IN THE COURT OF APPEALS OF IOWA

No. 1-942 / 11-0630
Filed January 19, 2012

DEAN E. THORSON,
Plaintiff-Appellant,

vs.

ARNE HOYLAND a/k/a OLAF ARNE HOYLAND and MARIA G. HOYLAND,
Defendants-Appellees.

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge.

Dean Thorson appeals from the district court's ruling in this mechanic's lien action. **AFFIRMED.**

James A. Garrett of Jacobson, Bristol, Garrett & Swartz, Waukon, for appellant.

Stephen J. Belay of Anderson, Wilmarth, Van Der Maaten, Belay & Fretheim, Decorah, for appellees.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Dean Thorson appeals from the district court's ruling in this mechanic's lien action. Thorson asserts the district court erred in finding some of the work he performed and improvements he made on the Hoyland farm were not done "by virtue of any contract," and therefore he was not entitled to a mechanic's lien with respect to those items claimed. He also contends the court erred in ruling his claims for the years 2000 through 2006 were barred by Iowa Code section 572.9 (2009). Upon our de novo review, we agree Thorson has failed to prove several of his claims were "by virtue of any contract," which provides the basis for a mechanic's lien; and claims based upon contracts for which labor and materials were supplied more than two years and ninety days before filing were time barred.

I. Scope and Standard of Review.

An action to enforce a mechanic's lien is in equity. *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188, 191 (Iowa Ct. App. 1984). Consequently, our review is de novo. Iowa R. App. P. 6.907. Yet, the district court had the advantage of listening to and viewing the witnesses and therefore we give weight to the district court's findings in credibility matters. *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 20 (Iowa 2001); *see also Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 404–05 (Iowa Ct. App. 1994) ("In mechanic's lien cases, involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs.").

II. Background Facts and Proceedings.

The following facts are fairly established by the evidence. In August 2000, Arne Hoyland and Maria Hoyland purchased real estate (the Farm) from the Rose Oyen Estate, consisting of approximately 200 acres, with 165 tillable acres. Before purchasing the Farm, the Hoylands rented and resided in the farmhouse located there.

Dean Thorson leased the tillable acres of the Farm from Duane Oyen from 1980 until the Hoylands bought it in 2000. He owns approximately 470 acres of farmland and leases an additional 600.

Thorson was the first to be offered the opportunity to purchase the Farm in 2000. He was at that time also renting two neighboring farms owned by Sherman Oyen and had the opportunity to purchase that real estate as well. The Hoylands told Thorson that if they were allowed to purchase the Farm, Thorson could have the right to lease the farmland from the Hoylands for a reasonable rent, so long as Thorson was interested; as well as the first option to purchase the Farm if the Hoylands decided to sell. Thorson accepted this "exceptional deal" and deferred his opportunity to purchase the Farm.[1]

The Hoylands further agreed that Thorson could make improvements to the Farm at no cost to the Hoylands so long as he had the right to lease the farm

[1] For the first time on appeal, the Hoylands claim the statute of frauds prohibits Thorson from offering evidence concerning the alleged agreement to provide improvements to the Farm. This claim is not properly preserved and we will not address it. *See Harriott v. Tronvold*, 671 N.W.2d 417, 422 (Iowa 2003) (noting the statute of frauds does not render oral promises invalid; rather it is a rule of evidence and "provides a defense, and the party asserting it must therefore raise it by answer or by objection to evidence at trial"); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

ground. Thorson operates an earth-moving business known as Thorson Construction and owns heavy equipment including two bulldozers, a crawler loader with a backhoe, and a scraper. Thorson testified he and Hoyland agreed that should there be a termination of the lease or a sale of the farm and Thorson retained neither the lease nor the right to purchase the farm, then the Hoylands would be responsible for any unpaid portion of the cost of the improvement. The parties discussed specific improvements at different times. Thorson and the Hoylands did not reduce their agreement to writing; nor did they sign a written lease.

