

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SWMO, LLC, a North Dakota Limited
Liability Company,

Plaintiff/Appellant,

vs.

Eagle Rigid Spans, Inc., the General
Contractor; Mon-Dak Plumbing and
Heating, Inc.; Ronald J. Koch d/b/a/ RK
Electric; Creative Image Concrete,
Inc.; and all other persons unknown,
claiming any estate or interest in, or
lien or encumbrance upon, the real
estate described in the complaint,

Defendants/Appellees.

SUPREME COURT NO. 20180132

Civil No. 53-2015-CV-00749

**BRIEF OF APPELLEE RONALD J. KOCH
D/B/A RK ELECTRIC**

ON APPEAL FROM (1) ORDER GRANTING PARTIAL SUMMARY
JUDGMENT TO RONALD J. KOCH, D/B/A RK ELECTRIC DATED MARCH
20, 2018 AND (2) ORDER GRANTING PARTIAL SUMMARY JUDGMENT
TO MON-DAK PLUMBING AND HEATING, INC. DATED MARCH 20,
2018, WILLIAMS COUNTY DISTRICT COURT, THE HONORABLE PAUL
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STATEMENT OF THE ISSUES

[1] SWMO, LLC (“SWMO”) raised five issues on appeal. However, these issues can be more appropriately grouped into three primary issues:

[2] Issue #1: Whether the district court properly granted partial summary judgment in favor of Ronald J. Koch dba RK Electric (“RK”) on its construction lien enforcement claim where RK properly supported its motion for summary judgment, SWMO failed to set out specific facts showing a genuine issue of material fact requiring a trial, and the district court’s order complied with N.D.R.Civ.P. 52(a)(3) and 56(d)(1).

[3] Issue #2: Whether SWMO can rely on evidence or arguments asserted by its motions and post-trial brief after the district court’s grant of partial summary judgment in favor of RK where SWMO has not appealed from such subsequent proceedings.

[4] Issue #3: Whether the district court properly considered and rejected the evidence and arguments SWMO asserted by motions and post-trial brief after the district court’s grant of partial summary judgment to RK.

SUMMARY OF THE CASE

[5] SWMO contends on appeal that it raised an issue of material fact warranting denial of RK's motion for summary judgment to enforce its construction lien claim.

[6] However, RK properly supported its motion by providing competent evidence of its contract with the general contractor on the project, Eagle Rigid Spans, Inc. ("Eagle"), its performance of the contract, the contract price and partial payments, as well as its construction lien demonstrating the resulting balance owed, which was less than the undisputed remaining unpaid balance on the main construction contract between SWMO and Eagle. RK also demonstrated that its construction lien had priority over Mon-Dak Heating and Plumbing, Inc.'s ("Mon-Dak") construction lien.

[7] In response, SWMO did not dispute or even address any of RK's evidence. Instead, SWMO asserted that discovery was incomplete, ignoring that the discovery deadline had already passed. SWMO asserted it did not know the correct amount of RK's lien claim, notwithstanding the evidence RK had submitted. SWMO also asserted the motion should be denied due to RK's contractual privity with Eagle and other extraneous issues regarding RK's pleaded claims against Eagle, notwithstanding the nature of the construction lien claim and underlying statutory scheme. The district court properly ordered partial summary judgment.

[8] Thereafter, SWMO raised a number of additional issues through subsequent attacks on the partial summary judgment order, which form the primary bases for its contentions on appeal. However, SWMO has not appealed from the district court's denial of these subsequent attacks. These issues were not timely raised and would not have altered the result even if they had been timely asserted. Therefore, this Court should affirm the Order Granting Partial Summary Judgment to Ronald J. Koch, D/B/A RK Electric.

STATEMENT OF THE CASE

[9] SWMO's statement of the case is incomplete and largely ignores the subsequent procedural posture of the action following the grant of partial summary judgment to RK.

[10] SWMO contracted with Eagle to construct a building in Williston, North Dakota on or about December 18, 2012. [App. 140-55; Doc ID# 16.] Eagle then contracted with a number of subcontractors, including RK for electrical on December 26, 2012, [Doc ID# 153], and Mon-Dak for plumbing and heating. RK completed its work without incident and received partial payment, leaving an unpaid principal balance of \$114,242.32. However, there were unrelated disputes between SWMO and Eagle as to other aspects of the project, as alleged in the *Complaint*. [App. 12-35; Doc ID# 1.] As a result, SWMO withheld the remaining \$219,319.00 final payment owed under its contract with Eagle. *See* Brief of Appellant, ¶ 7; [App. 12-35, Doc ID# 1], ¶ 82. RK timely filed a construction lien to protect its right to payment. [Doc ID# 40.] Mon-Dak also

filed a construction lien, albeit more than 90 days after completing its work. [Doc ID# 39.]

