STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0736

S. M. Hentges & Sons, Inc.,
Respondent,

vs.

Mark Elliot Homes, LLC,
Appellant,

Carla L. Benson, et al.,
Defendants,

Scherer Bros. Lumber Co., et al.,
Appellants,

CCM Finance, LLC, et al.,
Defendants.

Filed January 9, 2023
Affirmed in part and reversed in part
Johnson, Judge

Dakota County District Court
File No. 19HA-CV-20-719

Matthew T. Collins, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota (for respondent S.M. Hentges & Sons, Inc.)

Bryan R. Battina, Anna M. Koch, Trepanier, MacGillis, Battina, P.A., Minneapolis, Minnesota (for appellant Mark Elliot Homes, L.L.C.)

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Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

JOHNSON, Judge

This appeal concerns contractual disputes arising from three suburban residential developments. We conclude that the district court did not err by finding that the developer breached three contracts by not making full payment to a contractor. Accordingly, we affirm the judgment of approximately $100,000 on the contractor's breach-of-contract claim against the developer as well as the district court's declaration that the contractor's mechanic's lien is valid. But we conclude that the district court erred by finding that a financier of the development entered into an agreement with the contractor to guarantee the developer's performance of its contractual obligations toward the contractor. Accordingly, we reverse the district court's judgment of approximately $27,000 on the contractor's breach-of-guaranty claim against the financier. Therefore, we affirm in part and reverse in part.

FACTS

Mark Elliot Homes, LLC (MEH), is a developer and home-builder. Its principal and sole owner is Mark Pasvogel. In 2016 and 2017, MEH began work on three residential developments: the Providence Townhomes project in Empire Township of Dakota County and the Harmony Villas Phase I and Harmony Villas Phase II projects in the city of

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Rosemount. MEH hired an engineering firm, Tom Loucks & Associates, Inc. (Loucks), to create and revise project plans, draft project specifications, supervise day-to-day work, and approve contractors' payment requests on all three projects.

In 2016, MEH contacted S.M. Hentges & Sons, Inc. (SMH), to inquire into SMH's availability to perform grading and to install utilities, sanitary sewer lines, storm sewer lines, water mains, curbs and gutters, and asphalt paving for the Providence project. SMH asked MEH to fill out a questionnaire concerning MEH's finances. SMH found MEH's answers insufficient and asked for additional information. MEH referred SMH to Peter Scherer, president and CEO of Scherer Bros. Lumber Co. (SBL) and president of Scherer Limited Partnership (SLP) (collectively the Scherer companies), which were providing financing to MEH for part of the Providence project. Jeannette Hentges, the CFO and vice president of SMH, called Scherer by telephone to talk about MEH. Near the end of the telephone call, Hentges asked Scherer to send her a letter summarizing the call. Scherer sent Hentges a letter on May 9, 2016. Scherer's letter to Hentges, which is the focus of the Scherer companies' appeal, is discussed in greater detail below in part II of this opinion.

Providence Project

In May 2016, shortly after receiving Scherer's letter, SMH entered into a contract with MEH for the Providence project. SMH began work in early May 2016 and completed most of its work later that year. SMH submitted six requests for payment totaling approximately $420,000, and Loucks approved all six requests. MEH made most payments as they came due and paid the full amount in May 2017. SMH performed additional work worth approximately $7,000 in November 2017, which MEH paid for in December 2017.

During the summer of 2018, SMH performed approximately $20,000 of additional work and submitted two more requests for payment. MEH paid the first invoice but did not pay the second invoice.

In August 2018, SMH informed MEH that it soon would complete the final stage of the project, which was to install the top layer of asphalt on streets. In September 2018, Pasvogel responded by directing SMH to "hold off" on that work "until I give the approval." In the following weeks, SMH made additional attempts to schedule the final stage of work but did not obtain Pasvogel's approval to go forward. In November 2018, SMH attempted to pick up a check from MEH, which was promised to be delivered by November 7, 2018, and later by November 12, 2018. In mid-December 2018, Pasvogel wrote to SMH saying that MEH did not "have the money available right now" and would make a payment by January 4, 2019. In late December 2018, when SMH sought to confirm that MEH would make full payment of $27,586 on January 4, 2019, Pasvogel responded that full payment would not be possible until at least February 2019. SMH made several additional attempts to collect the unpaid amount, without success.

