such language "is not to be disregarded under the pretext of pursuing [the statute's] spirit." N.D.C.C. § 1–02–05. "A statute is ambiguous when it is subject to different, but rational meanings." Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 10, 655 N.W.2d 60. When a statute is ambiguous, "a court may resort to extrinsic aids, including legislative history, to interpret the statute." Id. Finally, this Court presumes "[a] just and reasonable result is intended." N.D.C.C. § 1–02–38(3).

LAW AND ARGUMENT

[¶9] This case can be resolved by answering a single question: what is a lien? Is it no more than a piece of paper in a recorder's office, as appellant would have this court believe, or is it something more intangible that exists independently of the recorder's office? The Century Code defines a lien as "a charge imposed upon specific property by which it is made security for the performance of an act." N.D. Cent. Code Ann. § 35-01-02. Black's Law defines a lien as a "legal right or interest that a creditor has in another's property, lasting [usually] until a debt or duty that it secures is satisfied." LIEN, Black's Law Dictionary (10th ed. 2014). "The North Dakota Supreme Court has held on several occasions that the right of a lien is purely a creature of statute." In re Reinhardt, 81 B.R. 565, 566 (Bankr. D.N.D. 1987). Based upon these definitions, it would appear that a lien is something intangible, a legal right, created by statute, which a party acquires upon the performance of a specific act. The act that creates the

lien, too, is not simply the act of recording a statement of lien with a county recorder, but rather the labor, material, or financing that underlies the lien.

[¶10] "Any person that improves real estate…has a lien upon the improvement and upon the land on which the improvement is situated or to which the improvement may be removed for the price or value of such contribution." N.D.C.C. § 35-27-02. This statute does not say that a person that improves real estate "may obtain a lien" or "can have a lien", but instead specifically uses the phrase "has a lien", meaning that a lien is automatic upon the commencement of improvements on property. "As against the owner of the land…liens 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." N.D.C.C. § 35-27-03. A lien, therefore, is not created or obtained by the recording of a statement of lien, but, rather, is created when the "first item of material or labor is furnished." Whether or not a statement of lien is recorded, then, has no bearing, in the absence of a statute that states otherwise, on whether or not a lien was created or takes effect, but, rather, on whether or not a lien is enforceable against third parties.

[¶11] The recording of a statement of lien is an act of perfection. Perfection does not create a security interest, which is done by "attachment", but is just "an additional step which makes the security interest effective against third parties." Thompson v. Danner, 507 N.W.2d 550, 554 (N.D. 1993); Foothill Park, LC v. Judston, Inc., 2008 UT App 113, ¶ 10, 182 P.3d 924, 928 ("It is evident that the filing of the statement does not create the lien ... but simply holds it or keeps it in force for the time [provided] ... so as to give the claimant an opportunity to enforce the same by process of law.") Recordation, therefore, has the effect of putting the world on notice and is required to enforce a lien. N.D.C.C. § 35-27-13; Struksnes v. Kevin's Plumbing & Heating, Inc., 1997 ND 245, ¶ 12, 572 N.W.2d 815, 819.

[¶12] When RJ Snider improved real estate on the Property, "a lien upon the improvement and upon the land on which the improvement is situated" was created and acquired by RJ Snider. The lien was not created when RJ Snider recorded its first statement of lien, Document No. 3105028. Rather, recording Document No. 3105028 simply made RJ Snider's lien effective against third parties. When the trial court declared RJ Snider's lien forfeited, the court was not only declaring Document No. 3105028 forfeited, but rather the right to lien underlying that statement of lien. RJ Snider, therefore, was legally precluded from recording its second statement of lien, Document No. 3124753, since it included work entirely from the already forfeited lien, and the right to claim a lien was no longer available.

A. Allowing Parties to Refile a Forfeited Lien Defeats N.D.C.C. § 35-27-25

[¶13] RJ Snider believes that a "liberal construction" of N.D.C.C. § 35-27-25 permits the filing of a second lien following a previously forfeited lien for the same work. Impliedly, though, this would allow for the recording of a third lien, and a fourth, and a fifth, ad infinitum. This would effectively defeat the whole purpose of N.D.C.C. § 35-27-25, since it would just lead to an unending spiral of 1) demanding the lienholder commence suit, then 2) forfeiting the lien, 3) refiling the lien, and then starting over again in a pattern of demand, forfeit, re-file, repeat; demand, forfeit, re-file, repeat; demand, forfeit, re-file, repeat; and so on.