[11] SWMO commenced this action by *Complaint* dated June 23, 2015, which only sought relief against Eagle (but not RK). [App. 12-35; Doc ID# 1.] At the time, SWMO had a pending sale for \$3,780,000, a substantial windfall relative to its investment in the building. [Doc ID# 5], ¶ 5; [Doc ID# 177.] So, SWMO sought a release of the construction liens by undertaking by depositing the undertaking funds into the district court. [Doc ID# 5.] RK and Mon-Dak stipulated to this request with the proviso that specified amounts be deposited, to which SWMO agreed, specifically \$124,242.32 for RK and \$152,620 for Mon-Dak. [Doc ID# 46, 47, 48.] The district entered an amended order granting SWMO leave to do so and released the liens by undertaking. [Doc ID# 52, 60.] The parties submitted their pleadings, although Mon-Dak did not respond to RK's cross-claim as to lien priority over Mon-Dak, and Creative Image Concrete, Inc., defaulted.

[12] On June 23, 2016, Mon-Dak moved for summary judgment. [Doc ID# 75.] SWMO opposed the motion, arguing discovery was not complete and that "SWMO has no idea who has been paid or what amounts have been paid to Mon-Dak by Eagle." [Doc ID# 79], ¶¶ 1, 24, 29-30. The district court denied the motion as premature pursuant to N.D.R.Civ.P. 56(f). [Doc ID# 90.]

[13] Thereafter, significant written discovery occurred, although SWMO never sought any discovery from RK. *See* [Doc ID# 203], ¶ 6. The district court entered a stipulated Scheduling Order on March 20, 2017, setting February 1, 2017 as the expert disclosure deadline at and September 1, 2017 as the deadline for discovery. [Doc ID# 112], ¶¶ 5, 7. On January 26, 2017, SWMO identified Scott Fournier as its expert, [Doc ID# 165], but its discovery responses to RK only indicated he would testify regarding “engineering defects related to roof line, walls, and general spans specifications.” [Doc ID# 164], Answer to Interrogatory No. 8.

[14] On November 7, 2017, Mon-Dak again moved for summary judgment on the basis of unjust enrichment. [App. 63-69; Doc ID# 131, 132.] RK responded asserting its priority over Mon-Dak’s lien claim. [App. 84-86; Doc ID# 148.] Mon-Dak did not reply on this point. SWMO again responded that “almost no discovery has taken place,” [App. 70-79; Doc ID# 136], ¶ 3, which was false by this point.

[15] On December 20, 2017, RK moved for summary judgment on its construction lien enforcement claim, as well as its breach of contract claim against Eagle, with supporting evidence. [Doc ID# 150-165, 181.] SWMO’s answer brief did not offer any legitimate dispute as to any of RK’s evidence as far as its lien amount and entitlement to enforce its lien. [App. 98-107; Doc ID# 171.] Eagle’s answer brief did not dispute RK’s quality of work or resist RK’s lien enforcement claim. [App. 108-13; Doc ID# 176], ¶ 3. RK replied, explaining,

inter alia, how SWMO's arguments did not raise a factual or legal challenge to RK's motion. [App. 114-22; Doc ID# 180.]

[16] The district court entered orders granting partial summary judgment to both RK and Mon-Dak on March 20, 2018. [App. 123-25, 126-28; Doc ID# 186, 187.] The orders directed release of undertaking funds sufficient to satisfy RK's and Mon-Dak's principal owing balances, \$114,242.00 and \$125,600, respectively, and reserved the issue of prejudgment interest for a later date. *Id.* The order regarding RK also awarded judgment against Eagle in the amount of \$114,242.00 and determined that RK's lien claim had priority over Mon-Dak's lien. [Doc ID# 186], ¶ 5.

[17] On March 27, 2018, SWMO filed a motion for reconsideration, [Doc ID# 191], contending there was "newly discovered evidence" of fraud by Eagle and RK relating to an alleged kick-back scheme that justified reconsideration of the orders. [Doc ID# 192.] RK responded by noting that SWMO had not previously raised any discovery issues and had not made any motion to compel regarding discovery defects by any parties, the alleged "new" evidence was not credible and was withdrawn by the deposition testimony of Bruce Meidinger, Eagle's president, and that, in any event, such allegations would have no effect on the arms-length contracts between SWMO and Eagle, and between Eagle and RK. [Doc ID# 203.] Eagle also responded admitting it had no evidence of any alleged "kick-back scheme" regarding the SWMO project. [Doc ID# 205], ¶ 6. Once Mr. Meidinger's deposition transcript became

available, SWMO filed it as an exhibit, [Doc ID# 217], and RK submitted a supplemental brief reciting the pertinent parts of the transcript confirming there was no evidence regarding the alleged “kick-back scheme” for the SWMO project, and that RK’s electrical subcontract was reasonable based on, *inter alia*, the price-per-square-foot of \$12.56 used. [Doc ID# 222], *citing* [Doc ID# 217], at 146:4-20, 148:9-150:1. The district court denied the motion for reconsideration by order dated April 23, 2018. [Doc ID# 224.]

[18] SWMO filed a *Notice of Appeal* to this Court on April 5, 2018. [Doc ID# 200.] SWMO also filed a motion for stay on April 18, 2018, arguing for the first time that RK’s motion for summary judgment was based upon an unjust enrichment claim. [Doc ID# 214], ¶ 25. This Court dismissed the appeal as there was no final judgment. [Doc ID# 228.] The district court denied the motion for stay as moot on April 27, 2018. [Doc ID# 229.]

