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SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

SHD Glenbrook Gardens, LLC v. D.S.O. Mechanical Corp.

FSTCV186036725S

August 15, 2019, Filed August 15, 2019, Decided
THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Alex V. Hernandez, J.

Alex V. Hernandez

MEMORANDUM OF DECISION

SUMMARY

The plaintiff, SHD Glenbrook Gardens, LLC, brought this matter to revoke a mechanic's lien filed by the defendant, D.S.O. Mechanical Corp., identified hereinafter as "SHD" or plaintiff, and "D.S.O." or defendant, respectively. In the alternative, the plaintiff moves the court to reduce the lien amount.

A hearing was held before this court on March 19, 2019. The court has carefully considered all of the testimony, exhibits and legal submissions by the parties and finds that the plaintiff has demonstrated by clear and convincing evidence that the subject lien overstates the amount due. For the reasons and findings set forth herein, the court directs that the lien amount shall be reduced to $16,878.89.

APPLICABLE LEGAL PRINCIPLES

Under Connecticut's mechanic's lien statutes, *General Statutes §49-33* et seq., "a contractor can put a lien on real estate for claims of more than ten dollars for materials furnished or services rendered in making repairs or improvements to the real estate affected . . . The lien can be foreclosed on in the same manner as a mortgage." (Citation omitted.) *Dehm Drywall, LLC v. Geary*, Superior Court, J.D. of Windham, Docket No. CV-08-5003665-S, 2011 Conn. Super. LEXIS 2296 (4/20/11, Vacchelli, J.).

"Although the mechanic's lien statute creates a statutory right" in derogation of the common law . . . its provisions should be liberally construed in order to implement its remedial purpose of furnishing security for one who provides services or materials." (Citations omitted; internal quotation marks omitted.) *F.B. Mattson Co. v. Tarte*, 247 Conn. 234 , 719 A.2d 1158 (1998).

A mechanic's lien, however, "can only be enforced to the extent that there is a 'lienable fund' available against which it can be applied." *Id .* "The statutory limitations on lienable funds as applicable to subcontractors are set forth in *General Statutes §§49-33* and 49-36 ." (Footnotes omitted.) *ProBuild East, LLC v. Poffenberger*, 136 Conn.App. 184 , 45 A.3d 654 (2012).

The lienable fund statutes pertinent to the present matter are §§49-33(e) and (f) , and §§49-36(a) and (c) . General Statutes §49-37 allows for the substitution of a bond in place of a mechanic's lien. Pursuant to this statutory scheme, "[a] subcontractor is subrogated to the rights of the general contractor through whom he claims, such that a subcontractor only can enforce a mechanic's lien to the extent that there is unpaid contract debt owed to the general contractor by the owner." *ProBuild East, LLC v. Poffenberger, supra* , 136 Conn.App. 191-92 . A second tier subcontractor is similarly subrogated to the rights of the general contractor through whom he claims. See *Seaman v. Climate Control Corp.*, 181 Conn. 592 , 436 A.2d 271 (1980) (holding that second tier subcontractor can be subrogated to general contractor's claims against owner even where first tier subcontractor has been fully paid).

"Those who provide services or materials in connection **[*2]** with the construction of a building are entitled to claim a lien on the land that they have improved if they fall into one of two categories. Lienors are protected if

they have a claim either (1) by virtue of an agreement with or the consent of the owner of the land, or (2) by the consent of some person having authority from or rightfully acting for such owner in procuring labor or materials . . . Lienors in the second category must give timely notice of their intent to claim a lien in order to perfect their lien, while those in the first category need not give such notice . . . Lienors in the second category include subcontractors and persons who furnish materials or services by virtue of a contract with the original contractor or with any subcontractor, that is to say at least first and second tier subcontractors." (Citations omitted; footnote omitted.) *Id .*, 595-96.