Until 2009, Thorson continued to lease the tillable acres of the Farm from the Hoylands. The Hoylands sent Thorson a notice of termination of lease in 2002, but Thorson continued to work the farmland. Thorson paid cash rent of "a little over $16,000" per year, or approximately $100 per tillable acre. From 2000 through 2009, Thorson completed several conservation projects on the Farm for which he was partially reimbursed by the United States Department of Agriculture's (USDA) cost-share.[2] For these projects, Thorson Construction submitted an invoice to Arne Hoyland or, in one instance, contracted directly with the USDA. During the years he leased the Farm from the Hoylands, Thorson

[2] USDA reimbursement was for 75% of the lesser of the project's actual cost or the USDA's estimated cost. The first project was for the construction of two ponds, for which Thorson submitted two separate invoices to Hoyland: one dated 10-20-00 and totaling $14,772, and another also dated 10-20-00 and totaling $2596. Thorson testified he received payments of $10,875 and $1875, respectively.

The second project was for a sediment basin, for which Thorson submitted an invoice to Hoyland dated 6-30-01 and totaling $4106.60; he received a $3000 payment.

A third project was for another sediment basin. Thorson submitted an invoice to Hoyland dated May 2007 totaling $5397.58 and was paid $4048.19.

A fourth project was to repair terracing damaged due to flooding, which work occurred in late 2008 and early 2009. Thorson dealt directly with the USDA on this project and received payment of $1912.97.

also cleaned along fence lines, repaired fencing, filled in ditches, leveled ground, buried debris the Hoylands had placed in ditches, and converted four to five acres of pasture to cropland. In 2008, Thorson transplanted maple seedlings from his own property to the Farm and applied fertilizer to acres on the Farm he was transitioning to organic farming.

In July 2008, Arne Hoyland approached Thorson and proposed a rent increase, asking for $240 per acre for three years, cash in advance. Thorson did not agree to the increased rent.

On August 19, 2008, the Hoylands entered into a written farm lease for the Farm with Arnold and Julie Weiss. The lease was to begin March 1, 2009, and end February 28, 2011; rent was $50,000 for two years, payable upon execution of the lease agreement.

On August 27, 2008, the Hoylands sent Thorson a notice of termination of farm tenancy as of March 1, 2009.

A year later, on August 13, 2009, the Hoylands accepted an offer to purchase the Farm from the Cheri Dearborn Trust for a price of $545,000. The Hoylands did not give Thorson the first opportunity to buy the Farm.

Also on August 13, 2009, Thorson filed a mechanic's lien on the Farm and served the Hoylands with the lien. Thorson asserted he was entitled to $115,824.80 plus interest for the items furnished and listed in Exhibit A. Exhibit A, the statement of account, lists separate projects, specifying the year(s) the work was completed, and totaling $115,824.80. The mechanic's lien stated the work was done beginning in 2001 and ending in 2009.

On September 25, 2009, Thorson filed a petition to foreclose the mechanic's lien. In answer, the Hoylands generally denied Thorson's claims and asserted one or more of plaintiff's claims were "barred by one or more statutes of limitation applicable to the alleged Mechanic's Lien." The Hoylands filed a motion for summary judgment, contending the lien was untimely under Iowa Code section 572.9. The district court denied the motion stating,

> The lien includes claims for work performed over a ten-year period of time. There appears to be a fact question as to whether the plaintiff may or may not enforce a mechanic's lien on work performed as long ago as 2001. That issue must be determined at trial.

The matter proceeded to trial on January 13 and 14, 2011. At the time of trial, Thorson asserted he had performed work and made improvements on the Farm for which he was entitled to compensation as summarized in Exhibit B:

1. Road fence right of way cleaned out and fence line leveled in 2000	$300
2. Pond construction in 2000	$3847
3. Sediment basin construction in 2000	$721
4. Sediment basin construction in 2001	$1106.60
5. Clean out lane and fence line west and southwest of building site in 2001	$450
6. East ditch and fence line cleaned out, including clearing trees, shaping waterway and building roadway in 2001	$1350
7. Tree grubbing, ditch fillings and shaping and top soil redistribution in 2001, 2002 and 2003	$30,000
8. Roadway and trail construction in 2001 and 2002	$1750
9. Flood damage repair (clearing channels and removing silt) in 2001	$1320
10. Burying poison materials in 2003 or 2004	$250
11. Shaping ditch, cleaning out trees to allow new fence construction in 2005	$225
12. New fence construction in 2005 and 2006	$1080
13. Sediment basin constructed in 2007	$1349.39
14. Tiling in 2007	$3000
15. Timber stand improvement in 2008	$300
16. Fertilizer spread on organic acres in 2008	$3844.80

