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Court of Appeals of Minnesota.

MINNWEST BANK, M.V., Plaintiff,

v.

ALL, INC., Defendant,

and

Vogt Heating, Air Conditioning & Plumbing, LLC, et al., Respondents,

v.

Minnwest Bank, M. V., Appellant,
Nadeau Excavating, Inc., et al., Defendants,
Stock Building Supply, LLC, Respondent,
FTK Properties, Inc., et al., Respondents.

No. A10-936.

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March 8, 2011.

Sherburne County District Court, File No. 71-CV-08-360.

Attorneys and Law Firms

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Considered and decided by [KLAPHAKE](#), Presiding Judge; [LARKIN](#), Judge; and [COLLINS](#), Judge.

UNPUBLISHED OPINION

[COLLINS](#), Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to [Minn. Const. art. VI, § 10](#).

*1 In this mechanics' lien dispute, appellant-mortgagee argues that the district court erred in (1) identifying the first visible improvement of the property, (2) ruling that subordination agreements entered by certain lienors did not give the mortgage priority over their liens, (3) granting a mechanics' lien to one respondent, (4) refusing to rule that one aspect of the project was a separate improvement with a distinct priority, (5) refusing to enforce a lien release, and (6) setting the amount of one mechanics' lien. We affirm in part, reverse in part, and remand.

FACTS

In 2004, Metro Plains Development, LLC, commenced the Bluff Block project in Elk River, which was to include 67 condominiums and 11,513 square feet of retail space. MetroPlains selected CSS Builders, Inc., as the contractor. Minnwest Bank M.V. agreed to provide financing on conditions including that the retail space be presold. The Elk River Downtown Partners, comprised of FTK Properties, Inc., MBO Properties, LLC, and GLS Stenson Family Limited Partnership (collectively, FTK Group), later agreed to purchase the retail space. FTK Group intended to lease the retail space to tenants, and the space was to be finished to a "vanilla shell," meaning that it was to be finished to the point at which FTK Group or the tenants could customize the space as the tenants desired.

In September 2005, CSS subcontracted with Nadeau Excavating for earthwork, including demolition of existing structures. Nadeau started work on October 1, 2005, and worked through November, when the ground froze. When Nadeau stopped working, it left piping on the site so that it could restart work promptly when the ground thawed. In December 2005, CSS and Nadeau entered a second contract for additional work, including some that Nadeau had apparently already completed.

On April 4 and 5, 2006, Metro Plains conveyed the project to Bluff Block, LLC, Minnwest loaned Bluff Block \$12.15 million and recorded the associated mortgage, and FTK Group entered a purchase agreement for the retail space. Nadeau restarted work on April 7, 2006. Other subcontractors started their work on the project later.

The project, initially expected to be finished by April 2007, fell behind schedule. In May 2007, despite the fact that it had not yet closed on its purchase of the retail space, FTK Group hired FTK Construction to work on the retail space. CSS, Bluff Block and Minnwest did not object to this work, and CSS and Bluff Block gave FTK Construction access codes for the site. FTK Group paid FTK Construction for the work, most of which was done while other subcontractors were working on other aspects of the project. The parties dispute whether the work done by FTK Construction included finishing the “vanilla shell” that was supposed to have been financed by Minnwest.

On June 26, 2007, Minnwest sent Bluff Block a notice of default on the construction loan. On or about November 27, 2007, Bluff Block agreed to a voluntary foreclosure of the mortgage and surrender of the property. A sheriff's sale occurred on February 8, 2008, at which Minnwest bought the property for \$10 million.

*2 By summons and complaint dated February 15, 2008, and filed February 19, 2008, several mechanics' lienors sued Minnwest and others involved in the project. On February 19, 2008, Minnwest served ALL, Inc., which supplied appliances and cabinets for the project but later removed some of those items, with a summons and complaint in a separate suit. Minnwest filed its summons and complaint on March 3, 2008. In June 2008, the district court consolidated the suits, and in an August 19, 2009 order for partial summary judgment, the district court rejected Minnwest's argument that “subordination agreements” signed by mechanics' lienors gave Minnwest's mortgage priority over the mechanics' liens. The order also ruled that the mechanics liens related back to October 1, 2005, the date Nadeau started work. By order of October 14, 2009, the district court clarified its August 19, 2009 order. After a bench trial, the district court issued two orders: One amended its order granting partial summary judgment to include an award to Stock Building Supply, LLC, of a \$324,879.66 mechanics' lien and \$37,497.14 in costs and attorney fees; the other awarded \$1,237,771.95 in mechanics' liens to other lienors, and an additional \$502,417.70 in attorney fees and disbursement to those lienors. This appeal followed the entry of judgment.