In May 2019, MEH asked Loucks to direct SMH to resolve a drainage issue that was first identified in September 2018. SMH responded by stating that the drainage issue was caused by the work of other contractors after SMH properly performed and completed its grading work. No further work was performed by SMH, and no further payments were made by MEH, with respect to the Providence project.

Harmony I Project

SMH and MEH entered into a contract for the Harmony I project in August 2017. SMH completed most of the work between September and November 2017. In late November 2017, SMH submitted four payment requests totaling approximately $542,000, all of which were approved by Loucks. MEH promptly paid SMH approximately $484,000 and paid the remaining amount in June 2018.

In mid-2018, only a small amount of work remained on the Harmony I project, including the final layer of asphalt, a few pieces of curb and gutter, and the removal of erosion-control materials. SMH did not complete that work while it was attempting to get paid for its work on the Providence project. By the summer of 2019, work on the Harmony I project remained incomplete. MEH did not direct SMH to complete the final stages of its work.

Harmony II Project

SMH and MEH entered into a contract for the Harmony II project in April 2018. After signing the contract, SMH sent MEH a pre-lien notice by certified mail. SMH began work shortly thereafter. Between May and October 2018, SMH submitted five payment requests totaling approximately $493,000, all of which were approved by Loucks. MEH promptly paid SMH the amounts due. In November 2018, SMH completed sewer and erosion-control work and submitted a sixth payment request for approximately $10,000. MEH made no further payments on the Harmony II project.

End of Contractual Relationship

In January 2019, Loucks estimated that approximately $77,000 of work remained on the two Harmony projects. In April 2019, SMH sent an e-mail to Pasvogel stating that MEH owed SMH approximately $63,000 on the two Harmony projects and requesting payment. When SMH followed up a month later, Pasvogel responded that he intended to pay SMH in full but first wanted SMH to resolve the drainage issue at the Providence project and an issue concerning a manhole on a street at the Harmony I project. In early June 2019, SMH reiterated that the Providence drainage issue was caused by other contractors after the completion of SMH's work and that the Harmony I manhole issue would be resolved after the final layer of asphalt was installed on that street.

In October 2019, SMH became aware that MEH had retained another contractor to perform the final stage of work at the Providence project and the Harmony I project by installing the top layer of asphalt on streets. SMH proceeded to install a short segment of curb near the disputed manhole at the Harmony I project and by removing a silt fence and other erosion-control materials from both Harmony projects. SMH submitted requests for payment for that work and for the release of retainage (*i.e.*, hold-back) amounts. Loucks approved SMH's payment requests four days later.

In November 2019, additional disputes arose. On November 6, 2019, SMH recorded a mechanic's lien for the Harmony II project in the amount of $36,597 and served it on MEH. A week later, Pasvogel wrote to SMH, saying that SMH owed MEH $6,800 for certain materials that were removed from the Harmony I and Harmony II project sites, $15,000 for the estimated costs of relocating the manhole at the Harmony project site,

between $4,000 and $6,000 for the estimated costs of additional grading work at the Providence project site to resolve the drainage issue, and $13,000 for the estimated costs of replacing curbs near the area with the drainage issue. A week after that, SMH responded by saying that the removed materials belonged to SMH, that the Harmony manhole need not be relocated because it was approved by Loucks and the City of Rosemount, and that the drainage issue at Providence was caused by excavator and landscaping contractors after SMH properly performed and completed its grading work.

Litigation

SMH commenced this action in February 2020. SMH sued MEH, SBL, and SLP as well as 17 other defendants. The procedural history of SMH's claims against SBL and SLP is discussed below in part II.

With respect to MEH, SMH asserted claims of breach of contract, unjust enrichment, and foreclosure of its mechanic's lien. For relief, SMH requested a declaration that SMH is entitled to a mechanic's lien in the amount of $36,567, foreclosure of the mechanic's lien, and a money judgment in an amount to be determined. In its answer, MEH asserted counterclaims of breach of contract and slander of title and requested a declaration that SMH's lien is invalid. SMH's claims against defendants other than the Scherer companies were dismissed based on settlements, resolved by summary-judgment motions, or preserved based on stipulations concerning the recording dates of mortgage liens.

SMH's claims against MEH and the Scherer companies were tried to the district court on four days in August 2021 via a commercially available video-conferencing

application. After the presentation of evidence, the parties submitted written closing arguments and proposed findings and conclusions.

In January 2022, the district court filed a 21-page order with findings of fact, conclusions of law, and an order for judgment. The district court's ruling with respect to SMH's claims against the Scherer companies is discussed below in part II.

