

STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

Rockingham, ss

S & J ENTERPRISES, INC.

v.

BRUCE DELLE CHIAIE et al.

218-2019-CV-00143

ORDER

The matter before the court is an objection to the continuation of a previously granted *ex parte* attachment to perfect a mechanics lien. For the reasons set forth below the court orders that:

- 1. The mechanics lien remains in place. However, it shall be automatically dissolved if defendant places the full amount of the lien in escrow, to be held in plaintiff's counsel's IOLTA account or in a separate trust account under the control of plaintiff's counsel, subject to a written escrow agreement.**
- 2. The escrow agreement must include a term stating that that the funds will be paid to plaintiff (or plaintiff's successor(s) or assign(s)) in the event and to the extent that there is a judgment or settlement of the breach of contract claim which gave rise to the mechanics' lien.**

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I. Factual Background

Defendant Bruce Della Chiaie owns land in Raymond, New Hampshire that he is developing into a 21 lot residential subdivision. Della Chiaie retained plaintiff S & J Enterprises, Inc. ("S & J). to install a roadway and associated landscaping, infrastructure and drainage improvements. The contract price was \$343,650. S & J alleges that even though it performed all of the work consistent with its contractual

obligations, Della Chiaie has failed to pay the last \$40,150 that is due under the parties' contract. S & J has sued Della Chiaie to enforce its mechanic's lien and for breach of contract.<sup>1</sup>

## II. Procedural History

At the time it filed its complaint S & J also filed an *ex parte* motion for an attachment to perfect a mechanic's lien in the amount of \$40,150. The court granted the motion the same day. Thereafter, Della Chiaie filed an appearance and an objection to the mechanics' lien.

In his objection, Della Chiaie disputed the validity of the mechanic's lien on its merits and demanded that it be dissolved. However, Della Chiaie also asked, in the alternative, to be permitted to post a cash bond with the court in lieu of the mechanic's lien.

On March 27, 2019 the court held a hearing on defendant's objection. Della Chiaie appeared through counsel but plaintiff S & J did not appear. S & J's counsel later explained that he had not received notice of the hearing date.

In any event, at the March 27 hearing, the court indicated that while it was inclined to leave the mechanic's lien in place, it was also inclined to allow substitute security for the lien. In particular, the court suggested that it might allow Della Chiaie to escrow the funds.

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<sup>1</sup>S & J has brought additional claims that are not relevant to the mechanic's lien issue. These include claims of quasi-contract (i.e. quantum meruit) and unjust enrichment, as well as claims related to Della Chiaie's use of a construction vehicle owned by S & J.

Before the court issued an order, S & J's counsel filed a motion objecting to the allowance of alternative security. Della Chiaie then filed a responsive objection.

### III. Analysis

#### (A) The Validity Of The Mechanic's Lien

Della Chiaie argues that the court should dissolve the attachment that perfects S & J's mechanic's lien because S & J has not shown a reasonable likelihood it will prevail at trial and recover the amount of the lien. Although S & J insists that it can meet this standard, it also argues that the "reasonable likelihood" test does not apply to pre-judgment attachments that perfect mechanic's liens. S & J maintains that it need only prove that it provided materials and performed work under a contract with the property owner and that the contract price remains unpaid. The court agrees. Further, the court finds that while Della Chiaie had the opportunity to factually rebut S & J's right to payment, it has failed to do so at this juncture.

Mechanics liens are governed by RSA Chapter 447. 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 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" See Alex Builders & Sons, Inc. v. Danley, 161 N.H. 19, 22 (2010). "[T]he contractor's lien is created as soon as any work or materials are furnished under the contract, increasing in amount according to the progress of the work until performance is completed." 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.”).

This statutory lien provides greater protection to contractors than an ordinary judicial prejudgment attachment. Mechanic's liens take precedence over all prior claims (except liens for taxes), RSA 447:9, all subsequent lien claims for labor or materials, RSA 447:11, and construction mortgages, subject to certain exceptions, RSA 447:12–a and 447:12-b. See, 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). 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. at 24. See also, Audette, 165 N.H. at 771; Innie v. W & R, Inc., 116 N.H. 315, 317 (1976).

However, a mechanic's lien is similar to a prejudgment attachment in that it cannot be foreclosed upon without a prior judicial determination of liability. See e.g., Pine Gravel, Inc. v. Cianchette, 128 N.H. 460, 464 (1986) (“It is the provision of labor or materials creates a lien, which may later be enforced by legal procedures.”). Thus, a contractor must still ultimately prove a breach of contract and damages, subject to whatever set-off and counterclaims might be asserted by the owner.

Further, a mechanic's lien will expire 120 days from the last day that the lienholder provides services or furnishes materials, RSA 447:9, unless the lienholder perfects it by means of a prejudgment attachment. RSA 449:10. See Alex Builders, 161 N.H. at 23. Strict compliance with the 120 day deadline and notice provisions of

RSA 447:9 and 10 is necessary. Alex Builders, 161 N.H. at 23. Thus, failure to perfect a lien within the 120 days will usually be fatal. Id.