[19] On April 30, 2018, RK and Eagle stipulated to dismissal without prejudice of RK’s claims against Eagle for late payment charges, fraud, deceit, and conversion, [Doc ID# 230], which the district approved by order dated May 9, 2018. [Doc ID# 233.]

[20] A bench trial was then held from May 29, 2018 through June 1, 2018, after which the parties submitted post-trial briefs. SWMO’s post-trial brief asserted the new argument that the amount it owed to Eagle also limited the amount it owed to any subcontractors (although it based this argument on an inapplicable statute regarding well and pipeline liens under N.D.C.C. ch.

35-24). [Doc ID# 310], ¶¶ 41-47. It requested the district court to “invalidate” the liens and essentially undo the partial summary judgment orders. *Id.* RK filed an objection to this argument because it was another attempt at reconsideration and SWMO offered no reason why it could not have discovered or offered the alleged evidence and argument in its opposition to RK’s summary judgment motion. [Doc ID# 314], ¶ 5 (citing *Pegg v. Kohn*, 2015 ND 79, ¶ 6, 861 N.W.2d 764 (“Unraised issues, even if meritorious, become the law of the case.”)).

[21] On August 28, 2018, the district court entered its *Findings of Fact, Conclusions of Law, and Order for Judgment*. [App. 129-34; Doc ID# 316.] As to RK, it incorporated the prior partial summary judgment order, and further awarded prejudgment interest, costs, and disbursements. *Id.* at ¶ 21. The *Judgment* also included this award. [App. 135-36; Doc ID# 320.]

[22] As to SWMO, the district court specifically included the amount SWMO had paid for its undertaking (\$250,542.32)¹ as part of the total SWMO had paid “to or on behalf of Eagle,” in addition to the \$1,216,568 that SWMO had directly paid Eagle. *Id.* at ¶ 8. Thus, SWMO was given credit for the amounts paid for lien claimants RK and Mon-Dak in determining the total amount it effectively paid (\$1,467,110.32), which the district court then used

¹ Although the district court referenced the amount of the undertaking amount as \$250,542.32, apparently based on the original undertaking order, [App. 177-78; Doc ID# 13], ¶ 3, the actual amount deposited was \$276,862.32 pursuant to the amended undertaking order. [App. 179-81; Doc ID# 49], ¶ 5.

to determine SWMO had paid \$142,154.21 more than the “adjusted” contract price (\$1,324,956.11), and awarded SWMO damages accordingly, as well as damages for diminution of value of \$120,000, for a total award in favor of SWMO against Eagle of \$262,154.21. *Id.* at ¶¶ 7, 8, 18. Judgment was entered accordingly. [App. 135-36; Doc ID# 320.] This appeal followed.

STATEMENT OF FACTS

[23] Against the backdrop of the foregoing Statement of the Case, the only relevant facts relate to how RK presented its construction lien enforcement claim in the summary judgment phase, and how SWMO responded.

[24] In support of RK’s motion, it filed the *Affidavit of Ronald J. Koch*, [Doc ID# 181], with numerous exhibits attached. RK included its contract with Eagle, consisting of RK’s bid to Eagle on November 26, 2012 for the base amount of \$199,727.00 (“Bid”), which Eagle accepted on December 26, 2012. [Doc ID# 153]; *see also* [Doc ID# 181], ¶ 5. In addition, RK submitted evidence of a restocking fee as agreed by SWMO and Eagle and four approved change orders (styled as “Extra Work Orders”), which increased RK’s total contract price to \$216,742.32. [Doc ID# 154-159.] RK provided evidence of the two partial payment checks it had received, for \$12,500 and \$90,000, respectively. [Doc ID# 160, 161.] RK also provided evidence of its final billing to Eagle with an unpaid balance of \$114,242.32, [Doc ID# 162], and an email from Eagle’s president confirming RK’s figures. [Doc ID# 163.] RK demonstrated that it had

completely performed its electrical duties as of October 27, 2014 under the contract without objection. *See* [Doc ID# 181], ¶¶ 16-18; *see also* [Doc ID# 40]; *accord Brief of Appellant*, ¶ 6. RK also provided evidence demonstrating that it was undisputed that at least \$153,608.00 remained unpaid on SWMO's contract with Eagle, more than the total amount of RK's lien claim. [App. 87-97; Doc ID# 152], ¶ 21.

[25] RK also noted that, although SWMO had alleged that it had requested three-phase electrical wiring, this was contrary to the specifications of SWMO's contract with Eagle, upon which RK's Bid was based, and that, in any event, SWMO had not disclosed an expert witness on this issue, which would have been necessary because any opinion on this issue required scientific, technical, or specialized knowledge. *See* [App. 90, 93-94; Doc ID# 152], ¶¶ 16-17, 26-27, *citing* [Doc ID# 181], ¶¶ 17-18.