With respect to the claims between SMH and MEH, the district court concluded that MEH breached the contracts concerning the Providence, Harmony I, and Harmony II projects by failing to pay SMH $26,875, $108, and $36,597, respectively, plus interest. The district court determined that SMH's mechanic's lien is valid and that SMH is entitled to foreclosure of the lien. The district court also ruled in favor of SMH on its claim of unjust enrichment. The district court further concluded that MEH had failed to prove any of its counterclaims. In March 2022, MEH filed a motion for amended findings, conclusions, and order or, alternatively, for a new trial. In April 2022, the district court denied MEH's motion in a two-page order.

MEH timely filed a notice of appeal, and the Scherer companies timely filed a notice of related appeal. MEH's appeal is the subject of part I of this opinion; the Scherer companies' appeal is the subject of part II.

DECISION

I. Appeal of Mark Elliot Homes

A. Breach of Contract Claim

MEH first argues that the district court erred by concluding that SMH proved that MEH breached the three contracts and by concluding that MEH did not prove that SMH breached the three contracts.

To prevail on a breach-of-contract claim, a plaintiff must prove three elements: "(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).

MEH initially contends that the district court's decision lacks detailed findings and detailed analysis of the relevant provisions of the contracts and, for that reason alone, should be reversed. But MEH does not contend that the matter should be remanded to the district court for additional findings or analysis, even though MEH preserved such an argument by moving for amended findings and conclusions. *See Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976). Rather, MEH requests an appellate opinion that essentially determines, as a matter of law, that SMH did *not* prove its breach-of-contract claim and that MEH *did* prove its breach-of-contract claim. Given MEH's argument and request for relief, our review is limited to determining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985). In performing that review,

we may not "reweigh the evidence" or "weigh the evidence as if trying the matter *de novo*." *In re Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted).

MEH does not dispute that SMH established the first element of its breach-of-contract claim because MEH agrees (as it must for purposes of its own breach-of-contract claim) that valid contracts were formed. MEH also does not dispute that SMH established the third element of its breach-of-contract claim, apparently conceding that SMH introduced sufficient evidence that MEH did not make full payment to SMH. MEH focuses on the second element of SMH's breach-of-contract claim. On that issue, the district court found that SMH "did not fail to perform any condition precedent." MEH contends that this finding is erroneous on the ground that SMH did not fully perform its contractual obligations in two ways: first, by not completing its work on the Harmony I project by November 1, 2017, and, second, by not performing a final inspection on all three projects.

In response, SMH contends that the district court properly found, based on evidence that Loucks approved SMH's payment requests, that SMH fully performed and was entitled to full payment. SMH further contends that, even if SMH did not satisfy all conditions precedent, the district court implicitly found either that such conditions were immaterial or that MEH prevented SMH from fully performing.

SMH's counter-arguments are consistent with the caselaw. A party's failure to satisfy a condition precedent may be excused if the failure is immaterial. *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23, 28 (Minn. 2018); *BOB Acres, LLC v. Schumacher Farms*, *LLC*, 797 N.W.2d 723, 728-29 (Minn. App. 2011). In addition, a party's failure to fully perform its contractual obligations may be excused by the other

party's prior breach of the contract. *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 715 (Minn. 1985); *Soderbeck v. Center for Diagnostic Imaging, Inc.*, 793 N.W.2d 437, 441 (Minn. App. 2010). Similarly, a party's failure to fully perform its contractual obligations may be excused by the other party's prevention of the first party's full performance. *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995); *Nodland v. Chirpich*, 240 N.W.2d 513, 516-17 (Minn. 1976).

SMH's counter-arguments also are supported by the evidentiary record. With respect to MEH's contention that SMH did not complete its work on the Harmony I project, the evidence shows that SMH did not complete work by November 2017 for valid reasons and that MEH did not fulfill its contractual obligations with respect to the November 2017 deadline. SMH's project manager testified that it is industry practice for contractors to install the top layer of asphalt after a full winter to allow the base layers to go through a freeze-thaw cycle and to prevent other contractors' work from damaging the top layer. Section 10.04 of the Harmony I contract provides that, if Loucks has approved a payment request submitted by SMH, MEH must make payment within 30 days or object in writing. SMH submitted a payment request for work it completed in November 2017, but MEH did not either make timely payment or provide a written objection within 30 days. Accordingly, the evidence is sufficient to support an implied finding that SMH did not breach the Harmony I contract on the ground that MEH committed a prior breach. *See Hruska*, 372 N.W.2d at 715; *Soderbeck*, 793 N.W.2d at 441.