17. Repair of 2008 flood damage in 2009	$1844
18. Fence maintenance labor (2000 to 2009)	$64,000
Total	$117,187.79

The district court found a mechanic's lien was valid only for Thorson's construction of the sediment basin reflected in item 13 and for the necessary preparatory tiling work reflected in item 14 because that work was completed on May 20, 2007, and the statement of account was filed within two years and ninety days of that date. The court found the remainder of Thorson's claims were either separate contracts that were time barred (items 1–12) or reflected work which was not "by virtue of any contract" with the Hoylands (items 10, 15–18). The court concluded Thorson was entitled to foreclose on the mechanic's lien in the sum of $4349.39, awarded attorney fees in the sum of $1000, and dismissed the remainder of the petition to foreclose mechanic's lien.

Thorson now appeals.

III. Discussion.

A. Mechanic's lien requires claimant establish a contract with the owner. Iowa Code section 572.2 (2009) provides:

> Every person who shall furnish any material or labor for, or perform any labor upon, and building or land for improvement, . . . *by virtue of any contract* with the owner . . . shall have a lien . . . to secure payment for the material or labor furnished or labor performed.

(Emphasis added.)

In *Ringland-Johnson-Crowley Co. v. First Central Service Corp.*, 255 N.W.2d 149, 151 (Iowa 1977), our supreme court summarized when a mechanic's lien attaches to a lessor's interest in property as a result of the activities of a lessee. There the court observed the well-established principle that

"mere knowledge of or consent to the making of improvements by a lessee does not subject the interest of the lessor to a mechanic's lien." *Ringland-Johnson-Crowley*, 255 N.W.2d at 151; *Cassaday v. DeJarnette*, 251 Iowa 391, 393–94, 101 N.W.2d 21, 23 (1960) (stating the principle is "well settled in this jurisdiction").

> But if the lessor has by express or implied agreement with his lessee contracted for the improvement of his real estate by the latter, it is generally held he has subjected his interest in the realty to the claim of a mechanic's lien for the reasonable value of labor and material furnished. . . .
>
> The burden is upon a mechanic's lien claimant to prove either an express contract with or on behalf of the lessor or vendor or else to prove such a state of facts as will give rise to an implied contract with him in order to claim a lien against the lessor's realty.

Ringland-Johnson-Crowley, 255 N.W.2d at 151 (citations omitted). A contract is express when the parties show their assent in words; it is implied when the parties show their assent by acts. *Cassaday*, 251 Iowa at 394, 101 N.W.2d at 23.

If the lien claimant establishes an express or implied agreement whereby the lessee is contractually bound to improve the lessor's property, the claimant must further establish that

> (1) such improvements made will become the property of the lessor in a comparatively short time, (2) the additions or alterations were in fact substantial, permanent and beneficial to the realty and were so contemplated by the parties to the lease agreement, and (3) that the rental payments reflected the increased value of the property as a result of those improvements.

Ringland-Johnson-Crowley, 255 N.W.2d at 152*; see also Knudson v. Bland*, 253 Iowa 614, 618, 113 N.W.2d 242, 244 (1962). "If no contract exists, these three

factors do not need to be considered." *A & W Elec. Contractors, Inc. v. Petry*, 576 N.W.2d 112, 114 n.2 (Iowa 1998)

Thorson argues

> all of the improvements and repairs performed [by him] were done pursuant to a contract with the Hoylands that was continuous from the time of their original agreement in 2000 until the Hoylands repudiated the agreement by denying Thorson the ability to rent the farm and entering into an agreement to sell it to another party.

We reject Thorson's contention that the Hoylands agreed to an ongoing contract for unspecified improvements and subjected their interest in the Farm to a mechanic's lien for any and all material and labor furnished from 2000 to 2009, thereby avoiding the limitations period for a mechanic's lien.[3]

The district court found that Thorson had proved an express agreement between Thorson and the Hoylands that, since Thorson had construction equipment, he *could* make improvements to the farm at no cost to the Hoylands, so long as he had the right to lease the Farm. Should there be a termination of the lease, then the Hoylands would be responsible for any unpaid portion of the cost of an improvement. We agree Thorson proved the parties had this general "understanding." However, Thorson did not sue for breach of this contract; he