DECISION

On appeal from a summary judgment, appellate courts “review de novo whether there are any genuine issues of

material fact and whether the district court erred in applying the law. In doing so, [appellate courts] view the evidence in the light most favorable to the party against whom summary judgment was granted....” *Sampair v. Vill. of Birchwood*, 784 N.W.2d 65, 68 (Minn.2010).

I

The relative priority of mechanics' liens and mortgages is governed by [Minn.Stat. § 514.05](#), subd. 1 (2010), which states:

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. *As against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground*

(Emphasis added.) Here, the district court ruled that the mechanics' liens had priority from October 1, 2005, when Nadeau started its work, and therefore had priority over Minnwest's April 5, 2006 mortgage. In doing so, the district court stated that

[t]he “actual and visible beginning of the improvement” cannot be established by staking, engineering, land surveying or soil testing. [Minn.Stat. § 514.05](#), subd. 2. *The lien may attach from the time the first item of material is furnished upon the premises for the beginning of the improvement.* [Minn.Stat. § 514.05](#), subd. 1; *see also Burns v. Sewell*, 48 Minn. 425, 432, 51 N.W. 224, 225 (1892).

*3 (Emphasis added.) Focusing on the italicized text, Minnwest asserts that it is a mortgagee of the property, and argues that the district court misapplied [section 514.05](#), subd. 1, by basing its ruling on the statute's first sentence, which

applies to property owners, rather than its second sentence, which applies to mortgagees .¹ We disagree.

¹ Despite Minnwest's acquisition of the property at the sheriff's sale, we assume, for purposes of this issue, that Minnwest correctly identifies itself as a mortgagee rather than an owner of the property.

Immediately after quoting [section 514.05](#), subd. 1, the district court lists activities that, under [Minn.Stat. § 514.05](#), subd. 2 (2010), do not satisfy the “actual and visible beginning of the improvement” standard applicable to mortgagees. Because the district court's order shows that it based its priority decision on its determination that, when Minnwest recorded its mortgage, the beginning of improvement of the property was visible, any reference in the order to an incorrect standard is harmless, and we ignore it. *See* [Minn. R. Civ. P. 61](#) (requiring harmless error to be ignored).

Asserting that, under cases including *Nat'l Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 104, 87 N.W.2d 32, 35 (1957), the first visible improvement “begins at excavation of the building itself and not before,” Minnwest argues that while Nadeau removed existing structures before Minnwest recorded its mortgage, Nadeau did not start excavation for the project until after Minnwest recorded its mortgage. Therefore, Minnwest concludes, its mortgage has priority over the mechanics' liens. *Nat'l Lumber*; however, supports the view that non-excavation work can be a first visible improvement of a property if it is “directly connected” with the excavation. *Nat'l Lumber*, 251 Minn. at 104, 87 N.W.2d at 35. And none of the numerous other cases that Minnwest cites holds otherwise.

Minnwest's argument that it recorded its mortgage before Nadeau started excavation for the building asserts that, under *Carr-Cullen Co. v. Deming*, 176 Minn. 1, 222 N.W. 507 (1928) and *Nat'l Lumber*, Nadeau's pre-mortgage demolition of the pre-existing structure was a project separate from the construction of the new structure. *Nat'l Lumber* summarizes *Carr-Cullen* as follows:

In [*Carr-Cullen*], after a mortgage was executed but before it was recorded, the wrecking and removal of an old building on the premises involved was commenced, and the work was finished on the day the mortgage was recorded. Two days

after the recording, an excavation for a basement for a new building began. This court held that the wrecking and removal of the old building were not within the statutory concept of visible improvement.

251 Minn. at 104, 87 N.W.2d at 35. *Nat'l Lumber* also states that “had the recording and the excavation been reversed [in *Carr-Cullen*,] the result might well have been different.” 251 Minn. at 104, 87 N.W.2d at 36.² Thus, *Carr-Cullen* and *Nat'l Lumber* may be read in a manner that would not preclude demolition of an existing structure from being the first visible improvement of a property. We need not reach the question here, however, because, as set out below, we conclude that Nadeau's pre-recording work was “directly connected” with the excavation.

