

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Rockingham Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **B & B Drywall, Inc. v Calamar Construction Management, Inc., et al**
Case Number: **218-2016-CV-01024**

Enclosed please find a copy of the court's order of November 30, 2017 relative to:

Defendants' Motions to Post Bond or Cash -

November 30, 2017

Maureen F. O'Neil
Clerk of Court

(398)

C: Rodney L. Stark, ESQ; Jamie N. Hage, ESQ; Kathleen A. Davidson, ESQ; Douglas J. Miller, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

B & B Drywall, Inc.

v.

Calamar Construction Management, Inc. and RM16A Holdings, LLC

2016-cv-01024

B&B Drywall, Inc.

v.

Calamar Construction Management, Inc. and RM24 Holdings, LLC

2016-cv-1194

Order on Defendants' Motions to Post Bond or Cash

Defendants RM24 Holdings, LLC and RM16A Holdings, LLC (collectively "Holdings") move for leave to file a bond or the amount of cash in dispute and thereby dissolve the mechanics' liens on their properties in Concord and Londonderry. For the reasons stated below, the motions are GRANTED IN PART. The Court will dissolve the mechanics' liens upon the payment into court of all funds in dispute.

Plaintiff B & B Drywall, Inc. ("B & B") brought suit claiming that it is owed \$129,020.57 in connection with drywall work done at a construction project for senior housing in Londonderry, New Hampshire and \$165,343 at a similar construction projection in Concord. B & B's contract on both projects was with the general contractor, Calamar Construction Management, Inc. ("Calamar"). RM 24 Holdings is the

owner of the project in Concord. RM16A Holdings owns the project in Londonderry.

B & B successfully sought an *ex parte* mechanics' lien against Holdings' properties in both cities. On December 13, 2016 a hearing was held on the mechanics' liens. Holdings objected to the lien, arguing *inter alia* that it had paid all sums owed to Calamar and thus, under RSA 447:6, it is not liable to B & B and, therefore, a mechanics' lien cannot be maintained. The Court disagreed, concluding on the record that *inter alia* B & B had raised a sufficient question as to whether the transactions between Holdings and Calamar were arms-length. The Court denied a motion by RM16A Holdings for reconsideration.

Holdings now seeks leave to post a bond or pay into court the amount in dispute in order to dissolve the mechanics' liens. Defendants argue that the liens are preventing them from refinancing a number of senior housing properties, a refinancing that they say is critical given certain issues facing their business partner.

In support of its request, Holdings points to RSA 511:48 which states:

A defendant whose interest in real estate is attached on mesne process may apply by a petition in writing to the court having jurisdiction over the underlying matter to have the attachment released, and upon reasonable notice to all parties interested, or their attorneys, and hearing, the court may order the petitioner to give bond to the plaintiff, with sufficient sureties, conditioned to pay the judgment which may be recovered by the plaintiff, with his costs on such petition, within 60 days of judgment.

The provision was enacted in 1879, almost 100 years before RSA c. 511-A, which established the current procedure for seeking attachments, was enacted. Holdings argues that the general use of "mesne process", a term that essentially means a prejudgment attachment, encompasses all prejudgment attachments including those issued under the mechanics' lien statute. B & B objects. Its argument focuses exclusively on the absence of any language in RSA c. 447 that permits a court to

substitute a bond for a mechanics' lien. Significantly, when asked during the hearing on Holdings' motion as to how it would be worse off in the event that Holdings paid the disputed funds into court and the mechanics' lien was dissolved, B & B could not articulate a single reason so long as the funds paid into court were earmarked to go to the prevailing party.

Analysis

Resolution of this issue requires the Court to engage in statutory interpretation, the principles of which are well-settled. The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *In re Carrier*, 165 N.H. 719, 721 (2013). The Court "must give effect to all words in a statute, and presume[s] that the legislature did not enact superfluous or redundant words." *State v. Thiel*, 160 N.H. 462, 465 (2010). The Court also "do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Carrier*, 165 N.H. at 721. Moreover, the Court must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.* "When interpreting two statutes that deal with a similar subject matter, [the Court] construe[s] them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Holt v. Keer*, 167 N.H. 232, 241 (2015) (quotation omitted). While the Court "interpret[s] legislative intent from the statute as written," it also "interpret[s] statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.* If the statutory language is ambiguous, the Court can consider legislative history in conducting its analysis. See *Laramie v. Stone*, 160 N.H. 419, 436 (2010). "A statute is ambiguous if its 'language is subject to more than one reasonable interpretation.'" *Attorney General*

v. Loreto Publ'ns, Inc., 168 N.H. 68, 74 (2016) (quoting *Appeal of Naswa Motor Inn*, 144 N.H. 89, 90 (1999)).