" General Statutes §§49-33 and 49-36 . . . define and delimit the fund to which a properly noticed mechanic's lien may attach. Both of these sections start with the proposition that no mechanic's lien may attach to any building or land in an amount greater than the price which the . . . owner has agreed to pay to the general contractor for the building being erected or improved. This amount may be diminished to the extent that it exceeds the reasonable cost . . . of satisfactory completion of the contract plus any damages resulting from . . . default for which [the general contractor] might be held liable to the owner . . . The amount may be diminished further by *bona fide* payments, as defined in section 49-36 , made by the owner [to the general contractor] before receiving notice of [the mechanic's] lien or liens." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Rene Dry Wall Co. v. Strawberry Hill Associates*, 182 Conn. 568 , 438 A.2d 774 (1980).

Pursuant to the subrogation theory, if a general contractor has a surviving right against the owner, so does the subcontractor. It is only in circumstances where the general contractor would not have a surviving right against the owner—e.g., where a general contractor is terminated or defaults on the original contract and the owner is forced to complete the contract in excess of its original price, or where a general contractor is paid in full *prior to* placing a lien on the owner's property—that a subcontractor will be prevented from realizing its equitable entitlement to the lien that would otherwise attach in favor of the general contractor.

General Statutes §49-33(a) provides: "If any person has a claim for more than ten dollars for materials furnished or services rendered *in the construction, raising, removal or repairs of any building or any of its appurtenances or in the improvement of any lot or in the site development or subdivision of any plot of land*, and the claim is by virtue of an agreement with or by consent of the owner of the land upon which the building is being erected or has been erected or has been moved, or by consent of the owner of the lot being improved or by consent of the owner of the plot of land being improved or subdivided, or of some person having authority from or rightfully acting for the owner in procuring **[*3]** the labor or materials, the building, with the land on which it stands or the lot or in the event that the materials were furnished or services were rendered in the site development or subdivision of any plot of land, then the plot of land is subject to the payment of the claim." (Emphasis added.) In turn, General Statutes §49-33(b) provides that: "The claim is a lien on the land, building and appurtenances or lot or in the event that the materials were furnished or services were rendered in the site development or subdivision of any plot of land, then on the plot of land and the claim takes precedence over any other encumbrance originating after the commencement of the services, or the furnishing of any such materials, subject to apportionment as provided in section 49-36 ."

"[T]o be the subject of a mechanic's lien, the materials for which a lien has been claimed must not merely have been furnished for, or delivered to the site of, the particular building or improvement, but must actually also have been used in its construction . . . The rationale for this rule is that it is equitable to grant a lien against property that has increased in value by virtue of the use of materials and, conversely, that it is not equitable to burden the property with a lien to secure the price of materials that never entered the construction. Similarly, we have construed the meaning of 'services' to be confined to services that are of a mechanical nature or to those services related to the construction of a building or skilled workmen using tools, machinery and other equipment to improve the land." (Citation omitted.) *Thompson & Peck, Inc. v. Division Drywall, Inc.*, 241 Conn. 370 , 696 A.2d 326 . Section 49-33 does not extend the availability of a mechanic's lien to "materials that have not enhanced the property in some physical manner, laid the groundwork for the physical enhancement of the property or that did not play an essential part in the scheme of physical improvement." *Id .*, 380.

DISCUSSION

A. The Contract Price

The first step in resolving a disputed mechanic's lien is to determine the amount of the contract price. The parties agree that the total amount of the contemplated subcontract price is *$394,274.66*. Plaintiff's Post-Hearing Brief (Dkt. #103.00), p. 1 and Post-Hearing Brief of D.S.O. Mechanical Corp. (Dkt. #105.00), p. 8.

As set forth above, the next step in resolving a disputed mechanic's lien is to calculate the total amount of payments. Again, the parties agree that payments were made by the plaintiff in the amount of *$237,807.89. Id.*

B. Disallowed Lien Claims

The defendant's lien amount reflects "retainage" payments withheld from subcontrator D.S.O. by the general contractor, Stone Harbour.

Retainage of payment provisions are unique to the construction industry. Governed by statute, and-provided for in the construction contract or subcontract, retainage represents the practice of withholding a portion of a payment in order to insure against incomplete or unsatisfactory work. (See, e.g., Connecticut General Statutes, Section 42-158k .) Retainage provisions may be set forth either in the contract between the owner and the general contractor **[*4]** or, as here, in the subcontract between the general contractor and the subcontractor.