² This statement about *Carr-Cullen* is dicta but, as dicta of the supreme court, it is entitled to considerable weight. *In re Wylde*, 454 N.W.2d 423, 425 (Minn.1990); *see Simons v. Shiltz*, 741 N.W.2d 907, 910 (Minn.App.2007) (relying on dicta in a supreme court opinion), *review denied* (Minn. Feb. 19, 2008).

*4 Noting that it recorded its mortgage on April 5, 2006, and that the city issued its building permit on April 6, 2006, Minnwest reads exhibits 35 and 14 to an affidavit of one of its attorneys, Ryan Dreyer, to show that Nadeau did not start excavating until after issuance of the building permit. Exhibit 35 contains excerpts of the deposition of Justin Blattner, Nadeau's project supervisor. Blattner's deposition, however, shows only that he was unsure whether excavating started without a permit but that he did not believe that occurred here. The affidavit of Paul Lyver, CSS's former construction manager for the project, states that he started work for CSS in February 2006 and that

[i]n February 2006, construction on the Project had already begun. As early as summer and fall of 2005, at a minimum, the following work had been completed on the Project: (1) demolition of existing buildings; (2) fifty percent (50%) completion of the

- excavation for the parking garage; and
- (3) temporary electrical service.

In contrast to Blattner's uncertainty, Lyver unambiguously indicates that work in addition to demolition of the existing structure had been done on the project before Minnwest recorded its mortgage on April 5, 2006.

Exhibit 14 is Nadeau's "Job Labor journal" for the period October 6, 2005 to September 4, 2007. It shows work through November 29, 2005, and starting again on April 7, 2006. Citing it and Blattner's deposition, Minnwest argues that "Nadeau's undisputed time records show excavation did not begin until April 2006, at the earliest..." Exhibit 14 identifies who worked, when they worked and what they were paid. But because it does not identify what the employees did, it does not show whether excavation occurred before Minnwest recorded its mortgage on April 5, 2006. The cited portions of Blattner's deposition are similarly unpersuasive. While they assert that the demolition work was not finished until the end of November 2005, they do not state that excavation or the other work mentioned in Lyver's affidavit had not been started. While appellate courts take a view of the evidence most favorable to the party against whom a summary judgment was granted, *Abdallah, Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954), we decline to reverse based on documents from which critical facts cannot be discerned.

Minnwest further argues that none of the circumstances of the property at the time it recorded its mortgage—the presence of pipe, the hole in the ground, the moved earth, and a fence, can be the first visible improvement under Minn.Stat. § 514.05, subd. 1. We disagree.

1. *Pipe*. Minnwest argues that under *Carlson-Greife Constr., Inc. v. Rosemount Condo. Grp. P'ship*, 474 N.W.2d 405 (Minn.App.1991), review denied (Minn. Oct. 31, 1991) and *Nat'l Lumber*, the presence of pipe on the property when Minnwest recorded its mortgage cannot be the first visible improvement of the property. In *Carlson-Greife*, before execution of a construction contract and months before construction started, the company that would later do the plumbing for the project parked a trailer on the property and stored plumbing materials in that trailer. 474 N.W.2d at 407. We ruled that storing plumbing materials in a trailer on the property was not the first visible improvement of the property under Minn.Stat. § 514.05, subd. 1 because "[t]he mobile

character of the trailer precludes the necessary permanence implicit in the [statutory] phrase 'visible improvement on the ground.' " 474 N.W.2d at 409 (quoting Minn.Stat. § 514.05, subd. 1). Here, consistent with its observation that "[t]he first contract between Nadeau and CSS included an attachment which reflected all the necessary work which would be required for completion of the entire project," the district court stated that "the demolition and excavation form one continuous improvement." Moreover, the placement of the pipe on the property occurred after execution of the first contract, was part of the integrated process of demolition, excavation, and construction required by that contract, and, unlike *Carlson-Greife*, the presence of the pipe was not the only evidence of improvement of the property. Thus, while it may have been possible to remove the pipe as in *Carlson-Greife*, we conclude that *Carlson-Greife* is factually distinguishable. And because Minnwest candidly admits that the structure at issue in *Nat'l Lumber* (a fence) "was not a permanent improvement," a similar analysis addresses Minnwest's cite to *Nat'l Lumber* as support for its argument regarding the pipe that Nadeau left on the property.

