

COPY

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Consolidated Electrical Distributors, Inc.

v.

SES Concord Company, Limited Partnership
Clark-Kenith, Inc. and Service Electric Company, Inc.

and

Service Electric Company, Inc.,

v.

SES Concord Company, Limited Partnership, and
Clark-Kenith, Inc.

89-C-571

89-C-579

ORDER ON DEFENDANTS' MOTION TO RELEASE
MECHANICS LIEN ATTACHMENT

FACTS: Defendant SES Concord Company, Limited Partnership ("SES") is the owner of a "Refuse to Energy" facility recently constructed in Concord, New Hampshire. Defendant Clark-Kenith, Inc. ("Clark-Kenith") served as the general contractor for the construction project. Clark-Kenith subcontracted the electrical work for the project to Service Electric Company, Inc. ("Service Electric"). Service Electric furnished labor and materials which were incorporated into the "refuse to energy" facility. Consolidated Electrical Distributors, Inc. ("Consolidated") provided electrical supplies to Service Electric which were incorporated into the construction project.

On approximately August 1, 1989, Service Electric perfected its mechanics lien by obtaining an ex parte order of

attachment pursuant to RSA 511-A:8 III and RSA 447. The attachment, which was duly recorded, secured a labor and materials lien in the amount of \$740,213.54 against the property. Subsequently, Service Electric moved to amend the lien amount to \$937,422.30 to cover work and material, exclusive of interest.

On July 28, 1989, Consolidated perfected its mechanics lien against the said property in the amount of \$75,808.01. Consolidated has since moved to increase the lien amount to \$90,000.00 to cover interest, late charges and collection costs.

The defendants SES and Clark-Kenith have moved to release the attachments. SES and Clark-Kenith do not challenge that Service Electric or Consolidated have complied with the requirements of RSA 447. Rather, the defendants assert that the provision of a mechanics lien pursuant to RSA 447 is modified by the attachment requirements contained in RSA 511 and in particular RSA 511-A:3. More particularly, the defendants maintain that under RSA 511-A:3 plaintiffs must show a reasonable likelihood of success on the merits. Further, if the plaintiff meets this burden, the defendant may then prevent the imposition of the attachment by establishing that its assets will be sufficient to satisfy such judgment. Defendants state that the attachments on the property should be released upon the defendants' posting a bond pursuant to RSA 511:48.

At a hearing on the motions, plaintiffs, Consolidated and Service Electric, established probable cause on their basic right

to recovery and the amount thereof. However, to the extent that it may later become an issue, the court finds that the plaintiffs have demonstrated a likelihood of success on the merits. Defendant Clark-Kenith has established that it has sufficient assets to satisfy a judgment.

The court denies defendants' motion to release the attachment for the reasons that follow.

RSA 447: The purpose of RSA 447 is to afford special protection to those who furnish labor or materials used to enhance the property of others. Innie v. W & R, Inc., 116 N.H. 315, 317 (1976). The mechanics lien differs from a general attachment in several ways.

First, the mechanics lien comes into existence upon the providing of labor and materials by virtue of the statute. RSA 447:2. Thayer v. Padelford, 69 N.H. 301 (1898). Second, the lien is later perfected through attachment of the particular property upon which it exists. RSA 447:9 and 10. A failure to attach the particular property will be fatal to the mechanics lien. Rodd v. Titus Construction Co., 107 N.H. 264 (1966). The equity of subjecting the enhanced property to the mechanics lien is apparent. Third, the effect of perfection is to relate the date back to when the material or services were provided. Fourth, the mechanics lien has priority over other non-tax liens. RSA 447:9. Priority is key when there is "a long line of creditors and a short list of assets." Tolles-Bickford Co. v. Tilton School, 98 N.H. 55, 58 (1953).

To gain these benefits, the claimant must strictly comply with RSA 447 and satisfy due process in accord with RSA 511-A. RSA 447 requires the lien claimant to observe the following procedures. The lien must be perfected within 90 days after the final work. RSA 447:9. The writ must describe the said property. Wurm v. Reilly, 102 N.E. 558 (1960). The writ must expressly state a purpose to secure a mechanics lien. RSA 447:10. A subcontractor or materialman must notify the owner in writing that a lien will be claimed. RSA 447:5. The lien amount is limited to the amount then due the contractor or that thereafter becomes due. Westinghouse Electric Supply Co. v. Electromech, Inc., 119 N.E. 833, 835 (1979). A written account must be made to the owner. RSA 447:8. These limitations protect the owner from unknown liability to a subcontractor or materialman and from the possibility of having to pay more than once for the same work or supplies. Westinghouse, 119 N.E. at 837.

Thus, the legislature has balanced the competing concerns of the subcontractor and owner by affording special protection to the mechanics lien claimant who strictly complies with the provisions of RSA 447. The issue becomes, then, to what extent do the provisions of RSA 511-A modify the mechanics lien.

RSA 511-A: The legislative purpose of RSA 511-A was to ensure due process in prejudgment attachments on all civil actions. State v. Tapply, 124 N.E. 315, 318 (1983). RSA 511-A:8 provides that in exceptional circumstances an attachment may be

ordered in advance of notice to the defendant. Among these exceptional circumstances is the mechanics lien. RSA 511-A:8, III. Nevertheless, the legislature indicated its intent that mechanics liens were bound by 511-A's requirement of notice and a hearing. Chagnon Lumber Co. v. Stone Mill Construction Corp., 124 N.H. 820, 823 (1984).

