THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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NOTICE OF DECISION

File Copy

Case Name: **Dandreo Brothers General Contractors and Masonry, LLC v CMAB Associates II, LLC**
Case Number: **218-2018-CV-00653**

Enclosed please find a copy of the court's order of January 09, 2019 relative to:

re; Mechanic's Lien Attachment

January 10, 2019

Maureen F. O'Neil
Clerk of Court

(504)

C: Michael Hurley Darling, ESQ; Michael D. Ramsdell, ESQ; Lyndsee D. Paskalis, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

DANDREO BROTHERS GENERAL CONTRACTORS
AND MASONRY, LLC.

V.

OLD TYME MANUFACTURING 4 CORP.
and
CMAB ASSOCIATES II, LLC

218-2018-CV-653

ORDER

The matter before the court is a motion filed by defendant CMAB Associates II, LLC's ("the Landlord") to discharge a mechanic's lien on its real estate. The

For reasons set forth below, the motion is GRANTED.

Factual Background And Procedural History

Defendant Old Tyme Manufacturing 4 Corp ("the Tenant") is a Massachusetts corporation that operates a charity poker room in Salem, New Hampshire. The Landlord is a New Hampshire limited liability company that owns the land and building occupied by the Tenant. The record does not suggest anything other than an arm's length, commercial relationship between the Landlord and Tenant. As best the court can tell from the record created by the parties, the Landlord receives rent from the Tenant but is not otherwise involved or affiliated with the tenant or its owners.

The Landlord and the Tenant first entered into their commercial lease in January 2017. The lease term is five years but the Tenant has the right to extend the lease for

two additional five year terms. Thus, the Landlord committed itself to leasing the property until December 31, 2032.

The lease required the Tenant to renovate the building and fit-up the property according to plans that the Landlord had to approve. The lease characterizes the renovation and fit-up as a tenant "construction obligation." Based on the record, the court believes that the purpose of using this language was to clarify beyond all doubt that the Tenant was responsible for the fit-up of the interior and exterior of its leasehold. Likewise, the lease allocated to the tenant the responsibility to undertake and pay for the maintenance and repair of every aspect of the premises, including but not limited to the roof, the exterior of the building, the HVAC system and the land.

After leasing the premises, the Tenant entered into a construction contract with plaintiff Dandreo Brothers General Contractors and Masonry LLC ("the Contractor"). The Contractor agreed to serve as the general contractor for the project. According the Landlord's uncontested offer of proof at the motions hearing, the "principals" of the Tenant and the Contractor are brothers. Hearing Audio at 9:19:30. Put another way the Tenant's owner hired his brother's company to do the work.

The Landlord was not a party to the construction contract. As best the court can tell from the limited record, the Landlord played no role in the negotiation of the contract, the determination of the contract price or the selection of the Contractor.

The Contractor's complaint in this case alleges that, although it performed all of the required work and provided all of the necessary materials, the Tenant failed to live up to its payment obligations. The Contractor alleges that the Tenant failed to pay more than $1 million dollars. The Contractor sued both the Tenant and the Landlord for (a)

breach of contract, (b) quantum meruit, (c) unjust enrichment and (d) promissory estoppel.

When the Contractor filed its complaint, it also filed an ex parte motion to perfect a purported mechanic's lien against the Landlord's fee simple interest in the real estate. The Court granted the ex parte motion.[1]

The Landlord moved to dismiss the claims against it and to dissolve the mechanic's lien attachment against its interest in the property. The Landlord argued that it was a stranger to the Tenant/Contractor contract and was not unjustly benefitted by the Contractor's work.

The Contractor responded to the motion to dismiss by voluntarily nonsuiting its claims against the Landlord while simultaneously objecting to the dissolution of the mechanic's lien attachment.

The court notes that the contractor did not seek to perfect its mechanic's lien against the Tenant's leasehold interest in the property. The court also notes that, at the time of the motions hearing, the Landlord was seeking to evict the Tenant for nonpayment of rent.