*5 2. *Fence*. Minnwest asserts that the fence in this case is similar to the fence installed in *Nat'l Lumber*, and therefore that the fence here cannot constitute the first visible improvement of the property. While *Nat'l Lumber* involved a fence, the supreme court stated that, on that record, the district court's determination that "the erection of the fence was severable and separable from the later work" was "justified." 251 Minn. at 105, 87 N.W.2d at 36. The severable nature of the fence in *Nat'l Lumber* as compared with the integrated nature of the current project, distinguishes this aspect of *Nat'l Lumber* from the present case.

3. *Demolition*. Referring to the hole and moved earth as the demolition of the existing building, Minnwest argues that, under *Carr-Cullen*, the demolition of that building cannot constitute the first visible improvement of the property. The district court distinguished *Carr-Cullen*, noting that it involved separate contracts for the demolition and excavation while, in the current case, "the demolition and excavation form one continuous improvement." Based on its assertion that demolition is separate from excavation Minnwest argues that the district court erred in distinguishing *Carr-Cullen*. We have already rejected the notion that demolition and excavation are necessarily separate projects. Further, as found by the district court, Nadeau's contracts do not clearly distinguish demolition from excavation. Therefore, we reject Minnwest's argument on this point.

Minnwest has not shown that the district court misidentified the first visible improvement of the property.

II

Minnwest argues that subordination agreements signed by most of the subcontractors give its mortgage priority over the mechanics' liens of those subcontractors. We disagree. A subordination agreement is a contract. *N. Star Universal, Inc. v. Graphics Unlimited, Inc.*, 563 N.W.2d 73, 75 (Minn.App.1997). “The construction and effect of a contract presents a question of law, unless an ambiguity exists.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn.1998). Unambiguous contract terms are given their plain meaning. *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn.1999). If possible, a court reads a contract to give meaning to all of its provisions. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn.1995).

“RECITALS” in the subordination agreements state that Minnwest's loan “is to be secured by a first mortgage lien and security interest in the Real Property, Project and personal Property contained therein.” Contract recitals, however, are not part of a contract and are not relevant to determining the meaning of a contract unless the contract is otherwise ambiguous. *Berg v. Berg*, 201 Minn. 179, 189, 275 N.W. 836, 842 (1937); see *State by Crow Wing Envtl. Prot. Ass'n, Inc. v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn.App.1986) (stating that contract recitals are statements of intent but not part of the contract), *review denied* (Minn. Dec. 17, 1986). Here, non-recital language in the agreements identifies a portion of the subcontractor's payments that can be withheld, refers to that amount as the “Subordinated Contractors Claims,” and states:

*6 Contractor will not receive, or take action to collect or enforce, payment in any form from [Bluff Block], and [Bluff Block] will not make payment to Contractor, of the Subordinated Contractor Claims, or any part hereof. Without prior written consent of [Minnwest], Contractor will not receive or take any action to collect or enforce payment of the

Subordinated Contractor Claims or any part thereof from the Disbursing Agent or any trustee in bankruptcy, receiver or other liquidator or from any part of [Bluff Block]'s Property, including but not limited to the Project, or from any other person.

In the first sentence, the contractors waive their right to payment from Bluff Block for the Subordinated Contractors Claims. The second sentence prohibits contractors from seeking payment from certain entities, or property, without Minnwest's consent. Because this mechanics' lien action does not seek payment from Bluff Block, it is not precluded by the agreement's first sentence. Because this action does not seek collection from the Disbursing Agent, a trustee in bankruptcy or receiver for the project, the action does not violate the portion of the second sentence prohibiting pursuit of those entities without Minnwest's consent. Because Minnwest bought the property at foreclosure before the subcontractors started this action, the subcontractors are not seeking to collect from Bluff Block's property.

The subordination agreement also prohibits collecting from an “other liquidator” without Minnwest's consent. The district court did not address what “other liquidator” means or what person or entity would be an “other liquidator.” Therefore, those questions are not properly before this court. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988) (stating that appellate courts generally address only questions presented to and considered by the district court).³ And because this action does not violate the unambiguous terms of the subordination agreement, we decline to address the parties' disputes about the meaning of various terms of the subordination agreements.