[26] SWMO did not raise a dispute as to any of these facts in its answer brief. Instead, SWMO argued that discovery was incomplete and that it had “no idea” and “no evidence” of payments made to RK by Eagle; that a pay application entitled “Contractor's Application for Payment and Project Activity Breakdown Sheet,” [App. 156; Doc ID# 38], from Eagle to SWMO indicated different amounts owing for electrical services—although SWMO concedes on appeal that this exhibit was false and misleading, *see Brief of Appellant*, ¶¶ 14, 19, 41, 61, 68; that RK was limited to pursuing its claims against Eagle rather than SWMO; that RK's motion did not address all of RK's

claims against Eagle; and, that SWMO's owners were entitled to provide lay testimony as to the three-phase wiring issue. *See* [App. 98-107; Doc ID# 171], ¶¶ 1, 2, 21-23, 26, 31, 32. SWMO also argued that RK had not submitted evidence of its contract with Eagle, *id.* at ¶ 24, but this is simply false. *See* [Doc ID# 153.] However, SWMO did not dispute that at least \$153,608.00 remained due under SWMO's contract with Eagle, or that this amount exceeded RK's lien claim. *See generally* [App. 98-107; Doc ID# 171.] RK submitted a reply addressing and refuting each of these contentions. [Doc ID# 180.] The district court then granted RK partial summary judgment. [Doc ID# 186.]

LAW AND ARGUMENT

I. The district court properly granted partial summary judgment in favor of Ronald J. Koch dba RK Electric on its construction lien enforcement claim.

A. Summary Judgment Standard of Review

[27] The summary judgment standard of review is well-established:

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 undisputed facts, or if the only issues to be resolved are questions of law. 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. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether *the information available to the district court* precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment

is a question of law which we review de novo on the entire record. *Poppe v. Stockert*, 2015 ND 252, ¶ 4, 870 N.W.2d 187 (emphasis added; internal citations omitted).

[28] In order to defeat a properly-supported summary judgment motion, a responding party must, “by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial.” N.D.R.Civ.P. 56(e)(2). “For an opposing party to demonstrate a genuine issue of material fact, the party must present enough evidence to allow a reasonable jury to rule in their favor.” *Davis v. Enget*, 2010 ND 34, ¶ 6, 779 N.W.2d 126 (internal citation omitted).

[29] If a party opposing summary judgment fails to present competent evidence raising an issue of material fact, “it is presumed such evidence does not exist.” *Schmitt v. MeritCare Health System*, 2013 ND 136, ¶ 8, 834 N.W.2d 627; *see also First Nat’l Bank of Hettinger v. Clark*, 332 N.W.2d 264, 267 (N.D. 1983). The nonmovant “must also demonstrate a plausible ground for his claim or defense” because demonstrating a genuine issue of material fact “is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts.” 10A *Fed. Prac. & Proc. Civ.* § 2727.2 (4th ed.) (citing *McGuire v. Columbia Broad. Sys., Inc.*, 399 F.2d 902, 905 (9th Cir. 1968)).²

² Federal court interpretations of substantially similar federal rules are highly persuasive guides for this Court. *See Farmers Union Oil Co. of Williston v. Harp*, 462 N.W.2d 152 (N.D. 1990).

B. Ronald J. Koch dba RK Electric properly supported its motion for summary judgment.

[30] The sole claim RK raised as to SWMO and the undertaking funds was for enforcement of its construction lien pursuant to N.D.C.C. ch. 35-27. Section 35-27-02 provides that any person that improves real estate has a lien for payment of their services and materials, regardless of whether its contract is with the owner of the property or the general contractor.³ However, the amount of the lien is “only for the difference between the price paid by the owner or agent and the price or value of the contribution... [and, if] the owner or agent has paid the full price or value of the contribution, no lien is allowed.” *Id.* Section 35-27-24 allows for enforcement of a construction lien.

[31] Thus, RK had the initial burden of establishing that (1) RK had a contract with SWMO or its contractor, Eagle, to provide the electrical services and materials for the project; (2) the price of RK’s contract, less any partial

³ Section 35-27-02 provides, in pertinent part:

Any person that improves real estate, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner, 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. Provided, however, that the amount of the lien is only for the difference between the price paid by the owner or agent and the price or value of the contribution. If the owner or agent has paid the full price or value of the contribution, no lien is allowed. Provided further that if the owner or an agent of the owner has received a waiver of lien signed by the person that improves the real estate, a lien is not allowed.

payments made; (3) performance by RK under the contract; and, (4) the remaining unpaid amount of SWMO's contract with Eagle exceeded RK's lien claim.

[32] In this case, RK's motion provided satisfactory evidence on all four points. First, RK provided a copy of its contract with Eagle, which is the Bid with a hand-written acceptance by Eagle on December 26, 2012. [Doc ID# 153], *see also* [Doc ID# 181], ¶ 5. This satisfied the requisites for a contract: parties capable of contracting, the consent of the parties, a lawful object, and sufficient consideration. *See* N.D.C.C. § 9-01-02.⁴ Thus, although SWMO claims that RK did not provide evidence of its contract, this is false.

[33] Second, RK demonstrated the contract price by providing evidence of the Bid, an increase for a restocking fee as agreed by SWMO and Eagle, four change orders (styled as "Extra Work Orders"), for a total contract price of \$216,742.32. RK provided evidence of the two partial payment checks it had received, for \$12,500 and \$90,000, respectively. RK also provided evidence of its final billing for \$114,242.32 and an email from Eagle's president confirming the same.