[¶14] Appellant also seems to believe that the statute of limitations for filing an infinite number of liens for the same work is three years, no matter if a demand, pursuant to 35-27-25, has been made or not. Even if it that bizarre interpretation was true, however, the time period for actually enforcing the lien, in this case, had already passed by the time RJ Snider had instituted its second action. Normally, a lienholder has three years from the time of recording a lien to commence an action to enforce its lien. As this Court has previously

stated, though, "[a] written demand by an owner under N.D.C.C. § 35–27–25 will ordinarily shorten the statute of limitations for commencing and filing an action to enforce a mechanic's lien." Comstock Const., Inc. v. Sheyenne Disposal, Inc., 2002 ND 141, ¶ 25, 651 N.W.2d 656, 663–64. Once Dickinson Elks, therefore, sent its 35-27-25 demand, the three-year period for RJ Snider to enforce its lien immediately shrank to 30 days. The demand was served on July 2, 2014, so RJ Snider only had until August 1, 2014 to initiate suit. The suit underlying this appeal, however, was not filed until February 26, 2015. The abbreviated statute of limitations, therefore, barred the second suit from being commenced passed August 1, 2014.

B. RJ Sniders Lien Was Both Forfeited and Deemed Satisfied

[¶15] One major point that RJ Snider did not address in its brief was that failure to file a lis pendens as required under 35-27-25 did not just forfeit RJ Snider's lien. The last sentence of that section specifies that "[i]f a lis pendens is not recorded within the limitations provided by this section, the lien is deemed satisfied." N.D.C.C. 35-27-25. When the trial court in the first case, therefore, determined that RJ Snider failed to file a lis pendens within the requirements of N.D.C.C. 35-27-25, RJ Snider's lien was not only forfeited, it was also deemed satisfied.

[¶16] Satisfaction of a lien is defined as "[t]he fulfillment of all obligations made the subject of a lien." SATISFACTION OF LIEN, Black's Law Dictionary (10th ed. 2014). The phrase "satisfaction of lien", though not explicitly defined in the Century Code or in North Dakota case law, is repeatedly used contextually to mean that the obligation underlying a lien is fulfilled or extinguished. *See* Remmick v. Whitman, 2001 ND 102, ¶ 7, 627 N.W.2d 376, 378; Martian v. Martian, 399 N.W.2d 849, 853 (N.D. 1987); Bovey, Shute & Jackson v. Odegaard, 53 N.D. 871, 208 N.W. 111 (1925); Merchants' State Bank of Fargo v. Tufts, 14 N.D. 238,

103 N.W. 760, 762 (1905); Kalscheuer v. Upton, 6 Dakota 449, 43 N.W. 816, 818 (1889).

[¶17] When the court in RJ Snider's first lawsuit ruled that RJ Snider's lien was forfeited, pursuant to N.D.C.C. 35-27-25, for failing to file a lis pendens, RJ Snider's lien was also deemed satisfied as a result. Since the lien was deemed satisfied, the underlying obligation was fulfilled. And once the obligation was fulfilled, there would have been no more obligation for which RJ Snider could file a second lien.

C. **RJ Sniders Preferred Statutory Interpretation Will Have Wide-Ranging Effect Over Liens Filed in North Dakota**

[¶18] In its brief, RJ Snider attempts to justify acceptance of its statutory interpretation by convincing this Court that ruling in RJ Snider's favor on the issue before this court would have little effect outside of 35-27-25. The issue before this Court, whether or not a previously forfeited and/or satisfied lien can be validly re-recorded a second time, does not just affect 35-27-25, or even just Chapter 35-27, but has much broader applicability to the entire title 35 of the Century Code having to do with all liens, and potentially all mortgages (which are just another form of lien). A ruling by this court that a lien, which has already been deemed satisfied, can be re-recorded for the same underlying act, could have a far-reaching, deleterious effect on innumerable real property transactions through this state.

[¶19] To give an example, it is entirely common, if there has been a dispute between an owner and a lienholder over the final, or even interim, amount due on a project, for the parties to agree to a lesser amount, and then sign a satisfaction of lien document for the lesser, settled-on amount. If this court finds that a satisfaction of lien is not the end of a lien, then a lienholder who has signed a satisfaction of lien for an amount lesser than it originally claimed could now come back and refile another lien for the difference between

the amount initially claimed and the eventual amount settled on. The lienholder would just claim that the earlier signed satisfaction of lien did not necessarily extinguish the underlying obligation. This Court should not be persuaded by such an interpretation, and, instead rule that the satisfaction of a lien means the end of that lien, and since RJ Snider's lien was deemed satisfied, their right to lien for the same labor and/or materials had, likewise, ceased.

