

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

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
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NOTICE OF DECISION

File Copy

Case Name: **Tim McCusker v In-Home Restored, Refound + Reinvented Furniture +
Accessories, LLC**
Case Number: **218-2017-CV-01000 218-2017-CV-01001; 218-2017-CV-01258**

Enclosed please find a copy of the court's order of March 20, 2018 relative to:

Order on Dft's Motion to Release Attachment & Accept Funds to be Paid into Escrow

March 23, 2018

Maureen F. O'Neil
Clerk of Court

(504)

C: Eleanor Wm. Dahar, ESQ; Paul B. Kleinman, ESQ; Sabin R. Maxwell, ESQ

The State of New Hampshire
Superior Court

Rockingham

TIM MCCUSKER

V.

IN-HOME RESTORED, REFOUND + REINVENTED FURNITURE + ACCESSORIES,
LLC

No. 218-2017-CV-1000

AND

PATRICK MCCUSKER

V.

IN-HOME RESTORED, REFOUND + REINVENTED FURNITURE + ACCESSORIES,
LLC

NO. 218-2017-CV-1001

**ORDER ON DEFENDANT'S MOTION TO RELEASE ATTACHMENT AND ACCEPT
FUNDS TO BE PAID INTO ESCROW**

The two above-captioned cases involve claims by contractors for unpaid bills relating to electrical and carpentry work on condominium units owned by the defendant. The Court granted Tim McCusker an attachment on the defendant's real estate at 129 Front Street, Exeter, NH in the amount of \$27,900.00. The Court granted Patrick McCusker's attachment on the same property in the amount of \$9,240.00. The defendant has now moved on both cases to pay those funds into the Court's escrow account and to release the attachments so that the defendant can sell the units. The plaintiffs objected. The Court held a hearing on the motion on March 15, 2018.

The plaintiffs argue that a mechanic's lien functions differently from an ordinary pre-judgment attachment because it is designed to give the contractor leverage to obtain payment. The plaintiffs cite no authority for this proposition. A mechanic's lien simply provides the contractor priority over all other liens except a tax lien. RSA 447:9. To accept the plaintiffs' argument would mean that a contractor could hold a property owner hostage by refusing to release the attachment until he or she paid the debt even if there were legitimate defenses to the plaintiffs' claims. In other words, if a defendant wanted to sell the real estate, he or she could not do so without the plaintiff's consent even if the defendant offered to put the proceeds from the sale into escrow with the Court. To accept the plaintiffs' argument would require a contractor to sacrifice legitimate defenses to the claimed indebtedness in order to release the attachment. Nothing in the mechanic's lien statute gives a contractor this kind of power to extort payment from the home owner.

It is equally clear that the defendants are entitled to substitute a payment bond in order to avoid the attachment of the real estate. "A payment bond assures the owner that the prime contractor will pay its subcontractors and suppliers, who might otherwise file liens against the owner's property." Gen. Insulation Co. v. Eckman Const., 159 N.H. 601, 606 (2010) (quotation omitted). RSA 511:48 (2010) provides:

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 after judgment.

This statute is designed to substitute the bond for the defendant's real estate so that the real property will not be encumbered during the pendency of the litigation. See Walsh v. Boulanger, 107 N.H. 458, 460 (1966). RSA 511:48 applies to any attachment issued on "mesne process," which simply means an attachment issued prior to final judgment. See Black's Law Dictionary 1205 (6th ed. 1990). A mechanic's lien must be perfected by an attachment on real estate. RSA 447:10. As such, it falls within the broad scope of attachments issued on mesne process covered by RSA 511:48.

In this case, the defendant requests permission to pay the amount of each attachment to the Court to be held in escrow until the case is resolved. A court "has inherent authority to modify or release [an attachment] upon such terms as justice requires." 4 G. MacDonald, Wiebusch on New Hampshire Practice, Civil Practice and Procedure §17.32[2] at 17-39 (4th ed. 2014). The defendant's proposal will protect the plaintiffs up to the full amount of their claims if the Court holds the escrow payments. This certainly would provide as much (if not more) security to the plaintiffs that a bond permitted by RSA 511:48.


The defendant may pay into the Court \$27,900.00 to be held in escrow pending final judgment on Docket No. 218-2017-CV-1000. Upon payment of this sum into the Court's escrow account, Tim McCusker shall release the attachment on 129 Front Street, Exeter, NH within 10 days.

The defendant may pay into the Court \$9,240.00 to be held in escrow pending final judgment on Docket No. 218-2017-CV-1001. Upon payment of

this sum into the Court's escrow account, Patrick McCusker shall release the attachment on 129 Front Street, Exeter, NH within 10 days.

SO ORDERED.

3/29/2018
DATE



N. William Delker
Presiding Justice