Although B & B is correct in noting the absence of a specific provision in RSA c. 447 that authorizes the posting of a bond or payment of cash in lieu of a bond the overall, the overall statutory scheme supports this result. It is important to remember that both RSA c. 447 and RSA 511:48 preceded RSA c. 511-A and that chapter 447 preceded RSA 511:48. Thus when RSA 511:48 was enacted in 1879, by its broad terms it would have applied to c. 447, which was already in existence in 1879. See *Moynihan Lumber of Plaistow, LLC v. DeStefano & Assoc., Inc.*, No. 218-2017-CV-0590 (August 3, 2017) (dissolving mechanics' lien attachment under RSA 511:48 upon the owner's filing of a bond) (*Delker, J.*). By extending its application to any defendant whose interest is attached by "mesne process," the statute clearly applies to mechanics' liens, which are, after all, a "mesne process" or prejudgment process. Moreover, application of RSA 511:48 to mechanics' liens is completely consistent with the purpose behind the mechanics' lien statute. See *Alex Builders & Sons, Inc. v. Danley*, 161 N.H. 19, 23-24 (2010). "[T]he purpose of the mechanics lien law is remedial, to guarantee effective security to those who furnish labor or materials that are used to enhance the value of the property of others." *Id.* As recognized by B & B during the hearing, the payment of cash into court provides B&B with at least as much security as a mechanics' lien.

Accordingly, the only potential benefit to B & B of maintaining the mechanics' lien is tactical, the ability to exert leverage over Defendants given their professed need to conduct a refinance of all of the senior housing properties. That would clearly be a misuse of the mechanics' lien statute, a matter of concern to the Court because the

device creating the leverage is a statutory creation. *Cf. Peter Fuller Enterprises, Inc. v. Manchester Sav. Bank*, 102 N.H. 117, 122 (1959). In *Peter Fuller*, the property owner sought to replace a mortgage with alternative security. *Id.* The New Hampshire Supreme Court held that there is “no law or judicial power by which considerations of equity may reform contracts which are free from legal attack on grounds of fraud and mistake.” *Id.* The critical difference here is that the problematic security is not the product of bargaining between the parties but a statutory creation. In *Danley*, the supreme court noted that the mechanics’ lien statute should not be subject to “strict construction” against a contractor in view of its remedial purpose. The corollary to that principle is that the statute should not be narrowly construed against a property owner when the plaintiff’s use of the statute is not at all remedial but rather tactical, i.e. an attempt to gain what is really an unfair advantage.

The New Hampshire Supreme Court instructs courts to interpret statutory language “in light of policy or purpose sought to be advanced by the statutory scheme” and to read multiple statutes in such a way that leads to “reasonable results.” *Holt*, 167 N.H. at 241. As previously noted, interpreting RSA 511:48 to not apply to mechanics liens is not only inconsistent with the broad language used in the statute, but is anathematic to the purpose behind the mechanics’ lien statute because it allows the subversion of that statute, allowing it to serve as a sword for forcing capitulation by owners rather than a shield to secure or protect valid claims. B & B’s clear acknowledgment that paying cash into court will provide as good security as a lien precludes any argument that substituting cash for the loan is inconsistent with the purpose of the statute.

This Court recognizes that there are other decisions from this court arriving at a

different conclusion. See, e.g., *Consolidated Electrical Distributors, Inc. v. SES Concord Company, LP*, Merrimack Superior Court, 89-CV-571, 579 (November 21, 1989 (*Manias, J.*)). In *Consolidated*, the superior court rejected the application of RSA 511:48 on the ground that it concerns general attachments rather than mechanics' liens. While that point is true, the analysis in *Consolidated* overlooks the fact that RSA 511:48 was enacted after the mechanics statute was enacted. Had the legislature intended to prevent it from applying to mechanics' liens the legislature could have included limiting language. Instead, it simply used the broad phrase of "real estate [] attached on mesne process." Moreover, the text of RSA 511:3 makes clear that mechanics' liens would have fallen within the definition of attachments obtained through "mesne process" as RSA 511:3 states that real estate could be attached through a "writ of mesne" simply by leaving an attested copy of the writ with the register of deeds. That was the common procedure for both mechanics' liens and other attachments prior to the enactment of RSA 511-A.

The court in *Consolidated* also expressed concern that a bond could interfere with a contractor's perfection of his mechanics' lien and priority, which the court suggested might be an issue in bankruptcy. Whatever merit there may have been to that concern in 1989, it would not apply to funds actually paid into court in connection with specific claims as the bankruptcy court has made clear that such funds are exempt from the bankruptcy estate when they are intended for a "special purpose." *In re Hinsdale Greyhound Racing Ass'n*, 417 B.R. 162, 165 (Bankr. D. N.H. 2009). In other words, priority would not be an issue as these funds would be held by the court and dedicated to B & B in the event that B & B prevails (at the point that B & B does not prevail or recovers less than the amount posted, the balance would be returned to


Defendants and thus become part of the bankruptcy estate if Defendants were to declare bankruptcy). On balance, the Court does not find the analysis in *Consolidated* persuasive.

Conclusion

For the foregoing reasons, Holdings' motions are GRANTED IN PART. Upon Holdings' payment into the court of \$142,000 in the Londonderry case and \$114,000 in the Concord case, the Court will issue orders dissolving both liens.

So Ordered.

November 30, 2017
Date



David A. Anderson
Associate Justice