D. Other Jurisdictions Do Not Allow a Party to Refile an Earlier Satisfied Lien

[¶20] Multiple other jurisdictions that have reviewed facts analogous to those in this case have ruled that a party cannot re-record a second lien for the same materials and/or labor that were subject to an earlier lien deemed forfeited or satisfied. In Foothill Park, LC v. Judston, Inc., for instance, Judston filed notice to hold and claim a lien on Foothill's property (first notice) in August of 2004. Foothill Park, LC v. Judston, Inc., 2008 UT App 113, ¶ 2, 182 P.3d 924, 926. Judston filed an amended notice on January 11, 2005 (second notice), and on July 14, 2006, Judston filed a third notice. Id. Foothill filed a Complaint challenging Judston's third notice. Id. The trial court found Judston's lien had expired because it was not enforced within 180 days of the first notice, as required by statute. Upon review, the Court of Appeals of Utah agreed with the trial court that "by the time the third notice was filed in 2006, Judston's lien right had already extinguished." Id., at 927. The court stated further that "Judston's third notice was ineffective and did not resurrect Judston's extinguished lien right or extend the statutory deadline for enforcement. Indeed, Judston's third notice did nothing more than seek to perfect a lien right which had been void for over one year…" Id., at 928.

[¶21] In Mullen Lumber Co. v. Lore, Mullen Lumber Co. "filed notice of [its] contract in the registry of deeds to record a mechanic's lien on [Lore's] house" on August 29, 1986.

Mullen Lumber Co. v. Lore, 404 Mass. 750, 756, 537 N.E.2d 123, 127 (1989). "On or about February 18, 1987…Mullen recorded a second statement in the same amount and for the same supplies detailed in the earlier recorded statement. Mullen also filed its complaint on February 18, 1987, asserting the existence of the lien and seeking its enforcement by sale of Lore's house." Id. On review, the Supreme Judicial Court of Massachusetts concluded that:

> [T]he filing of the second statement of account had no legal effect. Mullen's first statement was filed on December 5, 1986. The statutory period for enforcing the lien expired on February 3, 1987…If we were to reach a contrary result…we would afford the subcontractor a period greater than sixty days in which to commence an enforcement action, a result we believe unintended by the Legislature…Mullen's failure to commence an action within the statutory time period reckoned from the first filing proved fatal and, by the terms of the statute, caused the lien to dissolve. Id. There can be but one lien for the materials supplied and the filing of a second statement of account concerning the same materials neither extends the statutory period nor revives the lien if the statutory period has passed.

Mullen Lumber Co. v. Lore, 404 Mass. 750, 756-57, 537 N.E.2d 123, 127 (1989). *See also* Tremont Tower Condo., LLC v. George B.H. Macomber Co., 436 Mass. 677, 684, 767 N.E.2d 20, 26 (2002)("a lien that has forcibly expired due to failure to meet a required deadline cannot be recreated… **there can be but one lien**.")(Emphasis added).

[¶22] In a Kansas case, BG filed a mechanic's lien statement pertaining to the RIM property (the "2008 Lien Statement"). In re Rim Dev., LLC, No. 10-10132, 2011 WL 1299277, at *2 (Bankr. D. Kan. Mar. 31, 2011). The 2008 Lien Statement covered "professional services from January 31, 2007 to August 20, 2008 and represent[ed] the past due balance of $503,154.71. In support of its claims, BG attached 90 invoices describing services it had performed for RIM in the time period (the "Lapsed Work")." Id. "On September 11, 2009…BG filed a second mechanic's lien statement (the "2009 Lien"). This Statement include[d] an itemized spreadsheet that list[ed] 111 billing entries, including the Lapsed Work." Id. Since BG did not commence action to enforce the 2008 Lien Statement within one

year, the lien was deemed "canceled". Id., at 3. The court determined that, as a result of the earlier "canceled" lien, BG could not enforce a later-filed lien for work included in the earlier canceled lien:

> The cancellation of the 2008 Lien Statement prevented BG from claiming a lien for the same work in the 2009 statement. The filing of a lien statement commences the running of the one-year period for enforcing or foreclosing on a filed lien statement. [The statute] makes clear that if no action to foreclose the lien statement is instituted within that period, the lien "shall be considered canceled by limitation of law." When BG did not foreclose on the 2008 Lien Statement within a year of its filing, the lien was invalidated as a matter of law…The cancellation of the 2008 Lien Statement means BG has lost its lien upon RIM's real property to secure payment for any labor, equipment, materials or supplies it furnished to RIM listed in the 2008 Lien Statement and, further, is barred from obtaining a valid lien for that work. BG may have an unsecured claim for the value of the work, but its lien has expired.

