COURT OF APPEALS
DECISION
DATED AND RELEASED

July 26, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1974

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WM. R. HUBBELL STEEL CORPORATION,

Plaintiff-Respondent,

v.

WISCONSIN POWER AND LIGHT COMPANY, WISCONSIN PUBLIC POWER INCORPORATED SYSTEM and C.D. SMITH CONSTRUCTION COMPANY,

Defendants-Appellants,

FIRSTAR TRUST COMPANY, f/k/a FIRST WISCONSIN TRUST COMPANY,

Defendant.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

NETTESHEIM, J. This is a construction lien foreclosure case. Wisconsin Power and Light Company (WP&L), Wisconsin Public Power Incorporated System (WPPI) and C.D. Smith Construction Company appeal from a summary judgment awarding money damages and foreclosure in favor of Wm. R. Hubbell Steel Corporation which had supplied materials to a subcontractor for a construction project.

The appellants argue that the construction project is a public works project pursuant to §§ 779.14 and 779.15, STATS. Since those statutes do not recognize a lien against the lands of the owner, but rather only a lien against the bond furnished by a prime contractor, the appellants contend that the trial court erred in granting Hubbell a foreclosure judgment. We hold that the summary judgment record does not support the appellants' claim that the construction project was a public works project. We agree with the trial court that Hubbell was entitled to pursue its foreclosure action as a private construction lien under § 779.01(3), STATS.

The appellants also contend that a material issue of fact exists as to whether Hubbell's materials were actually delivered to and incorporated into the project. We conclude that the appellants have not rebutted Hubbell's prima facie showing that the materials it provided were delivered to and incorporated into the project. We affirm the summary judgment.

FACTS

WP&L is the owner and lessor of the property in question. WPPI is the lessee. WP&L and WPPI contracted with C.D. Smith for improvements on the property. Part of the project required C.D. Smith to provide a preengineered steel building with components. C.D. Smith contracted with Inland Buildings as a subcontractor for this phase of the work. Inland, in turn, contracted with Hubbell to provide certain steel coils which were to be incorporated in the steel building.

Hubbell supplied Inland with the steel coils. However, before Inland completed its subcontract with C.D. Smith, it became insolvent and filed a voluntary bankruptcy petition. When Hubbell was not paid for its materials by Inland or the bankruptcy estate, it sought payment, to no avail, from C.D. Smith and WP&L.[1]

On December 16, 1992, Hubbell served WP&L, the owner of the property, with a notice of its intent to file a claim for lien pursuant to § 779.06, STATS. On January 19, 1993, Hubbell filed the lien claim in the Fond du Lac County Circuit Court. *See* ***id***. Hubbell then commenced this action on April 21, 1993, seeking money damages and foreclosure. Hubbell named as defendants the general contractor C.D. Smith, the owner WP&L and the lessee WPPI.[2] The defendants filed a single collective answer denying Hubbell's allegations.

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[1] C.D. Smith had previously paid Inland for its work although Inland failed to complete the subcontract. C.D. Smith therefore had to hire another subcontractor to complete the work.

[2] Hubbell also named Firstar Trust Company as a defendant because of its interest in the property as a trustee. Firstar was subsequently dismissed from the action by stipulation.

Hubbell moved for summary judgment. The trial court granted Hubbell's motion, awarding money damages and foreclosure of Hubbell's lien.[3] In so ruling, the court rejected the defendants' claim that the project was a public works project pursuant to § 779.15, STATS. Instead, the court held that Hubbell's construction lien was a private lien governed by § 779.01(3), STATS. WP&L, C.D. Smith and WPPI appeal.

DISCUSSION

We review a summary judgment using the same methodology as the trial court. *See* ***Sievert v. American Family Mut. Ins. Co.,*** 190 Wis.2d 623, 626, 528 N.W.2d 413, 414 (1995). Our review is de novo. ***Nagel Hart, Inc. v. United Pac. Ins. Co.,*** 141 Wis.2d 858, 860, 417 N.W.2d 36, 37 (Ct. App. 1987). Summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Section 802.08(2), STATS.