³ An “other liquidator” would have to be a legal or natural person. A mechanics' lien proceeding, however, is a proceeding in rem. See *Henning v. McAdam*, 155 Minn. 194, 198, 193 N.W. 124, 125 (1923) (stating that an action to foreclose a mechanic's lien was a proceeding “in rem”). In rem proceedings are against a thing, not a person. See *Black's Law Dictionary* 864 (9th ed.2009) (stating that “in rem” is “[Latin ‘against a thing’]” and “Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing”); *In re Stephens*, 276 B.R. 610, 614 (8th Cir.BAP2002) (stating “ ‘In

rem is defined as '[a] technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.' " (citing *Black's Law Dictionary* 713 (5th ed.1979) (emphasis in original)), *aff'd* 53 Fed. Appx. 392 (8th Cir2002). Thus, if the other-liquidator question were properly before this court, it is not clear that it would be resolved in a manner precluding a mechanics' lien foreclosure action. A similar analysis addresses the agreement's prohibition on subcontractors seeking payment "from any other person" without Minnwest's consent.

Minnwest also challenges the district court's ruling that any waiver of the subcontractors' mechanics' lien rights was void under Minn.Stat. § 337.10, subd. 2 (2010). We agree. In relevant part, section 337.10, subd. 2 states:

Provisions contained in, or executed in connection with, a building and construction contract requiring a contractor, subcontractor, or material supplier to waive the right to a mechanics lien or to a claim against a payment bond before the person has been paid for the labor or materials or both that the person furnished are void and unenforceable.

The district court's determination that the subordination agreement violated this statute assumes that the subordination agreement stripped the subcontractors of their right to file a mechanics' lien. Minnwest, however, admits that it "does not argue that the subcontractors have waived their statutory right to secure future payments. The [subordination agreements], instead, preclude the subcontractors from collecting on their security or future payments unless or until Minnwest is paid in full." The subordination agreement limits the entities from whom payment may be sought, the assets that can be pursued, and the conditions under which those entities and assets can be pursued, but it does not require subcontractors to waive the lien that will secure their right to payment. Therefore, on the facts of this case, the subordination agreement does not run afoul of section 337.10, subd. 2, and the district court erred in ruling otherwise.

III

*7 The district court awarded FTK Group a mechanics' lien and attorney fees for work done on the retail space. Minnwest challenges the award, arguing that FTK Construction, Inc., not FTK Group, did the work in question. FTK Group responds that Minnwest did not preserve this question for appeal. A party cannot obtain review by raising the same general issue litigated below but under a different theory on appeal, and reviewing courts generally consider only issues presented to, and considered by, the district court. *Thiele*, 425 N.W.2d at 582. Here, the district court did not expressly address the distinction between FTK Group and FTK Construction, Inc. Nor did it address the impact of that distinction on the lien.

While Minnwest cites its posttrial memorandum to argue that it preserved these questions for appeal, motions for a new trial and for amended findings are too late to raise a question for the first time. *Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971) (new trial); *Allen v. Central Motors, Inc.*, 204 Minn. 295, 299, 283 N.W. 490, 492 (1939) (amended findings); *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn.App.2002) (citing *Antonson* and *Allen*). Further, the relevant part of Minnwest's posttrial memorandum, as well as the response thereto by FTK Group, addressed the amount of the lien rather than whether it could be awarded to FTK Group. Because any distinction Minnwest made in the district court between FTK Construction, Inc., and FTK Group was not made to argue that the district court could not award a lien to FTK Group, the propriety of awarding that lien is not properly before us and we decline to address it. See *Thiele*, 425 N.W.2d at 582; cf. *Antonson*, 289 Minn. at 539, 186 N.W.2d at 189 (affirming the denial of a new trial where, although the pleadings were general enough to have possibly made a claim based on a particular theory, the complaint contained no language that would alert anyone to a claim based on that theory, and plaintiff did not present the theory at trial).

IV

Mortgages take priority as of the date of their recording, while mechanics' liens take priority as of the date of the first item of material or labor furnished for that improvement. *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn.1995). Minnwest challenges the district court's ruling

that the lien of FTK Group for work it commissioned on the retail portion of the project relates back to October 1, 2005, the date Nadeau started work.⁴

⁴ The parties disagree regarding whether the district court's August 19, 2009 order granted summary judgment on this point. Reading the district court's orders of August 19, 2009, and October 14, 2009, together with its statements from the bench on November 13, 2009, shows that the court did not grant summary judgment on the relation back of FTK Group's lien and that the district court tried the question. Therefore, we address the question in light of the evidence presented at trial.