In addition, MEH prevented SMH from fully performing its contractual obligations by hiring another contractor to do work for which SMH was contractually obligated. In

mid-2018, the only remaining work on the Harmony I project was installing a top layer of asphalt, completing some curbs and gutters, and removing erosion-control materials. In September 2018, Pasvogel instructed SMH to refrain from installing the top layer of asphalt at the Providence project, and he did not give approval before winter. After becoming aware that another contractor had done asphalt-paving work at both the Providence project and the Harmony I project, SMH promptly completed the few other remaining items of work on the Harmony I project, submitted a request for final payment, and received Loucks's approval of the request.

With respect to MEH's contention that SMH did not perform final inspections of all three projects, the evidence shows that SMH did not fail to do so, either because it was not SMH's contractual duty to do so or because final inspections were unnecessary. Section 9.11.a. of all three contracts provides that, if SMH has given notice that its work is completed, it is the responsibility of the engineer (*i.e.*, Loucks) to "make a preliminary inspection with the contractor present" and notify SMH of any work that is defective or incomplete. Under section 9.11.c. of the contracts, if the contractor has corrected or completed any such items and given notice to the engineer, the engineer "shall make his final inspection of the project." Under section 9.11.d., if the engineer has approved the contractor's work, the contractor may request final payment. Under section 10.04, if the engineer has approved final payment, the client (*i.e.*, MEH) must, within 30 days, either accept the work or provide written reasons why the work is not acceptable.

In this case, Loucks's engineer testified that he did not perform formal final inspections of SMH's work on the three projects in the manner described in the three

contracts. Nonetheless, he ensured that SMH's work was properly completed and—most importantly—approved SMH's applications for final payment with respect to each of the three projects. But MEH did not either make a final payment or give SMH written reasons for not doing so. MEH does not explain why a final inspection is necessary if the engineer approved of SMH's work and approved SMH's application for final payment.

Thus, the evidence supports the district court's implied finding that SMH did not fail to timely complete its work on the Harmony I project and did not fail to perform final inspections on the three projects. Accordingly, the evidence shows that SMH proved the second element of its claim—that it satisfied the conditions precedent to its right to full payment by MEH. Consequently, the evidence supports the district court's conclusions that SMH proved its breach-of-contract claim and that MEH did not prove its breach-of-contract claim.

B. Mechanic's Lien Claims

MEH next argues that the district court erred by concluding that SMH's mechanic's lien is valid and by ordering foreclosure of the lien.

"A mechanic's lien is a statutory remedy intended to protect those who furnish materials or services in the improvement of real property" by providing them with "a non-consensual lien or security interest in the improved property." *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228, 230 (Minn. 2010). The applicable statute provides, "Whoever . . . contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes" stated in the statute, "shall

have a lien upon the improvement, and upon the land on which it is situated or to which it may be removed." Minn. Stat. § 514.01 (2022).

To be valid, a mechanic's lien must be filed and served within "120 days after doing the last of the work, or furnishing the last item of skill, material, or machinery." *See* Minn. Stat. § 514.08, subd. 1 (2022). If the "last of the work" is separated in time from earlier work, and if the earlier work was performed more than 120 days before the lien was filed, the lien is nonetheless valid if the later work is "an operation continuous with" the earlier work. *Kahle v. McClary*, 96 N.W.2d 243, 245 (Minn. 1959). But the lien is invalid if the later work and the earlier work "are separate or independent." *Id*. Whether work is continuous or separate and independent depends on "the general purpose of the contract" as well as the "lapse of time" between the later work and the earlier work, whether the later work "involved a trifling amount," and "the general circumstances under which the work was done." *Id.* at 245-46. "Revival of the lien is clearly disallowed when de minimus operations are performed for the sole purpose of extending the time for the lien and the work is otherwise substantially completed." *Id.* at 246. This court applies a clear-error standard of review to a district court's findings as to whether later work is continuous with earlier work. *Enviro-Fab, Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 846 (Minn. App. 1984).

The district court identified the applicable caselaw and legal principles and specifically found that SMH's work in October 2019 was necessary to the full performance of its contractual obligations and, thus, that the mechanic's lien is valid. The district court relied on the testimony of a Loucks engineer, who stated that SMH's last work was required

by the contract and that he would not have approved the payment requests if SMH were not entitled to payment.