⁴ N.D.C.C. § 9-01-02 provides:

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. The consent of the parties;
3. A lawful object; and
4. Sufficient cause or consideration.

[34] Third, RK demonstrated that it had completely performed its electrical duties under the contract without objection. SWMO's discovery responses confirmed this. And, although SWMO claimed that it had requested three-phase wiring from Eagle, it conceded it was not the fault of RK in any event. Also, as seen in Mr. Koch's affidavit, SWMO's contention regarding the three-phase wiring issue was incorrect, as RK's bid was based upon the specifications in Eagle's prime contract with SWMO (which SWMO signed). Thus, even if there had been a dispute regarding the three-phase issue, it was immaterial to the resolution of RK's motion. See *Knight v. N. Dakota State Indus. Sch.*, 540 N.W.2d 387, 388 (N.D. 1995) ("Even if a factual dispute exists, summary judgment is proper if the law is such that resolution of the factual dispute will not change the result. In such a case, the disputed facts are not material." (internal citation omitted)).

[35] Moreover, SWMO's contention regarding the three-phase wiring issue would have required testimony of an expert witness because this electrical issue was a matter requiring scientific, technical, or specialized knowledge. See *State v. Saulter*, 2009 ND 78, ¶¶ 10-12, 764 N.W.2d 430 (discussing the distinction between N.D.R.Ev. 701 and 702). RK pointed out that SWMO did not disclose an expert on this issue and SWMO's members were not experts, and so, SWMO could not rely on its members' lay testimony. Thus, even though this was a non-issue, SWMO's failure to designate an expert would have precluded SWMO from offering any testimony or argument on this

point at trial. See *Black v. Abex Corp.*, 1999 ND 236, ¶ 19, 603 N.W.2d 182 (party may “point out” lack of evidence on essential element of claim (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); see also *Flanders & Medeiros, Inc. v. Bogosian*, 65 F.3d 198 (1st Cir. 1995) (granting *Celotex* summary judgment where party failed to designate a legal malpractice expert on standard of care).

[36] Fourth, RK presented evidence that the remaining balance of SWMO’s contract with Eagle was at least \$153,608.00,⁵ which amount was more than enough to satisfy RK’s first-priority⁶ lien claim of \$114,242.32 principal plus prejudgment interest. *Accord* 5 Tiffany Real Prop. § 1576 (3d ed.) (under “New York” lien system, a subcontractor cannot claim a lien for a sum greater than that due to the principal contractor at the time the subcontractor gives notice of its claim); see also 56 C.J.S. *Mechanics’ Liens* § 91.⁷ Therefore, RK properly supported its motion and it became SWMO’s duty to respond with specific facts showing a triable issue of fact. It did not do so.

⁵ Although SWMO disputed certain change orders, the \$153,608.00 amount was based upon the unpaid balance of the original contract price of \$1,320,507.00 plus undisputed and approved change orders. [Doc ID# 152], ¶ 21.

⁶ No party has challenged the district court’s determination that RK’s lien claim had priority over Mon-Dak’s.

⁷ SWMO concedes this point on appeal by acknowledging that it “can only be liable under North Dakota law to the extent [SWMO is] liable under contract with Eagle.” *Brief of Appellant*, ¶ 63.

C. SWMO, LLC failed to set out specific facts showing a genuine issue of material fact.

[37] SWMO's answer brief to RK's motion argued that discovery was not complete, that SWMO had "no idea" and "no evidence" what amounts RK was paid or was still entitled to receive, that a pay application submitted by Eagle to SWMO indicating a lower amount owing for electrical work created an issue of fact, that RK was limited to pursuing its claims against Eagle, that RK's motion did not address all of its claims against Eagle, and that SWMO's owners were entitled to testify as to the three-phase electrical issue. None of these arguments raised a valid opposition to summary judgment.

[38] First, SWMO's argument about lack of discovery was invalid at that point. SWMO had made this same argument in response to Mon-Dak's first summary judgment motion filed June 23, 2016, which motion the district court denied under N.D.R.Civ.P. 56(f).

[39] However, by the time RK filed its motion on December 20, 2017, the September 1, 2017 discovery deadline had passed, and nearly two-and-one-half years had passed since commencement of the action. SWMO did not demonstrate that it had sought any discovery from RK or Eagle regarding RK's electrical services, the related contract price, or payments thereon, nor that it made any motion to compel discovery. Thus, SWMO's claim that it had "no idea" and "no evidence" about these issues was no longer a valid defense by the time of RK's motion, as SWMO certainly had a "reasonable opportunity for discovery to develop its position" by that time. *See Choice Financial Group v.*

Schellpfeffer, 2006 ND 87, ¶ 9, 712 N.W.2d 855 (internal citation omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). SWMO merely ignored RK's evidence.

[40] Second, the only exhibit SWMO submitted with its answer brief to RK's summary judgment motion was the "Contractor's Application for Payment and Project Activity Breakdown Sheet" it had received from Eagle, along with the affidavit of Scott Westergaard claiming he did not have evidence to verify what had been paid to RK on the project. [App. 156; Doc ID# 173, 174.] At most, this exhibit showed that Eagle misrepresented the portion of the remaining balance that was allocated to electrical work. SWMO cannot have it both ways by admitting the exhibit was false and misleading, *see Brief of Appellant*, ¶¶ 14, 19, 41, 61, 68, and then claiming it should be deemed to have raised a genuine dispute of material fact, which it did not.