Contracting separately for different stages of a single project “does not, by itself, divide the project into separate improvements. Division occurs when the facts surrounding the work done under the separate contracts indicate that they were separate improvement projects.” *Witcher Const. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn.App.1991), review denied (Minn. Mar. 15, 1991). “Construction work is considered a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement ...” but it is considered “separate improvements if there is little or no interrelationship between the contracts under which the project was performed.” *Witcher*, 465 N.W.2d at 407.

*8 [W]hether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact, and the reviewing court need only determine if the evidence reasonably supports the lower court's finding that the improvement was continuous. But findings of fact that are influenced by an error of law may be set aside by the reviewing court.

Witcher, 465 N.W.2d at 406 (citation omitted). In evaluating whether projects constitute improvements that are separate or single and continuous, courts “focus on the parties' intent, what the contracts covered, the time lapse between projects, and financing.” *Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn.App.1995), review denied (Minn. May 31, 1995). For the reasons below, we affirm the district court's determination that the retail and residential

portions of the project were sufficiently related to form a single improvement and that the priority of the work on the retail space commissioned by FTK Group relates back to October 1, 2005, when Nadeau started work.

1. *Intent & Contracts.* The intent factor of the *Poured Concrete* analysis addresses whether the parties had a single goal in developing the property in question; while, under the contracts factor, the less the interrelationship among the contracts for the improvement, the more likely a court will deem the projects separate. See *Poured Concrete*, 529 N.W.2d at 510. Here, it is undisputed that the contract documents required the retail space to be completed to the extent of what the parties called a “vanilla shell” and that, after retail tenants were secured, the retail spaces would be customized to fit their needs. The district court noted that the degree to which the retail space was to be finished was “incompletely defined in the documents relating to the Project.” Thus, it is unclear exactly what the parties intended and to what extent work commissioned by FTK Group was contemplated by the original contracts. It is undisputed however, that the project was to include retail space and that all but the finishing stages of the construction of that space was, originally, to be done by CSS. The record shows that at least some of the work commissioned by FTK Group was not specific to the tenants of the retail space. Therefore, we conclude that the intent and contracts factors of the *Poured Concrete* analysis favor treating the work commissioned by FTK Group as part of the work originally to be done by CSS, and to weigh in favor of allowing the resulting lien to relate back to October 1, 2005, the date Nadeau started work.

2. *Time Lapse.* The time-lapse factor of the *Poured Concrete* analysis addresses how much time passed between finishing one contract involved in an improvement and the start of work under another. See *Witcher*, 465 N.W.2d at 407. In *Poured Concrete*, we affirmed a finding that the time-lapse factor favored allowing mechanics' liens to relate back to site-preparation work because “no substantial amount of time lapsed between initial grading of the subdivision and ... excavation of the home site.” 529 N.W.2d at 510. Because much of the work commissioned by FTK Group occurred simultaneously with work on the rest of the project, this factor also favors allowing FTK Group's lien to relate back to October 1, 2005.

*9 3. *Financing.* It is undisputed that Minnwest, as primary financier of the project, intended to finance finishing the retail space to a “vanilla shell.” It is also undisputed that

FTK Group financed work on the retail part of the project. The district court found, however, that, to address the fact that the project was behind schedule, “CSS and Bluff Block permitted [FTK Group] to commence build-out construction on the Retail Space although the FTK Purchase Agreement had not closed” and FTK Group had yet to acquire the retail space. Thus, while the financing for the work commissioned by FTK Group was distinct from the financing for the rest of the project, that separate financing was a result of problems with the project rather than the parties' original plan.

In sum, we conclude that the district court did not clearly err in weighing the *Poured Concrete* factors in a manner causing it to refuse to treat the retail and residential portions of the project separately.