Wisconsin's lien laws are remedial in character and should be liberally construed to give effect to the legislative intent of protecting the claims of suppliers of work and materials. *See* ***Wes Podany Constr. Co. v. Nowicki,*** 120 Wis.2d 319, 324, 354 N.W.2d 755, 758 (Ct. App. 1984). In the case of a private construction contract, a party who performs work or provides labor, materials, plans or specification for the improvement is entitled to a lien against the owner's property. *See* § 779.01(3), STATS.; *see also* ***H.L. Munch Co. v. Anderson,*** 111 Wis.2d 194, 199, 330 N.W.2d 768, 771 (1983).

[3] According to the judgment, the money damages apply only against WP&L.

However, Wisconsin law does not permit a lien in favor of subcontractors and suppliers against property owned by a public entity. ***H.L. Munch,*** 111 Wis.2d at 199, 330 N.W.2d at 771; ***Nagel Hart,*** 141 Wis.2d at 861, 417 N.W.2d at 37. Instead, the law accords a different remedy, a lien against a bond provided by the prime contractor to one who provides labor or materials to a prime contractor or a subcontractor in a public works project. *See* §§ 779.14 and 779.15, STATS.; ***Nagel Hart,*** 141 Wis.2d at 861-62, 417 N.W.2d at 37. The statutory phrases "public work" and "public improvement" have been construed to mean "any improvement or work undertaken by a unit of government or a public agency or board." ***Blaser v. Don Ganser & Assocs.,*** 19 Wis.2d 403, 409, 120 N.W.2d 629, 632-33 (1962) (construing § 289.16, STATS., 1961, a predecessor to § 779.15).[4]

From the very outset, Hubbell viewed its lien as a private lien recognized by § 779.01(3), STATS. To that end, Hubbell served its notice of intent to file a lien and filed its lien pursuant to § 779.06, STATS., governing such liens. Operating on that same premise, Hubbell then commenced this action seeking foreclosure of its private lien. *See* § 779.10, STATS.

Hubbell's summary judgment proofs supported this claim. These proofs do not in the slightest suggest that this was a public works project. Thus, we conclude that Hubbell clearly established a prima facie case for foreclosure relief. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). We do not read the appellants' arguments to say otherwise.

[4] *See* Laws of 1967, ch. 351, § 3; Laws of 1979, ch. 32, § 57, § 92.

Having made out a prima facie case for summary judgment relief, we next look to the appellants' summary judgment proofs to determine whether a material issue of fact exists or whether reasonable alternative inferences may be drawn from undisputed facts. ***Id***. at 338, 294 N.W.2d at 477. As noted, the appellants claim that the construction contract represents a public works project. They base this contention on two underlying assumptions: (1) that the lessee, WPPI, is a municipal electric company pursuant to § 66.073, STATS.; and (2) that WPPI was a party to the construction contract.

The summary judgment record does not support either of these assumptions. While it might well be the case, nothing in the appellate record demonstrates that WPPI is a municipal electric company pursuant to § 66.073, STATS., or that the project under scrutiny in this case was a public works project. The appellants hinge their argument on the construction contract to which C.D. Smith, WP&L and WPPI were parties. That contract identifies WPPI as a "Wisconsin municipal electric company." However, this contract, crucial to the appellants' argument, was never made a part of the trial court record and, as a consequence, it is not part of the appellate record. An appellate court can only review matters of record in the trial court and cannot consider new matter attached to an appellate brief outside that record. ***South Carolina Equip., Inc. v. Sheedy,*** 120 Wis.2d 119, 125-26, 353 N.W.2d 63, 66 (Ct. App. 1984); *see also* ***Nelson v. Schreiner,*** 161 Wis.2d 798, 804, 469 N.W.2d 214, 217 (Ct. App. 1991). On this threshold basis, we reject the appellants' argument that this project was a public works project.

Moreover, even if we consider the contract, we reject the appellants' argument. The contract does not recite that the undertaking is a public works project. Nor does the contract describe the role or interest of WPPI in the project. We are not prepared to conclude that simply because a public entity is a party to a multi-party contract, the undertaking *necessarily* is a public works project within the meaning of § 779.15, STATS. Such would be rank speculation on our part. As against Hubbell's prima facie case showing that its claim is one for foreclosure of a private lien, the appellants' summary judgment proofs fail to raise any material issue of fact on this question.