MEH contends that the district court clearly erred in its finding on the ground that the work performed by SMH in October 2019 was "nominal," "insignificant in amount," "*de minimus*," and "so minor that it was completed in less than an hour and a half." Given the caselaw interpreting section 514.08, the district court did not clearly err. Despite the lapse in time, SMH's work in October 2019 was continuous with its earlier work and was within "the general purpose of the contract" because it was part of SMH's contractual obligations. *See Kahle*, 96 N.W.2d at 246-47 (concluding that heating contractor's last work of installing additional hot-air register was continuous with earlier installation of furnace); *Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 511-12 (Minn. App. 1995) (concluding that contractor's acid-wash treatment of exterior brick work was "standard cleaning process" that was "expected"), *rev. denied* (Minn. May 31, 1995). MEH's engineer, Loucks, previously had instructed SMH to do the work that SMH performed in October 2019, and SMH was justified in relying on that authorization. *See Hayle Floor Covering, Inc. v. First Minnesota Constr. Co.*, 253 N.W.2d 809, 811 (Minn. 1977) (concluding that lien was valid in part because Hayle Floor Covering installed additional material "pursuant to written authorization by the general contractor"); *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 374 N.W.2d 493, 498 (Minn. App. 1985) (concluding that contractors properly relied on developer's request for "last items of work" that were "needed"), *rev. denied* (Minn. Nov. 26, 1985).

Furthermore, SMH's last day of work appears to be more time-consuming and more valuable than the work in some other cases in which mechanic's liens were found to be valid. For example, in *W.B. Martin Lumber Co. v. Noss*, 99 N.W.2d 65 (Minn. 1959), a sub-contractor delivered two pairs of window shutters that had been requested by the general contractor, and the supreme court concluded that the mechanic's lien was valid, despite the fact that the value of the shutters was "insignificant in relation to the value of the total material delivered." *Id.* at 67-68. Similarly, in *Enviro-Fab*, the contractor delivered a single gasket for use in an industrial facility, and this court concluded that the furnishing of that material, which had been requested by the project owner, was not *de minimus*. 349 N.W.2d at 847. SMH's work is unlike the work of Schutz Contracting in *Hayle*, which merely "moved equipment and materials belonging to [the general contractor] to another jobsite" but did not perform any work that "pertained to [the contractor's] contracts." *See* 253 N.W.2d at 812.

Thus, the district court did not clearly err by finding that SMH's mechanic's lien is valid and by ordering the foreclosure of the lien. In light of that conclusion, we also reject MEH's argument that the district court erred by rejecting its counterclaim for a declaration that SMH's mechanic's lien is invalid and its counterclaim of slander of title.

C. Unjust Enrichment Claim

MEH also argues that the district court erred by concluding that SMH proved its unjust-enrichment claim. MEH contends that the doctrine of unjust enrichment does not apply to a matter that is governed by a valid contract. Consistent with MEH's argument, the supreme court has stated that "equitable relief cannot be granted where the rights of the

parties are governed by a valid contract." *U.S. Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981). SMH does not oppose MEH's argument; SMH contends only that, if this court were to affirm the district court with respect to the breach-of-contract claims and mechanic's-lien claims, the issue of unjust enrichment would be moot.

We believe that, regardless of our resolution of the issues in subparts I.A. and I.B., the doctrine of unjust enrichment does not apply because it is undisputed that SMH and MEH entered into valid contracts governing their business relationship. *See id.*; *see also Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992) (concluding that contractor could not prevail on unjust-enrichment claim because it had adequate contractual and mechanic's-lien remedies).

Thus, the district court erred by stating, in its conclusions of law, that "it would be inequitable to allow MEH to continue to refuse to pay Hentges for their services." But the district court did *not* order judgment in favor of SMH on its unjust-enrichment claim, for reasons that are not expressly stated. Therefore, the district court's error is a harmless error. *See* Minn. R. Civ. P. 61.

II. Appeal of the Scherer Companies

The Scherer companies argue that the district court erred by concluding that SMH proved its claims against SBL and SLP and by ordering the entry of judgment in favor of SMH against SBL and SLP.

SBL is a building-materials company that sells construction materials to contractors. SLP makes loans to builders and developers. SLP made two loans to MEH, totaling

approximately $1,000,000, for purposes of the Providence development. The first loan funded MEH's acquisition of land; the second loan funded additional development expenses. MEH gave SLP a note and a mortgage, and Pasvogel provided SLP with a personal guaranty for each loan.