V

On July 26, 2007, Stock Building Supply, LLC filed an amended mechanics' lien against the project for \$424,879.66. To facilitate sale of certain condominiums, and because Stock's amended mechanics' lien created a question about their marketability, Stock and Minnwest agreed that Stock would release its lien in exchange for Minnwest paying Stock \$100,000. On August 10, 2007, after the condominiums were sold, Stock filed another mechanics' lien for \$324,879.66. Minnwest sought a summary judgment that Stock's release of its lien precluded Stock from filing a subsequent lien. The district court, citing *Project Plumbing Co. v. St. Croix Props., Inc.*, 297 Minn. 409, 412, 211 N.W.2d 873, 875 (1973), denied summary judgment, ruling that Minnwest failed both to provide consideration for the release and to show detrimental reliance on that release.⁵ When Minnwest later informed the court that it asserted no other defenses to Stock's lien, the district court awarded Stock summary judgment on its lien. Minnwest challenges that ruling.

⁵ Without citing authority clearly distinguishing lien releases from lien waivers, Minnwest tries to distinguish *Project Plumbing* by arguing that it involved a waiver, while this case involves a release. Because Stock had a lien against the property and Minnwest is asserting that, because of the release, Stock no longer had a lien *and* could not obtain one, the purported distinction is, for purposes of this issue, doubtful. See *Flesner v. City of Ely*, 863 F.Supp. 971, 978 (D.Minn.1994) (stating that “[a] release has been defined as a relinquishment, the concession *or* the waiver of a right, claim or

privilege by the person in whom it exists to the person against whom it might have been enforced”) (citing *Balderrama v. Milbank Mut. Ins. Co.*, 324 N.W.2d 355, 356 (Minn.1992).

A. Consideration

In *Project Plumbing*, the project owner “comp[elled]” a subcontractor to waive all unpaid amounts due by refusing to make a partial payment to the subcontractor unless the subcontractor provided a global waiver. 297 Minn. at 411, 211 N.W.2d at 874. The supreme court ruled that consideration for the waiver was “wholly lacking” and that the waiver was invalid because the owner had no right to “exact” from the subcontractor a lien waiver “as a condition to its paying [the subcontractor] the amount it had a legal obligation to remit.” *Id.* at 412, 211 N.W.2d at 875 (emphasis added). Here, before payment, Stock was owed \$424,879.66. Because Minnwest was the mortgagee of the project and not its owner, Minnwest had no legal obligation to pay Stock. Nevertheless, Minnwest paid Stock \$100,000 for the release. Therefore, we conclude that *Project Plumbing* is distinguishable regarding consideration.

*10 “[A] thing is not consideration unless both parties to a contract have adopted it as such.” *U.S. Sprint Comm'ns Co. v. Comm'r of Revenue*, 578 N.W.2d 752, 754 (Minn.1998). Here, the district court noted that “[i]t is disputed whether [Minnwest's] payment and acceptance was intended to temporarily remove [Stock's] lien to allow sale of individual units or constituted full satisfaction of the lien.” Thus, fact questions exist regarding whether Stock accepted Minnwest's payment in exchange for Stock's releasing its lien or for releasing its lien *and* not filing another lien against the project. Further, the adequacy of consideration can also present a fact question. *Parrish v. Peoples*, 214 Minn. 589, 591, 9 N.W.2d 225, 227 (1943). Minnwest argues that the court should not consider the adequacy of consideration, citing two cases from this court that do not involve lien releases. In *Project Plumbing*, however, the supreme court stated that the “decisive issue” was whether the lien waiver “was supported by adequate consideration.” 297 Minn. at 411, 211 N.W.2d at 874. Therefore, we remand for the district court to address whether the parties intended the \$100,000 payment to Stock to preclude Stock from filing a third mechanics' lien and, if so, whether the \$100,000 payment was sufficient consideration.

B. Reliance

Minnwest asserts that it detrimentally relied on the release by paying Stock \$100,000 and not exercising its foreclosure

remedies. If the parties did not agree that the payment to Stock would preclude Stock from filing another lien, Minnwest's purported reliance would not have been reasonable. Further, while Stock re-filed its lien on August 10, 2007, Minnwest, in October 2007, was still negotiating with the holders of other interests in the project to allow them additional time for sale of some or all of the project. Thus, while Minnwest may have forborne exercise of its foreclosure rights, this record does not show that it did so based on Stock's lien release. Therefore, on remand, the district court must address the presence or absence of reliance. Whether to reopen the record on remand is left to the discretion of the district court.