However, RSA 511-A is "a mixture of substantive and procedural law." Chagnon, 124 N.H. at 822. In the present case, defendants concede they received notice and a hearing. Rather, they contend, RSA 511-A:3 must be applied to the mechanics lien. Under RSA 511-A:3 plaintiff must first show a reasonable likelihood of success on the merits. Further, having met this burden, the plaintiff will not be entitled to the attachment if defendant has sufficient assets to satisfy a judgment.

Application of RSA 511-A to RSA 447: When interpreting two statutes which deal with a similar subject, the court's task is to interpret them so that they are consistent with each other, lead to reasonable results and effectuate the legislative purpose. Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 282 (1988).

In the present context, the court finds that the sufficiency of assets test contained in RSA 511-A:3 is inapplicable to mechanics liens proceedings. Due process is satisfied by following the procedure outlined in RSA 511-A:8. However, applying RSA 511-A:3 would frustrate the underlying purpose and design of the mechanics lien statute.

Each exception in RSA 511-A:8 addresses a special situation which necessitates not only a deviation from the preattachment notice of RSA 511-A:2 but also from the particular hearing provisions of RSA 511-A:3. For these situations, RSA 511-A:8 specifies the appropriate procedure to be followed. It is necessarily different from that contained in RSA 511-A:3.

Under RSA 511-A:8, the mechanics lien claimant must first apply to the court for an ex parte attachment. To obtain it, the plaintiff must establish "probable cause... of his basic right to recovery and the amount thereof." RSA 511-A:8 preamble. Once the attachment is granted, the plaintiff must provide notice. Thereafter, a hearing will be granted upon the defendant's request. RSA 511-A:8, final paragraph.

The content and focus of that hearing is whether the plaintiff has met its burden under RSA 511-A:8 which the defendant may rebut. Thus, defendant may challenge plaintiff's basic right to recovery under mechanics lien law, the lien amount, or notice provisions.

Under RSA 511-A:3 the plaintiff would not only have to show "a reasonable likelihood of recovery of judgment" but also would lose its entitlement to the attachment, if the defendant showed it possessed sufficient assets to satisfy a judgment.

The sufficiency of assets test makes no sense when applied to the exceptions in RSA 511-A:8. For example, under RSA 511-A:8, II an attachment necessary to vest quasi in rem jurisdiction is not premised on the financial condition of a

defendant. Furthermore, under RSA 511-A:8, III, sentence one, an attachment will be permitted to prevent transfer of a unique chattel to a bona fide third party. Because of its unique characteristics, the chattel cannot be replaced with another item. Consequently, the sufficiency of defendant's assets is simply irrelevant.

Similar concerns are present in a mechanics lien case. An element of a mechanics lien is the attachment of the property for which the labor or materials were supplied. RSA 447:2 makes this clear. If the plaintiff was precluded from attachment within the requisite 90 days, its right to perfect would be cut off. With the secured status would vanish its special priority.

To deny security to one mechanics lienor because a defendant is well-to-do, yet grant the attachment when a defendant is less affluent creates a disparate effect on equally deserving claimants. Further, in the event of later reversals, an unsecured claim would be relegated to being one in "a long line of creditors [for] a short list of assets." Tolles-Bickford Co. v. Tilton School, 98 N.H. at 58.

To date our New Hampshire Supreme Court has affirmed the perfection procedures under RSA 511-A:8. Pine Gravel Inc. v. Cianchette, 128 N.H. 460 464-65 (1986). It has not applied the hearing provisions in RSA 511-A:3 to mechanics liens. Applying RSA 511-A:3 to mechanics liens would conflict with the legislative purpose of RSA 447, create discord between RSA 511-A and RSA 447, and perhaps lead to unreasonable results.

The Bond: The defendants also request that the court dissolve the attachment and substitute a bond for security, pursuant to RSA 511:48. Failure to do so, defendants contend, will result in plaintiffs being enabled to use the attachment as a vehicle of abuse to "hold up" the defendants. The court declines to substitute a bond for the following reasons.

RSA 511:48 concerns general attachments. It does not address the particular demand of RSA 447 that the mechanic lien be perfected through attachment of the property. RSA 447, on the other hand, makes no provision for substituting a bond for an attachment. A general statute which permits the court in its discretion and as justice requires to order other security does not effect the discharge of a mechanics lien. 57 C.J.S. Mechanics' Liens §232.

Although the defendants have articulated sound reasons for permitting substitution of a bond, reasons which have persuaded other states to pass laws enabling the courts to "bond off" a mechanics lien attachment, New Hampshire has not passed such a law. M. Shapiro and Sons, Inc. v. Yates Construction Co., 231 S.E.2d 497 (Ga. 1976); Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 1982).

In the absence of such a statutory provision, it is unclear what the effects of substituting a bond would be on the perfection and priority status of the mechanics lien. In the event of bankruptcy, these issues could become critical.

The legislative intent of RSA 447 clearly encompassed subjecting an owner's property to a lien. The court will not

intervene to readjust the relationships of the parties under the circumstances presented by this case.

Accordingly, defendants' motions to release the mechanics lien attachments in the above-captioned cases are DENIED.

So ordered.

11/21/89
Date

[Signature]
Presiding Justice