[41] More importantly, this exhibit and affidavit did nothing to raise a dispute of fact regarding RK's lien claim because SWMO provided no nexus between this exhibit and any alleged defects in RK's billing and payment information. A subcontractor's right to payment is determined by its contractual relationship with the general contractor, not what representations the general contractor may have made to the property owner, as long as there remains a sufficient unpaid portion of the owner's contract. *See* N.D.C.C. § 35-27-02. However, it is very important to note that SWMO did not argue in its answer brief to RK's summary judgment motion that the remaining balance of

at least \$153,608.00 that SWMO owed Eagle was in dispute, let alone that it could have any impact on RK's lien rights.⁸ See [App. 98-107; Doc ID# 171.] Thus, SWMO did not demonstrate a factual dispute relating to "a legal theory which remains viable under the asserted version of the facts." 10A *Fed. Prac. & Proc. Civ.* § 2727.2 (4th ed.).

[42] Likewise, it would undermine the purpose and policy of the construction lien statute to allow a general contractor to unilaterally reduce a subcontractor's lien rights without consent by making misrepresentations to an owner. See Brunner, *Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractors or materialman*, 75 A.L.R.3d 505, § 18 (Originally published in 1977) ("To deny the subcontractor his lien for any other reason than the owner's freedom from debt to the contractor would lead to the singular absurdity that one person might defeat and destroy another person's property interests at his pleasure."); accord 5 Tiffany Real Prop., *supra*, § 1576; cf. *Kirkland v. Oberquell*, 405 N.W.2d 21, 22-23 (N.D. 1987) (subcontractors' liens properly invalidated where owners had paid \$51,000, the approximate value of all work completed on the project).

[43] Third, SWMO argued that RK was limited to pursuing its claims against Eagle because it only had a contract with Eagle. However, this argument is meritless because, pursuant to N.D.C.C. § 35-27-02, a

⁸ SWMO attempted to raise this issue later in its Post-Trial Memorandum. See sections II and III, *infra*.

subcontractor necessarily must have a contract with the owner's general contractor, yet the subcontractor is explicitly entitled to a construction lien that it may enforce. *Id.* (“Any person that improves real estate ... under contract with any ... contractor ... of such owner, has a [construction] lien...” (emphasis added)); *see also* § 35-27-24; *Ronnisch Constr. Grp., Inc. v. Lofts on the Nine, LLC*, 886 N.W.2d 113, 122 (Mich. 2016) (“A party may proceed to enforce its lien through foreclosure while simultaneously seeking recovery based on the contract from which the lien arose. But there can only be one satisfaction.” (internal citations omitted)), cited by 53 Am. Jur. 2d *Mechanics' Liens* § 322; 56 C.J.S. *Mechanics' Liens* § 373; *accord Snider v. Dickinson Elks Building, LLC*, 2016 ND 162, ¶¶ 11-12, 883 N.W.2d 475 (dismissing appeal from interlocutory order invalidating construction lien where contractor's claim for money damages against property owner remained unresolved).

[44] Fourth, the fact that RK's motion did not address all of its claims against Eagle is irrelevant because N.D.R.Civ.P. 56(a)⁹ allows a motion based on all “or part” of a party's claim. In fact, RK was awarded its full contract amount against Eagle,¹⁰ the same damages it would have received under its

⁹ Rule 56(a) provides, in pertinent part: “A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.”

¹⁰ RK acknowledged in its reply brief that it could not double-recover and any money received from the undertaking funds would proportionately reduce Eagle's liability. [Doc ID# 180], ¶ 12.

fraud or deceit claims. This effectively rendered the latter claims superfluous, which is why RK stipulated to dismissing such claims shortly thereafter.

[45] Finally, as explained in the preceding section, SWMO did not disclose an expert on the three-phase electrical wiring issue. Instead, SWMO argued this issue was “an irrelevant issue as RK’s contract is with Eagle,” and that, in any event, an expert was not needed for such testimony (but provided no authority for this assertion). This is simply wrong and the district court paid no heed to these throw-away assertions.¹¹ Furthermore, the three-phase issue was immaterial, as it would not have changed the outcome because RK proved it performed the work it contracted to do, which SWMO did not dispute provided value to the project, thus entitling RK to a lien and payment for what it had done, based upon the undisputed evidence RK submitted. *See Knight, supra*, 540 N.W. at 388.

[46] Therefore, based on RK’s substantial support, and SWMO’s failure to raise a genuine issue of material fact, the district court properly granted partial summary judgment to RK based upon the information presented to it during the summary judgment phase.

¹¹ SWMO has not attempted on appeal to provide any legal support for this argument. *See Brief of Appellant*, ¶ 46. “[A] party waives an issue by not providing supporting argument” and, “without supportive reasoning or citations to relevant authorities, an argument is without merit.” *Kautzman v. Kautzman*, 2003 ND 140, ¶ 15, 668 N.W.2d 59 (internal citation omitted).