As stated above, when SMH was considering entering into a contract with MEH in May 2016, SMH sought to determine whether MEH had sufficient funding for the project. SMH sent MEH a written questionnaire, but SMH was not satisfied with the information provided. Hentges spoke with Pasvogel, who encouraged her to contact Scherer. Hentges called Scherer by telephone and asked him whether he would be helping with MEH's projects. Scherer told Hentges that SLP had provided funding for MEH's developments and that MEH had money set aside for grading work and other expenses. Near the end of the phone call, Hentges asked Scherer to send her a letter summarizing their telephone call, and Scherer did so the following day. The body of the letter states, in full, as follows:

> Scherer Bros. Lumber Co. or an affiliated entity will be funding the budgeted costs to acquire and improve that site in Empire known as Lots 1-5, Block 1, Providence Townhomes, Dakota County.
>
> This includes acquisition and engineering costs to date of $285,000, your work on grading, utilities and streets budgeted at $420,000 and additional acquisition and carrying costs of possibly another $300,000.
>
> Our development loan will be secured by a mortgage and guarantee. We will require lien waivers for payments received.
>
> While Mark Pasvogel along with Loucks Engineering will be overseeing the project, I will welcome your call if so needed.

Two days after Hentges received the letter, SMH entered into a contract with MEH for the Providence project.

In 2019, as issues remained unresolved between SMH and MEH, SMH informed Scherer of outstanding invoices, stating in an e-mail message that SMH had "relied upon his letter of endorsement before initially entering into contracts with MEH" and further stating it was "hopeful that [Scherer] will help ensure that our company is compensated fairly and completely."

As stated above, SMH commenced this action in February 2020 by suing 20 defendants, including SBL and SLP. With respect to SBL and SLP, SMH asserted two claims: breach of a guaranty agreement and estoppel. For relief, SMH requested a judgment against SBL and SLP of at least $26,875, which was the amount that SMH had alleged that MEH had failed to pay SMH with respect to the Providence project. The Scherer companies moved for summary judgment in December 2020, but the district court denied the motion.

At trial in August 2021, both Hentges and Scherer testified. Hentges testified that she contacted Scherer to "verify . . . that [Scherer] was going to help [Pasvogel] with the project." Hentges testified that Scherer said that "he was going to help [Pasvogel] . . . get started" and that "money was being prepared . . . with a mortgage, and hundreds of thousands of dollars were set aside" for the grading project and additional carrying costs. Hentges did not testify that, during the telephone call, she asked Scherer for a guaranty or that Scherer offered a guaranty. Hentges testified that Scherer's letter's reference to SLP's

own mortgage and guaranty suggested to her that Scherer would guarantee MEH's obligations to SMH. Hentges testified that she believed that the last sentence of Scherer's letter, which states, "I will welcome your call if so needed," means "I'm guaranteeing it, I will stand by it."

In contrast, Scherer testified that Hentges merely sought a "reference" from Scherer because SMH "had not worked with [Pasvogel] before." Scherer testified that Hentges did not "inquire about guaranteeing payment to her if [MEH] failed to make a payment for their work" and that he would not have given such a guaranty to SMH if she had asked. Scherer testified that the letter sent to SMH was "never intended to be a guaranty" but instead "was a courtesy follow-up to a conversation."

In its post-trial order, the district court reasoned that Scherer's letter is ambiguous. The district court referred to Hentges's and Scherer's testimony concerning the letter. Ultimately, the district court found "that the letter was indeed a promise by Scherer Bros. to guarantee MEH in return for [SMH's] agreement to enter into the [Providence] contract with MEH." The district court further found "that Scherer Bros. did indeed breach the guaranty agreement when they failed to reimburse [SMH] for their unpaid services."

In analyzing SMH's estoppel claim, the district court found that "Scherer Bros. made representations upon which [SMH] reasonably relied" and that, "if those representations are not enforced, [SMH] will be monetarily and unjustly harmed." Accordingly, the district court concluded that SMH "has established a valid claim for estoppel."

The Scherer companies challenge both of the district court's conclusions on appeal.

