The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

I.B.E.W., Local 490

v.

Maureen Electrical, Inc. and Merrimack Premium Outlets, LLC

NO. 2012-CV-00684

ORDER

The Plaintiff, I.B.E.W. Local 490, (Union") filed a Petition for Ex Parte Attachment of the Defendant's Merrimack Premium Outlets LLC's ("Merrimack ") property, an outdoor shopping mall located in Merrimack, New Hampshire. The attachment was sought to perfect a mechanic's lien under RSA 447:2 and 447:5. The Union alleged that its members supplied construction labor as employees of Defendant Maureen Electrical Inc. ("Maureen"), on various retail stores in the mall and that Maureen was a subcontractor of the general contractor. Based upon the allegations, supported by affidavit in the Petition, the attachment was granted. Merrimack has filed a pleading entitled "Objection to the Ex Parte Attachment and Request For Hearing", alleging in substance that a mechanic's lien is improper because it had no contract with the contractor with whom Maureen subcontracted, and that the contractor contracted solely with the retailers and none of the retailers are its agent. For the reasons stated in this Order, the Ex Parte Attachment is DISSOLVED.

I

The facts in this Order are based upon the parties' offers of proof, and do not

appear to be disputed, but are found only for the purpose of this Order. It appears that Merrimack operates a shopping mall in Merrimack, New Hampshire. Its tenants are well known global retailers, such as Reebok, Ann Taylor, and Estée Lauder. Maureen performed subcontracting work for general contractors who had done work for the retailers who had rented space from Merrimack. While employing union labor, Maureen is contractually obligated to make contributions to the Union's various employee benefit funds. The writ claims that Maureen owes $190,578.01 in unpaid fringe benefit contributions based on hours that its members worked for Maureen at the Outlet. The Union seeks to recover damages from Merrimack by asserting a subcontractor's mechanic's lien under RSA 447:5. Maureen has been sued for breach of contract, and has apparently defaulted.

The writ of summons alleges in substance that the union members supplied construction labor as employees of Maureen, a subcontractor on various retail stores in the outlet, and that it is therefore entitled to a mechanic's lien against Merrimack. In its Objection, Merrimack asserted that neither Maureen nor the general contractor with whom it contracted had any contractual relationship of any kind with Merrimack. The parties agree that Merrimack completed construction of the outlets using a general contractor and subcontractors which did not include Maureen. Merrimack then leased retail space in the outlet to various retailers. The individual retailers hired contractors to "build out" their space and Maureen was hired directly or indirectly by the retailer tenants acting independently of Merrimack.

The leases between Merrimack and its tenants are relatively standard commercial leases. They provide in relevant part that Merrimack is to construct a basic "white room"

that includes finished (unpainted) walls, a storefront, concrete floor, standard finished ceiling, bathroom, HVAC, utilities, and basic electrical, among other things. Merrimack's electrical work, which was not performed by Maureen required installation of an electrical panel, outlets every 25 feet and one fluorescent light for every 100 square feet of floor space, among other things.

The leases allow, but do not require, tenants to construct interior improvements known as "build outs" and establish a procedure for tenants to submit construction plans to Merrimack for approval. The landlord's consent to the "build outs" may not be unreasonably withheld. Merrimack has the right, but not the obligation, to request that interior improvements be removed upon termination of the leases, but improvements otherwise become the property of Merrimack upon termination of the lease with the exception of movable trade fixtures.

Merrimack made an offer of proof, through its general manager, that the tenant improvements are generally of no benefit to Merrimack, because most of the leases are for 10 years, tenant turnover in mall similar to the outlet is extremely small, and when turnover does occur, subsequent tenants typically "gut" the old space before building out to their own unique specifications. Tenant improvements represent a cost to subsequent tenants, and little or no value to the owner and are undertaken, controlled and paid for by the tenants for the tenants' benefit.

The Union argues that the law does not require benefit as a condition of the lease and that "whether or not these tenant fit ups increased the value of the real estate is immaterial; mechanic's lienors need not prove that they enhanced value." Plaintiff's Memorandum of Law in Support Of Attachment, page 2. Plaintiff argues that it is

entitled to a lien because "[a]s long as the tenants had Merrimack's authority to contract for the work done on the premises, and as long as those improvements became Merrimack's property, Merrimack's tenants should be deemed agents of the owner for the purpose of improving the property" and "[n]othing more is needed to conclude that the tenants were Merrimack's agents within the meaning of RSA 447:5." The Court disagrees.

II

As a general rule, courts which have considered agency in the context of mechanic liens for tenant improvements allow such liens only when the lease requires the tenants to undertake the specific improvements at issue. Jennings v. Connecticut Life, Ins. Co., 177 So.2d 66 (Fla. App. 1965). Plaintiff argues that the New Hampshire statute is unique, because unlike most, it expressly includes "agent" in the list of contractees who can subject an owner's land to a mechanic's lien. However, this contention has been rejected by the Iowa courts, construing an Iowa statute which grants a lien "by virtue of any contract with the owner, the owner's *agent*, trustee, contractor or subcontractor...". Under Iowa law, mere permission to renovate, at a tenant's option, does not result in a common-law agency between landlord and tenant even though the improvements become property of the landlord following termination of the lease. Ringland-Johnson-Crowley Co. v. Central Service Corporation, 225 NW 2d 149, 151 (Iowa 1976). In A & W Contractors, Inc. v. Petry, 576 NW2d 112, 114 (Iowa 1998) the court stated that:

> Ordinarily mere knowledge of or consent to the making of improvements by lessee does not subject the interest of the lessor to a mechanic's lien. (Citation omitted). A mechanic's lien claimant must prove either an express or implied contract with or on behalf of the lessor or vendor in order to claim a lien against the lessor's realty. (Citation omitted). The establishment of an express or implied agreement whereby the lessee is contractually bound to improve the lessor's

property is a prerequisite to a plaintiff's successful assertion of its claim.

Even if this burden is met, under Iowa law the claimant must also establish that (1) improvements made will become the property of the lessor in a comparatively short time; (2) the additions or alterations were substantial, permanent, and beneficial to the realty; and (3) the rental payments reflect the increased value of the property as a result of the improvements. Id. at 114 n.2.

None of these conditions are met in the instant case. The improvements will not become the property of the lessor until the end of the lease, in 10 years. The alterations to the property, while substantial and permanent, are not beneficial, but are actually a cost because a new tenant will want to fit up the space it rents for itself. Finally, there is no evidence the rental payments reflect any increased value of the property as a result of the improvements.

Iowa law seems to be consistent with the New Hampshire common law of agency. Common-law agency New Hampshire requires (1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act and (3) the understanding that the principal is to exert some control over the agent's actions. Dent v. Exeter Hospital, 155 N.H. 787, 792 (2007). Here, the retailers were not acting for Merrimack in fitting up their spaces for their particular purposes. While they had the owner's consent to so act, and the principal exercised no control over the retailers' actions; indeed, the lease specifically required that the while the owner must consent to any action of the retailer, that consent cannot not be unreasonably withheld. Under the circumstances, the retailers could not be considered an agent of the owner of the outlet mall, Merrimack.

It follows then, that since Merrimack never contracted with Maureen or general contractor which employed Maureen, and the lessee retailers were not its agent, Petitioner is not entitled to relief against Merrimack. Accordingly, the lien must be dissolved.

SO ORDERED.

1/16/13	Richard B. McNamara
DATE	Richard B. McNamara, Presiding Justice

RBM/