D. The district court's partial summary judgment order complied with N.D.R.Civ.P. 52 and 56.

[47] SWMO takes issue with the fact that the partial summary judgment order did not “acknowledge” SWMO’s opposition to summary judgment or make specific findings of fact on all issues framed by RK’s motion. *See Brief of Appellant*, ¶ 67.

[48] However, N.D.R.Civ.P. 52(a)(3) specifically provides that “[t]he court is not required to state findings on a motion under Rule 12 or 56 or, unless these rules provide otherwise, any other motion.” *See, e.g., Anderson v. Zimbelman*, 2014 ND 34, ¶ 23, 842 N.W.2d 852 (summary judgment decision “was not required to make findings regarding [non-movant’s] four claims underlying their counterclaim”). Likewise, Rule 56(d)(1), relating to partial summary judgment orders, requires that the district court shall “issue an order specifying what facts, including items of damages or other relief, are not genuinely at issue,” which facts “must be treated as established in the action.”

[49] In this case, the district court’s partial summary judgment order for RK’s motion provided that “there appears to be no real issue of material fact contrary to RK’s assertion that it did the work on the project and is entitled to be paid for that work,” that \$114,242.32 was the principal balance owed to RK, and that there was “no just reason to deny RK’s motion at this time insofar as the principal amount due;” it directed that amount be released from the undertaking funds; and, it reserved the issue of prejudgment interest for further proceedings. [Doc ID# 186], ¶¶ 2-6. These findings satisfied Rules

52(a)(3) and 56(d)(1) because they showed what the district court was deciding, which became established for the remainder of the action, and what was reserved for later determination. No further explanation was required.

II. SWMO, LLC cannot assert on appeal any arguments it raised after the grant of partial summary judgment because it has not appealed from the orders denying such subsequent attacks.

[50] N.D.R.App.P. 4(a)(3)(B)(ii) requires that the notice of appeal (or amended notice) specify the order or judgment being appealed per N.D.R.App.P. 3(c). *See also Dvorak v. Dvorak*, 2007 ND 79, ¶ 9, 732 N.W.2d 698. Failure to do so bars appellate review of any issues raised in orders or judgments not specified in a notice of appeal. *Id.* at ¶ 10. In *Dvorak*, the appellant had failed to include the district court’s denial of post-decisional motions in its notice of appeal, which precluded appellate review of the issues raised in those motions. *Id.*

[51] In this case, SWMO’s *Brief of Appellant* is replete with arguments and issues that were untimely raised (and rejected by the district court) after the district court granted RK partial summary judgment, specifically, the dubious “kick-back scheme” (in the motion for reconsideration), whether RK’s claim was really an “unjust enrichment” claim (in the motion for stay), and whether SWMO had fully paid Eagle under the primary construction contract (under its “adjusted contract price” theory) and, if so, whether this invalidated

RK's lien¹² (in its post-trial brief). *See Brief of Appellant*, ¶¶ 55-56, 58-62, 63-66, 69-71. However, SWMO's *Notice of Appeal* only designated for appeal the two partial summary judgment orders. [App. 137-39; Doc ID# 323.] Thus, only the district court's partial summary judgment orders are reviewable in this Court, and SWMO is precluded from raising these subsequently-raised issues for appellate review. *See Dvorak*, 2007 ND 79, ¶¶ 9-10.

III. The district court properly considered and rejected the arguments SWMO, LLC raised after the grant of partial summary judgment to Ronald J. Koch dba RK Electric.

[52] SWMO's "kick-back scheme," unjust enrichment, and "adjusted contract price" arguments merit little discussion, but it is important to demonstrate where, when, and how SWMO asserted these arguments, as the *Brief of Appellant* conveniently ignores these points.

[53] **Kick-Back Scheme.** A motion for reconsideration is treated as a either a Rule 59(j) or Rule 60 motion. *Kautzman v. Doll*, 2018 ND 23, ¶ 9, 905 N.W.2d 744. A district court's decision on a motion for reconsideration is reviewed for abuse of discretion, *i.e.*, "if it acts in an arbitrary, capricious, or unreasonable manner, which occurs when its decision is not the product of a rational mental process, or when the trial court misinterprets or misapplies the law." *Hildebrand v. Stolz*, 2016 ND 225, ¶ 7, 888 N.W.2d 197.

¹² SWMO tacitly admits that the issue was raised after the summary judgment phase by stating that "[u]ltimately, it was determined that SWMO overpaid under the contract..." *Brief of Appellant*, ¶ 62 (emphasis added).

[54] Rule 60(b)(2), N.D.R.Civ.P.,¹³ requires that, in order to constitute “newly discovered evidence,” such evidence could not have been discovered with reasonable diligence in a timely manner. In this case, on March 27, 2018 (one week after entrance of the partial summary judgment orders), SWMO filed a motion claiming it had “newly discovered evidence” of a kick-back scheme based on Eagle’s written discovery responses to RK’s requests that could create a factual issue warranting revisiting the recent orders. However, SWMO was unable to explain how it was prevented from obtaining written discovery or deposition testimony during the multi-year pendency of the action. Inexplicably, SWMO did not notice the deposition of Eagle’s president, Bruce Meidinger until after the pertinent summary judgment motions were fully briefed.