A. Breach of Guaranty Claim

The Scherer companies first argue that the district court erred by concluding that SMH proved its claim of a breach of a guaranty. Specifically, the Scherer companies argue that the statute of frauds applies, that Scherer's letter does not promise to guarantee a debt from MEH to SMH, and that Hentges's testimony does not support a finding of either an oral or a written guaranty.

A guaranty is "a collateral contract to answer for the payment of a debt or the performance of a duty in case of the default of another who is primarily liable to pay or perform the same." *Charmoll Fashions, Inc. v. Otto*, 248 N.W.2d 717, 719 (Minn. 1976) (quotation omitted). A guaranty agreement is interpreted and enforced in the same manner as other contracts. *American Tobacco Co. v. Chalfen*, 108 N.W.2d 702, 704 (Minn. 1961). Accordingly, to prove a breach-of-guaranty claim, a plaintiff first must prove the "formation of a contract" to guarantee the debt of another. *See Park Nicollet Clinic*, 808 N.W.2d at 833. A contract is formed only if there is an offer that is "clear, definite, and explicit, and leaves nothing open for negotiation." *Short v. Sun Newspapers, Inc.*, 300 N.W.2d 781, 786 (Minn. 1980) (quotation omitted).

The statute of frauds applies to a guaranty agreement so long as the agreement is collateral to another party's debt and not an original promise to pay a debt. Minn. Stat. § 513.01(2) (2022); *J.J. Brooksbank Co. v. American Motors Corp.*, 184 N.W.2d 796, 798-99 (Minn. 1971). In the context of a guaranty agreement, the statute of frauds ensures that, when "the real debtor has proved insolvent or unable to pay," the creditor does not "enlarge the scope of the promise or . . . torture mere words of encouragement into an

absolute promise." *Esselman v. Production Credit Ass'n*, 380 N.W.2d 183, 187 (Minn. App. 1986), *rev. denied* (Minn. Mar. 21, 1986). "A promisor receiving no benefits should be bound only by the exact terms of his promise, so a writing is required." *Id.*

Under the statute of frauds, an agreement must be "in writing, and subscribed by the party charged therewith." Minn. Stat. § 513.01. The required writing must "state the consideration" and "state expressly or by necessary implication the parties to the contract," the subject matter of the agreement, and "the general terms and conditions of" the agreement. *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979). "Where a contract within the statute of frauds is made out by correspondence, the correspondence taken together must establish the contract in all its terms," without any "aid from parol evidence." *Lewis v. Johnson*, 143 N.W. 1127, 1128 (Minn. 1913). "Evidence of extrinsic facts and circumstances" may not "supplement a manifestly incomplete [writing] by proving the description by parol." *Taylor v. Allen*, 42 N.W. 292, 292 (Minn. 1889).

In this case, the Scherer companies argued to the district court that the statute of frauds applies, but the district court did not expressly consider the argument. The writing on which the alleged guaranty agreement is based—Scherer's letter—does not contain an express statement that either SBL or SLP will guarantee a debt from MEH to SMH. Rather, the letter describes the business relationship between the Scherer companies and MEH. The district court essentially agreed, stating that "the letter itself does not explicitly state that there is an agreement between the parties," *i.e.*, between SMH and the Scherer companies. The district court found a guaranty agreement only by referring to parol evidence, specifically, the testimony of Hentges and Scherer. But the district court's

reliance on oral testimony to discern an essential term of a guaranty agreement is contrary to the above-described caselaw concerning the statute of frauds. *See Malevich*, 278 N.W.2d at 544; *Lewis*, 143 N.W. at 1128; *Taylor*, 42 N.W. at 292.

Furthermore, even to the extent that parol evidence is "admissible to explain (but not to contradict or supply) a term of" Scherer's letter, *see Malevich*, 278 N.W.2d at 544, the parol evidence in this case is insufficient to prove that any particular statement in the Scherer letter constitutes a promise by either SBL or SLP to guarantee a debt from MEH to SMH. The district court did not identify any such statement. In addition, the parol evidence on which the district court relied is insufficient. The district court noted testimony that the letter was intended to be either a written summary of the telephone call or a "courtesy follow-up letter" and testimony that Hentges would rely on the letter. But that testimony does not establish, or even allow an inference, that the letter contains a promise by SBL or SLP to guarantee a debt from MEH to SMH. Furthermore, there was no testimony that, during their telephone call, Scherer made an oral promise to Hentges that either SBL or SLP would guarantee a debt from MEH to SMH. Consequently, there is no promise that is "clear, definite, and explicit, and leaves nothing open for negotiation." *See Short*, 300 N.W.2d at 786 (quotation omitted).