RSA Chapter 511-A governs prejudgment attachments, including attachments that perfect statutory mechanic's liens. Chagnon Lumber Co. v. Stone Mill Construction Corporation, 124 N.H. 820, 822 (1984). However, several trial courts have held that the requirements of RSA 511-A:3 (setting forth the substantive grounds for prejudgment attachments) conflict with RSA 447:2 and 11 (setting forth the substantive grounds for mechanic's liens and for the priority of such liens). Under RSA 511-A:3 a plaintiff wishing to obtain an ordinary prejudgment attachment must establish a reasonable likelihood that he will recover the amount of the attachment. If the plaintiff meets that burden, the attachment may still be denied if the court determines that the defendant nonetheless has sufficient assets to pay the judgment. These requirements conflict with the notion of a lien that arises by the performance of work, or the provision of materials, and that has priority over all subsequent liens regardless of the amount of the defendant's assets. See, e.g., H.E. Contracting v. Franklin Pierce College, 360 F. Supp. 2d 289, 291 (D.N.H. 2005) (“[A]pplying RSA 511–A:3 to mechanic's lien proceedings “would frustrate the underlying purpose and design of the mechanics lien statute in that it could cause a plaintiff to lose its statutory entitlement to an attachment and priority status in bankruptcy.” (internal quotation marks omitted)); Fraser Engineering. Company, Inc. v. IPS-Integrated Project Services, LLC, 2018 WL 1525725, at \*2 (D.N.H. Mar. 27, 2018) (noting that, consistent with prior state and federal trial level decisions, that both parties agreed that the framework established by RSA 511-A:3 does not apply to mechanic's liens); West Side Development Group, LLC

v. D'Amour, No. 212-2004-CV-018, (Carroll County Superior Ct., March 24, 2004) (O'Neill, J.) ("The Court further finds that the provisions as contained within RSA 511-A:3 and specifically the 'reasonable likelihood of success test' and subsequent 'sufficiency of assets test' is inapplicable to a mechanic's lien proceeding under RSA 447."); Consolidated Electrical Distributors v. SES Concord Company L.P., 217-1989-CV-571 (Merrimack County Superior Court, Nov. 21, 1989) (Manias, J.) ("Applying RSA 511-A:3 to mechanic's 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.").

This court agrees that S & J does not have the burden to show a reasonable likelihood of prevailing at trial. Instead, because S & J has demonstrated that (a) it performed work and provided materials to improve Della Chiaie's land pursuant to a contract with Della Chiaie, and (b) Della Chiaie did not pay the contract price, the burden has shifted to Della Chiaie to rebut S & J's right to recover the amount of the lien. Fraser Engineering, at \*2; H.E. Contracting, 360 F.Supp. 2d at 291. Della Chiaie has not—at this juncture at least—factually rebutted S & J's claim for recovery.

Accordingly, the court overrules Della Chiaie's objection to the mechanic's lien.

#### B. Alternative Security

S & J objects to any form of alternative security on the grounds that (a) such security may not be entitled to the same priority as an actual mechanic's lien and (b) such security might be an avoidable lien in bankruptcy, while an actual mechanic's lien would establish a secured interest. In support of its objection, S & J provided the court

with several trial court orders rejecting the proposition that a mechanic's lien may be dissolved by posting a secured or unsecured bond.

The court need not resolve whether a defendant is ever entitled have a mechanic's lien dissolved if he posts a bond. While it seems likely that the purchase of a third party surety bond, posted by a solvent insurer, payable only to the plaintiff, and written as a payment guarantee rather than a collection guarantee, should negate the need for a mechanic's lien, that question is not presently before the court.

Instead, the court finds that if Della Chiaie places the full amount of the mechanic's lien in escrow, this will completely ensure S & J's right to recovery. The terms of the escrow must be memorialized in a written escrow agreement. By virtue of placing the funds in escrow, S & J will have an equitable interest in the escrowed funds similar to that of the beneficiary of a trust. At the same time, while Della Chiaie will retain formal legal title, his legal interest in the funds will be diminished. See generally, In re NTA, LLC, 380 F.3d 523, 529–30, (1st Cir. 2004) (applying Illinois law and holding that, "Although legal title does not transfer upon placing property in escrow, the grantor does not necessarily hold the same rights to the property as he did prior to the deposit. Rather, when property is delivered in escrow, a trust is created." (internal quotation marks omitted)); In re Intercontinental Publications, Inc., 131 B.R. 544, 548 (Bankr. D. Conn. 1991) ("The creation of an escrow creates in the grantee an equitable interest in the escrow. Pending occurrence of the escrow condition, legal title in the escrow remains in the grantor. Upon performance of the escrow condition, legal title simultaneously vests in the grantee." (internal citations omitted)). Therefore, the

creation of the escrow places S & J's interest in the funds beyond the reach of Della Chiaie's creditor's.

Of course, the conveyance of funds into an escrow account could be challenged by a creditor, either under the fraudulent transfer doctrine or as a preferential transfer in bankruptcy. However, in return for conveying the funds into escrow, Della Chiaie is receiving new value of equal amount, i.e. the discharge of the mechanic's lien.

Finally, because S & J's attorney will be the escrow agent, and because the funds will be deposited in his IOLTA account or separate trust account, there is no doubt that the funds will be available if there is a judgment in S & J's favor.

May 6, 2019



Andrew R. Schulman,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 05/06/2019