[55] More importantly, SWMO failed to demonstrate that this purported evidence would have “probably changed the result,” another requirement under Rule 60(b)(2). *See First Nat. Bank and Trust Co. of Williston v. Scherr*, 456 N.W.2d 531, 533 (N.D. 1990). In Mr. Meidinger’s deposition, he clarified that he had no evidence of a kick-back scheme related to the SWMO project, he confirmed the reasonableness of RK’s contract, and he confirmed the validity and accuracy of RK’s lien. *See Statement of the Case*,

¹³ Rule 60(b)(2) provides: “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).”

supra, ¶ 17. Further, SWMO failed to explain how this purported evidence, if taken as true, would have any impact on the contract price upon which SWMO had agreed at arms-length with Eagle well before RK's bid for this project was approved. Both RK's and Eagle's answer briefs to this motion pointed these issues out, *see id.*, yet SWMO failed to reply to these points. The district court did not abuse its discretion in denying the motion.

[56] **Unjust Enrichment.** In its motion for stay filed April 18, 2018, SWMO first attempted to characterize RK's claim as sounding in unjust enrichment. [Doc ID# 214], ¶ 25. As a starting point, if a motion for stay to the district court is denied, a party cannot appeal that denial but, rather, may move this Court for a stay. *Lund v. Lund*, 2011 ND 53, ¶ 21, 795 N.W.2d 318. In this case, SWMO did not renew its motion for stay in this Court. Thus, any argument it may have about characterizing RK's construction lien claim as one for unjust enrichment should be ignored.

[57] More importantly, RK's claim has always been to enforce its construction lien against the undertaking funds. *See Judgment*, [App. 136; Doc ID# 320], ¶ 3. Construction liens are governed by N.D.C.C. ch. 35-27, a specific statutory scheme that deals with the creation, perfection, and enforcement of such liens. Thus, general equitable concepts such as unjust enrichment simply do not apply to the statutory scheme. *Accord* N.D.C.C. § 1-01-06. Any reference to RK's claim as sounding in unjust enrichment is meritless.

[58] **Adjusted Contract Price.** In an appeal from a bench trial, the district court's findings of fact are reviewed under the clearly erroneous standard of review and its conclusions of law are fully reviewable. *W. Energy Corp. v. Stauffer*, 2019 ND 26, ¶ 5, 921 N.W.2d 431. Here, the first time SWMO argued that an "adjusted contract price" should be imposed on Eagle, and thereby eliminate RK's lien, was in its Post-Trial Memorandum. [Doc ID# 310], ¶¶ 41-47. However, as RK noted in its objection to SWMO's post-trial brief, [Doc ID# 314], ¶ 5, SWMO did not seek reconsideration of the partial summary judgment orders, and did not provide any explanation as to why it did not raise this issue during the summary judgment phase, but merely argued that the evidence at trial justified invalidating RK's lien.

[59] The district court did not make a finding about the effect of the adjusted contract price on RK's lien, but in its conclusions of law, it reiterated the relief it had granted in the partial summary judgment orders. The district court also gave credit to SWMO for the amounts it paid into the undertaking fund for RK's and Mon-Dak's liens as part of the damage computation against Eagle, which made SWMO whole. *See* Statement of the Case, *supra*, ¶ 22.

[60] This makes sense because it was too late for SWMO to raise this issue after trial, as the district court's decision on a summary judgment motion was necessarily based upon the information available to it at the time it decided the motion, and the issues decided in a summary judgment are conclusive. *See Poppe*, 2015 ND 252, ¶ 4; *see also* N.D.R.Civ.P. 56(d)(1) ("The

facts so specified must be treated as established in the action.”); *see also Pegg v. Kohn*, 2015 ND 79, ¶ 6, 861 N.W.2d 764 (“Unraised issues, even if meritorious, become the law of the case.”). This underscores the problem with all of the arguments SWMO asserted after the partial summary judgment orders in its attempts to get a “re-do” after losing in the summary judgment phase. However, “[i]t is for the public interest and policy to make an end to litigation,” so that “suits may not be immortal, while men are mortal.” *See City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2 324, 331 (N.D. 1975).

CONCLUSION

[61] Partial summary judgment was appropriate for RK in this case. RK properly supported its summary judgment motion for enforcement of its construction lien claim against the undertaking funds, which placed upon SWMO the burden to respond with evidence demonstrating there was a genuine dispute of material fact. SWMO did not do so.

[62] The only exhibit SWMO provided was a payment application submitted to it by Eagle. SWMO acknowledges on appeal that this exhibit was false and misleading, yet then inexplicably argues it should have created a fact issue requiring a trial on RK’s claim. However, this exhibit was immaterial to what RK was owed under its subcontract with Eagle, as well as to what SWMO still owed under its contract with Eagle, the only two figures relevant to RK’s lien claim.

CERTIFICATE OF COMPLIANCE

[65] The undersigned, as attorney for the Defendant/Appellee in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of words in the above Brief, including footnotes, but excluding words in the table of contents, table of authorities, this certificate of compliance, and the certificate of service, totals 7,295 words.

Dated February 21, 2019.

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CERTIFICATE OF SERVICE

[66] I hereby certify that on February 21, 2019, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

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