Analysis

I. The Nature Of A Mechanic's Lien

Mechanics' liens are governed by RSA Chapter 447. As that Chapter makes clear, a mechanic's lien differs significantly from a plain vanilla pre-judgment attachment. Unlike ordinary pre-judgment attachments, a mechanic's lien springs into

[1]The court initially denied the motion by mistakenly checking the wrong box on the motion form. The court then granted the plaintiff's motion for reconsideration and approved the ex parte attachment.

existence the moment that a contractor or subcontractor performs work (or provides materials) and the lien automatically increases in amount according to the progress of the work. Daniel v. Hawkeye Funding, Ltd. Partnership, 150 N.H. 581, 583 (2004), quoting Boulia-Gorrell Lumber Co. v. Company, 84 N.H. 174, 177 (1929). See also, H.E. Contracting v. Franklin Pierce College, 360 F. Supp. 2d 289, 290 (D.N.H. 2005) ("Under New Hampshire law, a mechanic's lien is a statutory right that arises automatically upon the provision of labor or materials.").

A mechanic's lien differs from other judicial attachments in another important respect as well: Once perfected by a judicially approved attachment recorded at the registry of deeds, see RSA 477:10 and RSA 511-A:8,III, a statutory mechanic's lien has priority over all prior claims (except tax liens), RSA 477:9, including all judicial attachments filed after the lien first arose through the provision of labor or materials. See, e.g., In re McLaughlin, BK 2011 WL 1706791, at *3 (Bankr. D.N.H. May 4, 2011) ("After the mechanic's lien is validly perfected, it has priority over any interests that were created after the mechanic's lien first arose."); see generally Audette v. Cummings, 165 N.H. 763, 771 (2013); Lewis v. Shawmut Bank, N.A., 139 N.H. 50 (1994); In re Moultonborough Hotel Group., LLC, 726 F.3d 1 (1st Cir. 2013).[2] Subject to certain exceptions, a mechanic's lien also has priority over construction mortgages. RSA 447:12–a and 447:12-b. The priority given to mechanic's liens reflects the Legislature's purpose "to guarantee effective security to those who furnish labor or materials which are used to enhance the value of the property of others." Alex Builders, 161 N.H. 19, 24

[2]A unrecorded mechanic's lien does not have priority over the interest of a bona fide purchaser for value, Chagnon Lumber Co., Inc. v. Stone Mill Construction Corp., 124 N.H. 820, 823 (1984).

(2010). See also, Audette, 165 N.H. at 771; Innie v. W & R, Inc., 116 N.H. 315, 317 (1976).

II. A Mechanic's Lien Grounded On A Contract With A Tenant Does Not Burden The Fee Simple Interest Of A Passive Landlord

A mechanic's lien can only arise under the circumstances delineated in the statute. Pursuant to RSA 447:2, any person who "by virtue of a contract with the owner" performs labor or furnishes materials for the construction of a building has a statutory lien on (a) the material he furnishes, (b) the "owner's" interest in the building that is the subject of the contract, and (c) "any right of the owner to the lot of land on which [the building] stands.[3]

Thus, the statute makes clear that a lien can only arise "by virtue of a contract" with an "owner." However, the contracting "owner" need not hold a full fee simple interest in the property. This much is apparent from the text of RSA 447:2, which provides that the lien extends to "any right of the owner to the lot of land on which it stands." The language presupposes that other persons may also have interests in the property that are not subject to the lien.

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[3]The full text of RSA 447:2,I is as follows:

> If any person shall perform labor, provide professional design services, or furnish materials to the amount of $15 or more for erecting or repairing a house or other building or appurtenances, or for building any dam, canal, sluiceway, well or bridge, or for consumption or use in the prosecution of such work, other than for a municipality, by virtue of a 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).