VI

Before trial, Minnwest and Otto Drywall, Inc. stipulated that Otto originally had a \$675,000 subcontract, received payments of \$684,850, and filed a mechanics' lien for \$94,650. After trial, the district court found that change orders made Otto's subcontract worth \$699,500. The district court also found that, in early April 2007, Lyver instructed Otto to do an additional \$80,000 of work, that on Friday April 6, 2007, Otto received and deposited a \$118,000 progress payment, and that on Monday April 9, 2007, Lyver cancelled the \$80,000 change order and requested repayment of \$80,000 of the \$118,000 payment. Otto issued CSS an \$80,000 check. The district court, in approving Otto's calculation of its mechanics' lien, reduced the \$684,850 in payments Otto received by the \$80,000 refunded to CSS, and subtracted the resulting \$604,850 in payments to Otto from Otto's \$699,500 contract amount to reach a mechanics' lien amount of \$94,650. Minnwest argues that because Otto stipulated to receiving more than its subcontract was worth, Otto's lien is barred by waiver or estoppel. Otto responds that Minnwest did not properly plead the affirmative defenses of waiver and estoppel.

*11 In the district court, Minnwest's answer stated that it "affirmatively pleads the potential existence of the affirmative defenses set forth in [Minn. R. Civ. P.] 8.03 pending the development of whether or not there are specific facts supporting and proving the validity of said defenses." Waiver and estoppel are two of nineteen affirmative defenses set out in Minn. R. Civ. P. 8.03. Affirmative defenses "must be pleaded specifically and the failure to do so results in a waiver of the defense." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn.App.2000). Minnwest's answer does not specifically plead affirmative defenses; it does not

identify the affirmative defense(s) it is pleading, against whom it will assert the defense(s), nor any factual basis for the defense(s). Further, when Otto's disgorgement of the \$80,000 arose at trial not only did Minnwest move the district court for permission to amend its answer to plead waiver and estoppel against Otto but the district court characterized Minnwest's allegations as "additional" defenses." Thus, Minnwest and the district court each believed waiver and estoppel were not then before the court regarding Otto. The district court declined to allow the affirmative defenses, stating that Minnwest had "not asserted any defenses that are supported by the new facts revealed mid-trial, but instead are defenses that could have been asserted previous to the revelation of the new facts...." Because the district court's ruling is consistent with the record, we decline to disturb it.⁶

⁶ On appeal, Minnwest makes a conclusory challenge to the denial of its motion to amend but does not address why it believes the district court abused its discretion in denying the motion or why it could not have raised the defenses earlier. Minnwest's failure to adequately brief the question waives it. See *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn.1997).

Citing caselaw stating that parties are bound by their stipulations, Minnwest also argues that Otto's lien is invalid because it is inconsistent with the pre-trial stipulation. We disagree. While not inaccurate, the stipulation is incomplete. The stipulation does not address the fact that Otto disgorged \$80,000. Nor does it address the effect of that disgorgement on Otto's lien. Moreover, Minnwest's argument that a party is bound by stipulations made at trial is based on *Atl. Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 124 (Minn.1986), the relevant part of which cites *Pampusch v. Nat'l Council of Knights & Ladies of Security*, 145 Minn. 71, 72, 176 N.W. 158, 158 (1920). *Pampusch* states that "[a] stipulation made by a party in the trial of a cause, unless he is relieved from it, is binding upon him." 145 Minn. at 72, 176 N.W. at 158. Here, despite its explicit acknowledgement of the terms of the stipulation, the district court, after reciting the facts of Otto's disgorgement of the \$80,000, used the \$604,850 figure to calculate Otto's lien. How this is anything but the district court's release of Otto from its (incomplete) stipulation is unclear.⁷

⁷ Nor does *Elk River Concrete Prods. Co. v. Am. Cas. Co.*, 262 Minn. 310, 319, 114 N.W.2d 655, 661 (1962) support Minnwest's position. There, unlike this case, the question was whether a stipulation bound an entity *not* a party to

the stipulation or to the proceeding before the court. 262 Minn. at 318-19, 114 N.W.2d at 661. Because *Elk River Concrete* presents a question different from the one here, the weight to be given that case here is limited. See *Skelly Oil Co. v. Comm'r of Taxation*, 269 Minn. 351, 371, 131 N.W.2d 632, 645 (1964) (stating that “ ‘the language used in an opinion must be read in the light of the issues

presented’ “ (quoting *Sinclair v. United States*, 279 U.S. 749, 767, 49 S.Ct. 471, 477 (1929))).

Affirmed in part, reversed in part, and remanded.

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