The State of New Hampshire
Superior Court

Rockingham S.S.

FABCON PRECAST, LLC

V.

ZIRKELBACH CONSTRUCTION, INC. *ET AL.*

NO. 218-2015-CV-1011

ORDER ON ATTACHMENT

The plaintiff is a subcontractor, who contracted with the defendant Zirkelbach Construction, Inc. to perform precast work in conjunction with the construction of a Federal Express shipping plant located at 22 Industrial Drive in Londonderry. Zirkelbach was the general contractor hired to construct the FedEx facility. The plaintiff alleges that Zirkelbach breached the contract by not paying the plaintiff for its services. Ballinger Properties, LLC and Five N Associates own the land on which the facility was built. Ballinger and Five N entered into a long-term ground lease with Scannell Properties #174, LLC. In conjunction with the filing of the breach of contract action, the plaintiff also filed a petition for an *ex parte* attachment against Scannell, Ballinger, and Five N to perfect its mechanic's lien pursuant to RSA 447. The Court granted the *ex parte* attachment on September 14, 2015. All defendants objected and request that the Court lift the attachment. The Court held a hearing on the matter on November 16, 2015.

Ballinger and Five N object to the attachment arguing that they have no interest in the construction project. They are simply the owners of the fee interest in the land, which they have leased on Scannell. They argue that the plaintiff should not be able to attach their interest in the land in this situation. RSA 447:2, I, provides in relevant part:

> If any person shall perform labor . . .or furnish materials to the amount of $15 or more for erecting or repairing a house or other building or appurtenances . . . by virtue of the contract with the owner thereof, he or she shall have a lien on any material so furnished and on said structure, and on any right of the owner to the lot of land on which it stands.

(Emphasis added).

In this case the owner of the building is Scannell. Scannell owns no interest in the land itself. According to the terms of the ground lease, Ballinger and Five N had no ownership interest in the building. The plaintiff did not perform the work "by virtue of a contract with" Ballinger or Five N. RSA 447:2 does not establish a right to attachment of Ballinger or Five N's interest in the land. Accordingly, the *ex parte* attachment with respect to these two defendants must be dissolved.

The defendants Zirkelbach and Scannell argue that the attachment with respect to the building should be dissolved for two reasons. First, the defendants assert that this lawsuit is barred by the contract provision which requires mediation before a suit can be filed. Next, they contend that if it the petition to attach can go forward, the attachment should be denied because it was not perfected within 120 days of the last work performed. The plaintiff responds that the court can issue a petition to attach even if the contract contains a binding arbitration clause. Next, the plaintiff counters that it last performed work on the building on May 20, 2015—less than 120 days before the Petition for *Ex Parte* Attachment was filed.

The defendant's first argument is directly contradicted by the holding in Pine Gravel, Inv. V. Cianchette d/b/a Site Prep., 128 N.H. 460, 465 (1986). That case plainly stands for the proposition that even if a binding arbitration clause bars the breach of contract action by a subcontractor, a petition to attach is still a valid means to perfect the mechanic's lien pursuant to RSA 447. The New Hampshire Supreme Court held, "The court's determination that the suit for damages was premature and precluded by the arbitration clause did not render the lien a nullity." Id. Thus, this Court must consider the merits of the plaintiff's request for an attachment.

With respect to the argument that the lien was not perfected within 120 days that issue is somewhat more complicated. RSA 447:9 provides that the mechanic's lien continues "for 120 days after the services are furnished . . . ." Both sides seem to agree that if the lien is not perfected through an attachment prior to the expiration of 120 days, the plaintiff is not entitled to an attachment. See generally 4 N.H. PRACTICE, WIEBUSCH ON NEW HAMPSHIRE CIVIL PRACTICE AND PROCEDURE § 17.05 & n.11 (3d ed. 2010). The plaintiff contends that the last work performed by it on the FedEx site occurred on May 20, 2015. To support that claim the plaintiff called Kenneth Russell, Zirkelbach's superintendent on the project to testify at the attachment hearing. Russell testified that the plaintiff's workers returned to the facility on May 20, 2015. At that time they completed two different projects. One project was "warranty work." Russell explained that certain panels which the plaintiff had previously installed had separated and needed to be repaired. While they were at the facility fixing this problem, the plaintiff's workers also engaged in caulking some doors. Russell acknowledged that this was work that was supposed to be completed under the terms of the original contract but

had not been done. It was part of a "punch list" of items that the plaintiff was required to finish as part of the contract. No evidence was presented during the hearing about the scope, extent, or duration of the caulking work performed on May 20, 2015.

The defendants respond that Def. Ex. B is the sworn statement for payment submitted by the plaintiff to Zirkelbach on January 15, 2015. This document demonstrates that the plaintiff represented on that date that the work was 100% complete and the plaintiff was entitled to be paid. The plaintiff did not represent in that sworn document that it still needed to complete the caulking work. The defendants assert that the plaintiff is bound by its sworn admission that it was entitled to payment of 100% owned on January 15, 2015.

The Court finds that Exhibit B undermines any claim the plaintiff had that the caulking work performed on May 20, 2015 was part of the final contract. The New Hampshire Supreme Court has held work which is "inconsequential and not done pursuant to the contract but done at the request of the owner to correct defects . . . could be found not to be such as to extend the duration of plaintiff's lien." Bader Co. v. Concord Elec. Co., 109 N.H. 487, 489 (1969) (quotation omitted). In this case the plaintiff could have preserved its right to extend the lien by representing on January 15, 2015 that it still needed to complete some work and, therefore, was not entitled to full payment at that time. Because it represented that the work was 100% complete, the Court finds that the work performed on May 20, 2015—both the repair of the panels and the caulking—was remedial. The 120 days began to run on January 15, 2015. Accordingly, the failure to perfect the lien within that time is "fatal" and the lien must be lifted. See Tolles-Bickford Lumber Co. v. Tilton Sch., 98 N.H. 55, 57 (1953).

The plaintiff has not otherwise established it is entitled to a pre-judgment attachment pursuant to RSA 511-A:3 because the defendants proffered that they would be able to satisfy the judgment if the plaintiff does prevail after trial on the merits. The plaintiff presented no evidence to counter that representation.

Because the attachment should not have been granted for the reasons stated above, the Court does not need to address the other arguments presented by the defendants. Accordingly, the *ex parte* attachment is dissolved.

SO ORDERED.

11/25/2015
DATE

N. William Delker
Presiding Justice