Although the New Hampshire Supreme Court has not addressed the specific question of whether a mechanic's lien reaches a passive landlord, the case law from other jurisdictions with somewhat similarly worded statutes (regarding this issue) is relatively clear:

In Hall v. Peacock Fixture & Elec. Co., 475 A.2d 1100, 1102 (Ct. 1984), the Connecticut Supreme Court discharged a mechanic's lien on a landlord's fee simple interest. As in this case, the tenant had a long term lease. The tenant renovated a commercial building to a new use as a Japanese steakhouse. A subcontractor later filed a mechanic's lien against the landlord's fee simple interest. The Connecticut Supreme Court discharged the lien because (a) neither the general contractor nor the subcontractor ever dealt with the landlord, (b) the tenant did not act as the landlord's agent (and "[t]raditionally, a lessee is not considered the agent of a lessor within the contemplation of a mechanic's lien statute merely by virtue of the relation of landlord and tenant"), (c) "[t]he mere granting of permission for work to be conducted on one's property has never been deemed sufficient to support a mechanic's lien against the property[,]" and (d) a claim of unjust enrichment without any grounding in contract was insufficient to trigger a mechanic's lien. See also, Kansas City Heartland Construction Co. v. Maggie Jones Southport Cafe, Inc., 824 P.2d 926, 929 (Kan. 1992):

> The general rule is where a mechanic's lien arises under a contract with a tenant, such lien attaches to the leasehold or tenant's estate only, and not to the reversion, fee, or the estate of the landlord. The rights of the mechanic's lien claimant can rise no higher than those of the person with whom he has contracted or to whom he has furnished labor or materials. . . . Without the authority of the landlord, or his consent, or some act of the landlord to make his estate liable, a tenant cannot charge the land with a lien for labor or materials for constructing or improving a building thereon.

Dunlap v. Hinkle, 317 S.E.2d 508, 511-512 (W.Va. 1984):

> Where the terms of a lease simply authorize a lessee to make improvements to the leased premises, although the improvements become the property of the lessor upon termination of the lease, a party with whom the lessee has contracted to make the improvements may not assert a mechanic's lien against the property interest of the lessor in the leased premises. [citations from 11 jurisdiction omitted]. There must be some other evidence that the lessee was acting as the agent of the lessor in making improvements to the leased premises, however, mere acquiescence or inactive consent by the lessor of the leased premises to the improvements by the lessee is not sufficient to constitute a finding of agency between the lessor and lessee for the purpose of asserting a mechanic's lien against the property interest of the lessor.

Nunley Contracting Co. v. Four Taylors, Inc., 384 S.E.2d 216, 217 (Ga. Ct. App. 1989) (A contract for improvements between a lessee and a materialman does not subject the interest of the lessor to a lien unless a contractual relationship exists between the lessor and the materialman as well."); Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, 576 S.W.2d 794, 805 (Tex. 1978) ("Our courts have long held that a mechanic's and materialman's lien attaches to the interest of the person contracting for construction. Thus, if a lessee contracts for construction, the mechanic's lien attaches only to the leasehold interest, not to the fee interest of the lessor."); Ringland-Johnson-Crowley Co. v. First Central Service Corp., 255 N.W.2d 149, 151 (Iowa 1977) ("The burden is upon a mechanic's lien claimant to prove either an express contract with or on behalf of the lessor or vendor or else to prove such a state of facts as will give rise to an implied contract with him in order to claim a lien against the lessor's realty."); Wilmington Trust Co. v. Branmar, Inc., 353 A.2d 212, 215 (Del. Super. Ct. 1976) ("[W]here labor or materials are supplied to the owner of a leasehold interest in a