In re Rim Dev., LLC, No. 10-10132, 2011 WL 1299277, at *4 (Bankr. D. Kan. Mar. 31, 2011).

[¶23] As in the cases cited above, RJ Snider has attempted, in filing its second lien against the Dickinson Elks property, "to perfect a lien right which had been void." When the district court declared forfeited RJ Snider's initial lien in the amount of $198,255.08 for work performed between December 26, 2011, and October 15, 2012, that order had the effect of extinguishing RJ Snider's right to again claim a lien for that work. As one court commented, "[t]he mechanic's lien statute does not permit the resurrection of a lien, or the creation of a new lien, once the lien has been extinguished by a failure to comply with the statute." Golden v. Gen. Builders Supply LLC, 441 Mass. 652, 659, 807 N.E.2d 822, 827 (2004). The district court has already ruled that, since RJ Snider failed to comply with the statute, N.D.C.C. § 35-27-25, RJ Snider's first lien was forfeited. This Court should not allow RJ Snider to resurrect that lien, which has already been extinguished.

[¶24] Finally, in a California case, a lumber company furnished lumber to defendants for residential improvements. Beacon Inv. Co. v. Khemlani, No. B145790, 2001 WL 1227890, at *1 (Cal. Ct. App. Oct. 16, 2001). "The lumber had a fair market value of $78,402.41. Defendants did not pay the amount due. In December of 1998, [the lumber company] recorded a mechanic's lien on the property." Id. On January 4, 1999, the same lumber company sued, alleging causes of action for foreclosure of the mechanic's lien, open book account, quantum valebant, and account stated. Id. Although the trial court found for the lumber company on other grounds, the trial court did not order foreclosure of the mechanic's lien. Id. Judgment was entered and became final. Id. Plaintiff recorded a second mechanic's lien on the property. Id. On April 18, 2000, plaintiff filed another action, alleging the four causes of action alleged in the first complaint. Id. The trial court sustained the demurrer without leave to amend on the ground of res judicata. Id. Dismissal was entered, and Plaintiff appealed. Id. In upholding the trial court demurrer, the Court of Appeals concluded:

> In the first action, plaintiff sought to foreclose on a mechanic's lien claim for the lumber delivered to 618 Via Del Monte, property owned by the trust. Plaintiff did not prevail on this cause of action. Plaintiff filed a second mechanic's lien for the same lumber. In the instant action, plaintiff sought to foreclose on the same property owned by the trust for the same debt. This it may not do. This action is barred by the doctrine of res judicata.

Id., at 2.

[¶25] Analogous to the facts in Beacon Inv. Co., RJ Snider sought, unsuccessfully, in its first action against Dickinson Elks, to foreclose on its construction lien. That first action was decided by summary judgment in favor of Dickinson Elks. "A summary judgment is a final judgment and has the effect of adjudicating the merits of the particular claim." Trottier v. Bird, 2001 ND 177, ¶ 8, 635 N.W.2d 157, 160. RJ Snider then filed a second statement of lien for the same labor and materials as its first lien, and is now seeking to foreclose on that lien. As

in Beacon Inv. Co., this Court should find that RJ Snider is barred by res judicata from enforcing a lien for work and labor that was included in its first lien foreclosure action.

CONCLUSION

[¶26] For the reasons set forth above, RJ Snider has neither a valid nor accurate lien against Dickinson Elks' property. Appellee, therefore, respectfully requests a ruling that, RJ Snider has no valid lien against Dickinson Elks' property.

Dated this 25th day of August, 2016.

BY: /s/ Chris Thompson
Chris Thompson (ID No. 07189)
OF: GRANDE, FRISK & THOMPSON
2700 12th Avenue South
Suite A
Fargo, ND 58103
Attorneys for the Appellee
chris@grandefrisk.com
Telephone No: (701) 365-8088

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2016, the Appellee's Brief was served, via email, upon the following individual(s):

Sean T. Foss
O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD
sean@OkeeffeAttorneys.com

Dated: August 25, 2016

BY: /s/ Chris Thompson
Chris Thompson (ID No. 07189)
GRANDE, FRISK & THOMPSON
2700 12th Avenue South, Suite A
Fargo, ND 58103
Telephone No: (701) 365-8088
chris@grandefrisk.com
Attorneys for the Appellee