Defendant asserts that, "[i]t is the position of DSO that retainage being withheld by *Stone Harbour* is due and owing and is properly included as part of its mechanic's lien . . . the subcontract does not provide that the retainage can be withheld indefinitely. DSO was not declared in default. *Stone Harbor* just decided it 'no longer required the services' of DSO . . . *Stone Harbor is holding 5% retainage on all work and materials completed by DSO*." Post-Hearing Brief of D.S.O. Mechanical Corp., pp. 11-12, emphasis added. The defendant's claim is self-evidently self-defeating. Stone Harbour is not a party to this litigation. To the extent that subcontractor D.S.O. is seeking the release of payments retained by general contractor Stone Harbour, defendant's only recourse is to seek payment from Stone Harbour.

Accordingly, the defendant may not include retainage payments which may be due from the general contractor in its mechanic's lien. The court calculates that $13,404.53 of the challenged lien includes disallowed retainage payments as calculated below.

The court accepts as credible the testimony of plaintiff's witness, Gerard ("Jerry") Kiley of Stone Harbour, the general contractor on the project. His testimony carefully reviewed a number of exhibits. He further testified that—based upon his review of the exhibits and his examination of the building—that D.S.O. failed to deliver approximately $130,684.02 worth of value on the contract. Kiley, Tr. 3/19/ 2019, pp. 64-94. At pages 1 and 14, footnotes 1 and 13 of the Plaintiff's Post-Hearing Brief, plaintiff acknowledges that this value should be adjusted downward by $4,500.00 to *$126,184.02*. The court adopts this concession and conclusion as clearly and convincingly established by the various exhibits and testimony.

The parties agree that the total value of the contemplated subcontract was $394,274.66. Deesso, Tr. 3/19/ 2019, p. 54. Thus, the value of completed work is equal to the difference between the contemplated subcontract price and uncompleted work, calculated as follows. $394,274.66 - $126,184.02 = *$268,090.64*. The subcontract agreement between Stone Harbour and D.S.O. provided that 5% would be withheld as retainage on completed work. Thus, the amount of retainage improperly included in the proffered lien is equal to 0.05 x $268,090.64 = *$13,404.53*.

The balance due under the contract must next be scrutinized to determine whether all of the claimed work was actually completed and whether purchased materials were actually used in the project to enhance the value of the property. The plaintiff is also entitled to credits for additional expenses incurred to complete any unfinished work and for expenses to remediate any work which was improperly performed. Finally, any requests for payments which were not authorized—whether billed by mistake or fraud—must be deducted as well.

The court finds that the plaintiff established with clear and convincing evidence that the following amounts represent either charges for work which was **[*5]** not completed or materials which were not actually installed and made part of the subject property, and

which, thus, must be subtracted from the claimed lien amount.

Installation of plumbing fixtures—($28,000.00)

Naviens—($4,000.00)

Water Meters—($15,000.00)

Close out Documents—($5,000.00)

Booster Pump—($38,000.00)

Fixtures—($12,000.00)

Change Order #10—($1,000.00)

Gas Piping for 1st Floor—($3,000.00)

External, 1st Floor Water Spigot—($3,500.00)

Pumps—($7,684.02)

Elevator Pump—($9,000.00)

Total Disallowed Charges—(*$126,184.02*)

C. Total Adjusted, Allowable Lien Amount

The total, permissible lien amount can now be calculated as the difference between the balance due on the contract minus impermissible retainage and the total disallowed charges.

Adjusted Balance Due—$156,466.77

Impermissible Retainage—($13,404.53)

Total Disallowed Charges—($126,184.02)

Total Adjusted, Allowable Lien Amount
$16,878.89

CONCLUSION

The plaintiff's motion to discharge the mechanic's lien is denied.

The plaintiff, however, has demonstrated by clear and convincing evidence that the lien overstates the total adjusted, allowable lien amount as calculated above. The plaintiff's alternative motion to reduce the lien amount, therefore, is granted and the lien is ordered reduced to $16,878.89.

Alex V. Hernandez, J.