The appellants further argue that even if the project was not a public works project, there remains a material issue whether all of the materials Hubbell produced for the project were actually delivered to or incorporated into the project. If there are disputed issues of material fact, a grant of summary judgment is inappropriate and must be reversed so that the disputes can be resolved by the fact finder. ***Clay v. Horton Mfg. Co.,*** 172 Wis.2d 349, 353-54, 493 N.W.2d 379, 381 (Ct. App. 1992). The alleged factual dispute must concern a fact that affects the resolution of the controversy, and the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. ***Id.*** at 354, 493 N.W.2d at 381.

The appellants rest their argument on two items of evidence contained in the summary judgment record. First, the appellants note that the job number assigned to the WP&L project (N2679-01) by Inland's order entry department is different from that assigned by Inland in its communications

with Hubbell (267904). This, according to the appellants, suggests that some of Hubbell's materials went to a different job. Second, the appellants note that an internal Inland memo listing the materials provided to the project carries the notation "approx. 1900# left." This, according to the appellants, suggests that the amount of material provided by Hubbell to Inland was not actually delivered to the project by Inland.

We disagree with the appellants that these isolated excerpts from the substantial summary judgment record documenting this transaction raise a material issue of fact as to whether all the Hubbell materials were actually delivered to or incorporated into the project. In support of its motion, Hubbell provided an affidavit of its own representative and that of an Inland representative. Attached to both of these affidavits were the relevant business records of Hubbell and Inland regarding the entire transaction. Each affidavit explained the attached exhibits, tracing the progression of the Hubbell materials from Hubbell to Inland to C.D. Smith. Each affiant stated that the materials referenced in the exhibits represented the materials produced by Hubbell, shipped to Inland and then further delivered by Inland to C.D. Smith.

We think it significant, as did the trial court, that against this evidence the appellants never averred that the materials produced by Hubbell were not delivered to or incorporated into the project. We fairly infer that the appellants, as recipients of the materials, and particularly C.D. Smith as the general contractor, were in a position to make such a definitive denial. They did

not. Instead, all they mustered were the two isolated record entries which we conclude do not detract from Hubbell's summary judgment proofs.

A request for summary judgment is not defeated by the mere presence of conflicting facts. Rather, in order to defeat a request for summary judgment, the conflict must be determinative of the question, ***Dahlke v. Dahlke***, 25 Wis.2d 559, 568A, 131 N.W.2d 362, 122 N.W.2d 584, 584 (1964) (per curiam on motion for rehearing), and must be material to the question of law presented, ***DeBonville v. Travelers Ins. Co.***, 7 Wis.2d 255, 260, 96 N.W.2d 509, 512 (1959). In light of Hubbell's prima facie showing that its materials were delivered to and incorporated into the project, and in further light of the appellants' failure to rebut that claim, we conclude the two isolated bits of evidence cited by the appellants fall short of raising any material issue of fact on this question.

Finally, the appellants argue that because Inland failed to complete the project, Hubbell "can only recover for products which were actually incorporated into the project." We disagree. Our supreme court has specifically rejected that body of lien law which holds that the materials provided must actually be used in the building or improvement in order to sustain a lien. *See* ***Builder's Lumber Co. v. Stuart,*** 6 Wis.2d 356, 362-64, 94 N.W.2d 630, 633-34 (1959). In Wisconsin, the delivery of materials to a property owner or agent for use upon a particular project is sufficient to sustain a construction lien. ***Id.*** (construing § 289.01, STATS., 1953, renumbered by Laws of 1979, ch. 32, § 57, § 92 to the current § 779.01, STATS.); *see also* ***Amoco Oil Co. v. Capitol Indem. Corp.,*** 95 Wis.2d 530, 538-40, 291 N.W.2d 883, 888-89 (Ct. App.

1980) (holding that the principle that the delivery of goods is sufficient to sustain a construction lien as stated in ***Builder's Lumber*** affords coextensive protection for public works projects under the bonding statutes).

As we have already noted, the summary judgment record supports Hubbell's claim that all of the materials it invoiced to Inland were delivered to or incorporated into the project at WP&L's River Road property. At no time did C.D. Smith or WP&L reject or return any of the materials. Although Inland did not ultimately complete the WP&L project, the record establishes that Hubbell's steel coils were incorporated into the materials that Inland actually delivered to the project.

By the Court.—Judgment and order affirmed.

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