

**The State of New Hampshire  
Superior Court**

**Rockingham**

MOYNIHAN LUMBER OF PLAISTOW, LLC

V.

DESTEFANO & ASSOC., INC., ET AL.

No. 218-2017-CV-0590

**ORDER ON EX PARTE MOTION FOR ATTACHMENT**

The plaintiff filed this breach of contract case against the defendants DeStefano & Associates, Inc. ("DeStefano") and Constitution Apartments, LLC ("Constitution Apartments"). The plaintiff also filed a petition to perfect a mechanic's lien in the amount of \$374,674.00. Constitution Apartments is the owner of the property upon which the plaintiff seeks an attachment. DeStefano is the general contractor. The plaintiff alleges that DeStefano has not paid the plaintiff \$374,674.00 for the services and material provided in connection with a construction project located at 2454 Lafayette Road in Portsmouth. The Court held a hearing on petition to perfect the mechanic's lien on August 1, 2017.

The defendants objected to the mechanic's lien on its merits but asked the Court to accept a payment bond in the amount of \$374,674.00 in lieu of the attachment. The construction project is still ongoing with a number of subcontractors who must be paid to keep the work in track for completion. The defendants argued that to grant an attachment of the property in this situation would result in a substantial hardship to the

defendants with no additional benefit to the plaintiff. The plaintiff objected, claiming it is entitled to the mechanic's lien.

The Court will assume without deciding that the plaintiff can meet the test to perfect the mechanic's lien by attaching the real property under RSA ch. 447. 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 (6<sup>th</sup> 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. The plaintiff was provided notice of the bond as required by law. It raised no substantive objection to the bond other than that it provided the plaintiff less tactical leverage in the litigation than a real

estate attachment would. This is not a valid basis to challenge the payment bond. Accordingly, the defendants' motion to accept the payment bond issued on July 27, 2018 by Hudson Insurance Company in the amount of \$374,674.00 for the benefit of the plaintiff is granted. See Def. Ex. A. The *ex parte* real estate attachment issued by this Court on June 6, 2017 is hereby dissolved.

SO ORDERED.

8/2/2017  
DATE

N. William Delker  
N. William Delker  
Presiding Justice