structure, the supplier may obtain a mechanic's lien on that leasehold interest, provided all other statutory requirements for a lien are met. In such a situation, the mechanic's lien obtained is limited to the leasehold interest, unless the fee simple owner has expressly consented, in writing, to the performance of the work for which the lien is sought"); Advanced Restoration, L.L.C. v. Priskos, 126 P.3d 786, 792 (Utah Ct. App. 2005) (the short term nature of the lease and the active knowledge and participation of the landlord supported a finding that the tenant was the agent of the landlord for the purpose of contracting with the lienholder); United HVAC, Inc. v. CP/HERS Somerville Corp., 18 Mass. L. Rptr. 577, 2004 WL 3120558 (Mass. Super. Dec. 16, 2004) (no mechanic's lien against landlord's interest when the tenant contracted for improvements to a large commercial building, even though the lease itself contemplated the improvements and the landlord approved the plans); See generally, 74 A.L.R.3d 330, Enforceability Of Mechanic's Lien Attached To Leasehold Estate Against Landlord's Fee.

III. In This Case The Tenant Is The Only Contracting "Owner"

In this case, the Tenant is the contracting "owner" within the meaning of RSA 447:2 because (a) it contracted with the Contractor for improvements to the real estate and (b) it held a long-term lease. Yet, the Contractor did not perfect its statutory lien against the Tenant's interest in the property. Per RSA 447:9, the Contractor's lien against the Tenant's interest dissolved as a matter of law because more than 120 days passed since the completion of the work.

The Landlord is not a contracting owner. It is a passive fee owner that entered into a long-term lease with a commercial tenant who then contracted to improve the

premises. To be sure, the lease required the Tenant to renovate and fit-up the property, for the tenant's benefit, subject to the landlord's approval. But the landlord was not involved in selecting the contractor, negotiating the price or arranging for payment.

Based on the limited record, the court cannot find that the Tenant acted as the Landlord's agent when the Tenant hired a company owned by the Tenant's principal's brother to serve as the Tenant's general contractor. Likewise, the court cannot find that the Tenant was acting for the Landlord as an agent with the capacity to contractually bind the Landlord when the Tenant negotiated contractual price terms. If the Landlord was more actively involved with the project, the operative facts would be known to both the Contractor and the Tenant, yet the record includes no such facts.

Under these circumstances, the Contractor's mechanic's lien is only effective to the extent of the Tenant's interest in the property.

IV. The Tenant Was Not The Landlord's Subcontractor

The Contractor's reliance on RSA 477:5 is misplaced. That statute extends mechanic's lien protection to subcontractors by virtue of the general contractor's contract with the "owner." The Contractor argues that:

(A) The Landlord retained the Tenant as a general contractor; and

(B) The Tenant the subcontracted with work out to the Contractor.

However, this argument mischaracterizes the economic relationships among the parties. The Tenant was not a subcontractor; it was a long-term lessee that was responsible for doing its own renovation and fit-up of the interior and exterior of the premises. The Tenant was not the Landlord's agent; it was the landlord's counterparty

in a lease agreement. It did not act on the Landlord's behalf; it acted as permitted by its lease for its own benefit.

Furthermore, a subcontractor's lien under RSA 447:5 is only valid to the extent of the general contractor's mechanic's lien. In this case, the Tenant never had a mechanic's lien against the Landlord. The Tenant never had a right to payment from the Landlord in connection with the renovation and fit-up. Indeed, the lease specifically places the entire financial responsibility for the project on the Tenant.

V. Matters Beyond The Scope Of The Present Motion

At the motions hearing, the Contractor made a fairness argument, suggesting that the Landlord was unjustly enriched by the Contractor's labor and materials. Whether this is so, and whether the Contractor might have a right to equitable restitution, cannot be resolved based on the evidence in the record. More important, the Contractor has nonsuited its equitable claims and is not seeking a routine prejudgment attachment.

The court opines only that the Contractor lacks a statutory mechanic's lien against the Landlord's fee interest.

Conclusion

The mechanic's lien attachment against CMAB Associates II, LLC is DISCHARGED and DISSOLVED.

January 9, 2019

Andrew R. Schulman,
Presiding Justice