We acknowledge SMH's argument that the alleged guaranty agreement is outside the statute of frauds because of the doctrine of part performance. SMH did not present this argument to the district court. In any event, SMH does not cite caselaw in which the part-performance exception has been applied to a guaranty agreement. Furthermore, even if the

statute of frauds did not apply, Hentges's testimony is insufficient to establish an agreement by Scherer to guarantee a debt from MEH to SMH.

Thus, the district court erred by concluding that the Scherer companies entered into and breached a guaranty agreement.

B. Estoppel Claim

The Scherer companies also argue that the district court erred by concluding that SMH proved a claim of estoppel.

In count 5 of its complaint, SMH alleged that SBL and SLP refused to comply with its obligations under the alleged guaranty agreement and should be "promissorily and equitably estopped." In its post-trial order, the district court did not expressly state whether it was applying the doctrine of promissory estoppel or the doctrine of equitable estoppel. The Scherer companies argue that the district court's conclusion is inconsistent with the law of both promissory estoppel and equitable estoppel; SMH argues that both doctrines support the district court's conclusion. Accordingly, we will consider both theories. We apply an abuse-of-discretion standard of review. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 23-24 (Minn. 2011).

To prevail on a claim of promissory estoppel, a plaintiff must prove that "1) a clear and definite promise was made, 2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and 3) the promise must be enforced to prevent injustice." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000). In *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588 (Minn. 1975), the supreme court considered whether the plaintiff was estopped from asserting the statute of frauds as

a defense to a claim of breach of an oral contract. *Id.* at 592-95. The supreme court first considered whether the doctrine of promissory estoppel applied. *Id.* at 593. The supreme court identified two approaches to the issue, without committing to either. *Id.* at 593-94. Under the more restrictive view, "promissory estoppel will defeat the statute of frauds only when the promise relied upon is a promise to reduce the contract to writing." *Id.* Under the more expansive view, promissory estoppel will defeat the statute of frauds if the plaintiff's "detrimental reliance is of such a character and magnitude that refusal to enforce the contract would permit one party to perpetrate a fraud" and if the defendant's conduct is "unconscionable." *Id.* at 594.

In this case, the evidence does not support a promissory estoppel claim under either view of the law. SMH cannot prevail under the more restrictive view because the Scherer companies did not fail to fulfill "a promise to reduce the contract to writing." *See id.* at 593-94. To the contrary, Hentges asked Scherer to write her a letter to summarize their telephone conversation, and he did so. SMH cannot prevail under the more expansive view because there is no evidence or argument that Scherer acted unconscionably or intended to defraud SMH. *See id.* at 594. Rather, SMH argues only that Scherer represented that SMH "would be paid" for its work on the Providence project, that SMH reasonably relied on Scherer's representations, and that SMH would be unjustly harmed if Scherer's promise were not enforced. Furthermore, even if the statute of frauds did not apply, SMH could not establish a claim of promissory estoppel because SMH cannot prove that Scherer made "a clear and definite promise" to guarantee any debt from MEH to SMH. *See Martens*, 616 N.W.2d at 746.

In *Del Hayes & Sons*, the supreme court also considered whether the doctrine of equitable estoppel applied to "take the contract out of the statute of frauds." 230 N.W.2d at 594. The supreme court identified six elements that must be proved, the first of which is that a party engaged in "conduct—acts, language, or silence—amounting to a representation or a concealment of material facts." *Id*. at 594-95 (quotation omitted). Because of the first element, "equitable estoppel is akin to fraud." *Id*. at 595. Again, SMH cannot establish the elements of equitable estoppel because there is no evidence or argument that Scherer misrepresented or concealed material facts or intended to defraud SMH.

Thus, the district court erred by concluding that SMH proved a claim of estoppel against the Scherer companies.

In sum, paragraph 1.a. of the district court's order for judgment and judgment, which rules in favor of SMH and against MEH on the mechanic's-lien claims in count 1, is affirmed. Paragraph 1.b., which rules in favor of SMH and against MEH on the breach-of-contract claim in count 2, is affirmed. Paragraph 1.c., which rules in favor of SMH and against SBL and SLP on the breach-of-guaranty and estoppel claims in counts 4 and 5, is reversed. And Paragraph 1.d., which rules in favor of SMH and against MEH on MEH's counterclaims, is affirmed.

Affirmed in part and reversed in part.