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[3] *Jones v. Swan & Co.*, 21 Iowa 181 (1886), cited by Thorson, is not controlling as it dealt with an "*implied contract* which arises when the owner of a dwelling or mill sends to a mechanic or merchant for something with which to improve or repair his buildings or machinery to meet new exigencies, which often arise in the management of such property." *Jones*, 21 Iowa at 183. The court stated,

> Of course, where the work is done under different contracts, or such space intervenes between the different items as to raise the presumption that the work had once ceased, and the contract was completed, a different rule would obtain. But the contract once shown, if the work is done, as in this instance, almost daily, the lien continues, as to the owner and subsequent incumbrancers, for ninety days from the date of the last item. Any other rule would render the lien of the mechanic next to, if not quite, a sham and delusion.

Id. at 185. The case before us is governed by the "different rule" noted above.

filed a mechanic's lien and a petition to foreclose that lien. If Thorson had sued for breach of his oral contract with the Hoylands and proved the terms of the contract, his statute of limitations would have expired five years from the time of the breach. *See* Iowa Code § 614.1(4).

B. Time for filing and limitation on action. The district court concluded all of Thorson's projects reflected in entries 1 through 12 of Exhibit B were time-barred. We agree that even if the labor and materials furnished prior to 2007 on those projects were "by virtue of" a contract,[4] those claims were barred by statutory limitations periods. For the matters reflected in items 1–12 of Exhibit B, Thorson notes an end date, and in each instance labor or materials furnished was last provided in 2006 or before. Each of these projects was completed more than two years and ninety days before Thorson sought to enforce his mechanic's lien. Separate contracts cannot be joined for purposes of extending the time period for filing. *See Clemens Graf Droste Zu Vischering*, 358 N.W.2d 702, 712–13 (Iowa 1985); *Casler Electric Co. v. Carlsen*, 249 Iowa 289, 295, 86 N.W.2d 682, 686 (1957).

"A mechanic's lien is purely statutory in nature." *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994). A mechanic's lien claimant must perfect[5] and enforce the lien within two years and ninety days after the date on which the

[4] Because we conclude the claims were time-barred, we need not address whether Thorson met his burden to prove an express or implied contract existed. We note, however, there is a failure of proof of one or more of the additional factors noted in *Ringland-Johnson-Crowley*, 255 N.W.2d at 152. Thorson's rental payments did not increase throughout his tenancy. Thorson thus did not prove that the "rental payments reflected the increased value of the property as a result of those claimed improvements." *See id*.

[5] Under our statutory scheme, a mechanic's lien must first be perfected before any action to enforce or challenge it may be brought. Iowa Code § 572.24.

claimant last furnished material or labor. *Id.* §§ 572.9 ("The statement of account required by section 572.8 shall be filed . . . within two years and ninety days after the date on which the last of the material was furnished or the last of the labor was performed."), 572.27 ("Any action to enforce a mechanic's lien shall be brought within two years from the expiration of ninety days after the date on which the last of the material was furnished or the last of the labor was performed.").

"It is true that mechanic's liens stem from principles of equity which require paying for work done or materials delivered. But the lien itself is purely statutory in nature, dependent solely on statutory authority for its existence." *Baumhoefener Nursery, Inc. v. A & D P'ship II*, 618 N.W.2d 363, 366 (Iowa 2000) (internal quotation marks and citations omitted). The district court was correct in dismissing Thorson's barred claims.

C. Existence of separate contracts. We have already rejected Thorson's argument that the Hoylands agreed to an ongoing contract for improvements, finding that the various projects constituted individual contracts, or no contract at all.

The record establishes that Thorson and the Hoylands discussed specific projects at various times throughout the tenancy relationship. Each of those projects constitutes a separate offer by Thorson to contract, but only some were assented to by the Hoylands. *See Anderson v. Douglas & Lomason Co*., 540 N.W.2d 277, 285 (Iowa 1995) ("All contracts must contain mutual assent; mode of assent is termed offer and acceptance."). We adopt as our own the following findings of the district court:

> With regard to Thorson's 18 claims for compensable work, the Court finds Thorson's act of burying poisonous materials in 2003 and 2004 (Plaintiff's Exhibit B—Entry #10), although foresightful, was not done at Hoyland's request. Likewise, Thorson's act of bringing in manure from another farm and spreading it on Hoyland's land (Plaintiff's Exhibit B—Entry #16) was not done at Hoyland's request.
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> With regard to Thorson's claim for timber stand improvement (Plaintiff's Exhibit B—Entry #15), both Hoyland and Thorson apparently thought it would be nice to have access to maple syrup. Thorson testified Hoyland indicated money was tight on his end. It was Thorson who said he would go ahead and plant the trees. There was no understanding that reimbursement would follow from Hoyland.
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> With regard to Thorson's claim to compensation for fence maintenance labor (Plaintiff's Exhibit B—Entry #18), it does not appear the parties ever addressed that issue at the time they entered into their lease arrangement. Thorson's claim for compensation appears to be based on the contention the landlord is generally responsible for fence repairs. Furthermore, he has no records to support his claim he expended 1.5 hours daily, 320 days a year, checking and/or repairing fences.
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> With regard to Thorson's claim for repair of 2008 flood damage in 2009 (Plaintiff's Exhibit B—Entry #17), Thorson testified he told Hoyland that he (Hoyland) should sign up for cost share, if it became available. However, Hoyland told Thorson that he (Thorson) would need to repair the ditches and that Thorson could sign up for the program. Again, Hoyland made no promise of reimbursing Thorson for any expense connected with the project.

With respect to the above findings relative to items 15, 16, 17, and 18 of Exhibit B, Thorson failed to prove any contract existed and we affirm the district court's dismissal of these claims.

We agree with the district court that Thorson showed the Hoylands assented to the construction of the sediment basin reflected in item 13 of Exhibit B. While the Hoylands were unaware of the tiling work reflected in item 14, Thorson testified—and the district court found—that work was necessary

preparation for the basin. The Hoylands do not appeal this finding of the district court and we affirm.[6]

IV. Attorney Fees.

Thorson contends this court should increase the attorney fees awarded by the district court. We decline.

Iowa Code section 572.32[7] authorizes the award of reasonable attorney fees to a "prevailing plaintiff." The award is no longer mandatory, but discretionary. *Compare* Iowa Code § 572.32 (providing attorney fees *may* be awarded) with *Schaffer v. Frank Moyer Constr. Inc.*, 628 N.W.2d 11, 22 (Iowa 2001) (noting 1997 Code provides attorney fees *shall* be awarded to prevailing plaintiff). "[T]he amount awarded is 'vested in the district court's broad, but not unlimited discretion.'" *Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d 363, 368 (Iowa 2000) (citation omitted). Only when the district court bases its decision of the amount of the award on clearly unreasonable or untenable grounds will this court reverse. *Id.*

Particularly in light of the limited nature of plaintiff's success, we find no abuse of the district court's award of attorney fees.

We decline to award either party appellate attorney fees.

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[6] Having established an express contract for improvement, Thorson was required to establish further that

> (1) such improvements made will become the property of the lessor in a comparatively short time, (2) the additions or alterations were in fact substantial, permanent and beneficial to the realty and were so contemplated by the parties to the lease agreement, and (3) that the rental payments reflected the increased value of the property as a result of those improvements.

Ringland-Johnson-Crowley, 255 N.W.2d at 152.

[7] Iowa Code section 572.32 provides: "In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees."

> In *Baumhoefener,* we permitted an award of appellate attorney fees under Iowa Code section 572.32. *See* 618 N.W.2d at 368–69. We did so because the mechanic's lienholder prevailed on appeal. Although the question of whether section 572.32 allows appellate attorney fees was not raised in *Baumhoefener*, we think the holding was correct. Section 572.32 in no way limits attorney fees to those incurred in the district court. We therefore think the statute contemplates the award of appellate attorney fees. *See Bankers Trust*, 326 N.W.2d at 278 (using the same rationale to allow appellate attorney fees pursuant to a statute that allowed "attorney's fee" and where parties' agreement which provided for attorneys fees did not limit such fees to only those incurred at trial).

Schaffer, 628 N.W.2d at 23.

While Thorson was a "prevailing plaintiff" at trial, his claims on appeal have been rejected. We also reject the Hoylands' request for appellate attorney fees as they are not "successful plaintiffs" under section 572.32.

Costs are assessed to Thorson.

AFFIRMED.