IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DONALD SNOW, d/b/a DONALD, SNOW CONSTRUCTION, a Sole Proprietorship,	)	
Plaintiff and Claimant,	)	C.A. No. 04L-01-011 PLA
v.	)	
MAP CONSTRUCTION a/k/a M.A.P. Associates, Inc. a/k/a M.A.P. CONSTRUCTION ASSOCIATES, L.P., C. ARENA & COMPANY, INC., d/b/a ARENA CONSTRUCTION, BLUE HEN HOTEL, L.L.C., a Delaware limited liability company, and UNIVERSITY OF DELAWARE, a Delaware Corporation,	)	
Defendants.	)	

Submitted: December 14, 2007
Decided: January 11, 2008

MEMORANDUM OPINION

James R. Leonard, Esquire, ROEBERG, MOORE & FRIEDMAN, P.A., Wilmington, Delaware, Attorney for Plaintiff and Claimant.

James D. Taylor, Jr., Esquire, & Jennifer M. Becnel-Guzzo, Esquire, BUCHANAN INGERSOLL & ROONEY PC, Wilmington, Delaware, Attorneys for Defendants Blue Hen Hotel, L.L.C. & University of Delaware.

ABLEMAN, JUDGE

I. Introduction

This litigation arises out of a construction project for a Courtyard by Marriot Hotel (the "hotel project") that was erected on property owned by the University of Delaware and Blue Hen Hotel, L.L.C. (collectively the "University Defendants"). Plaintiff Donald Snow d/b/a Donald Snow Construction ("Snow") seeks a mechanic's lien in the amount of $127,500.00 for work that he performed on the hotel project.

The Court held a bench trial on the matter on November 14 and 15, 2007. The parties subsequently submitted their proposed findings of fact and conclusions of law. This is the Court's ruling. For the reasons stated below, the Court finds for Defendants the University of Delaware and Blue Hen Hotel, L.L.C.

II. Parties' Contentions

Snow argues that he is entitled to a money judgment and a mechanic's lien in the amount of $127,500.00 for the work he performed from July 15, 2003 through September 12, 2003 when he was discharged from the hotel project. Snow has offered numerous invoices which, he argues, establish the amount of labor he performed for the University Defendants. Snow argues that he received no complaints concerning his work, that his work was monitored by MAP Construction ("MAP") and C. Arena & Company

("Arena"), and that he could have repaired any work that the University Defendants found faulty "in a matter of days."

In response, the University Defendants argue that Snow is not entitled to a mechanic's lien because the work he performed was of poor quality and needed to be replaced. The University Defendants offered documents and testimony of James Fenstermacher ("Fenstermacher"), an engineer who surveyed Snow's work, to support their claim. In the alternative, the University Defendants allege numerous procedural errors by Snow that, they claim, warrant a finding in their favor, including (1) failure to serve MAP Construction & Design, LLC, a necessary party; (2) failure to serve Arena within the thirty days granted by the court; (3) and failure to perfect service on Arena. By failing to name a necessary party within the allotted time, the University Defendants claim Snow failed to comply with statutory requirements of the Mechanic's Lien Statute, 25 *Del. C.* § 2712, barring Snow's mechanic's lien claim.

In response to procedural errors raised by the University Defendants, Snow argues that proper service of process was effected upon the defendants in the Diversified Construction Staffing, Inc. ("DCS") action, which was later consolidated with the instant action. Snow also notes that the University Defendants' failure to raise any procedural errors before trial

amounts to a waiver of those claims. Snow himself raises a procedural violation on the part of the University Defendants, contending that the Court should enter a default judgment in his favor because the University Defendants' affidavit of defense failed to comply with 25 *Del. C.* § 2716. The University Defendants, however, argue that Snow never raised this argument until after trial and after they had proven their defenses, and therefore waived it. Should the Court find in Snow's favor on this issue, however, the University Defendants request an opportunity to amend their affidavit.

III. Findings of Fact

A. The Hotel Project

The University is the sole member of Blue Hen Hotel, L.L.C. ("Blue Hen"), a Delaware limited liability company, which holds a leasehold interest in the subject property and hotel project. The hotel project consisted of a four-story, 126-room hotel. Originally, C. Arena & Company ("Arena") was the general contractor who was under contract to the University Defendants. MAP Construction ("MAP") was a sub-contractor engaged by Arena to erect and install light gauge metal framing. MAP then entered into a contract with Snow on or about June 16, 2003 to provide labor for the installation of all light gauge metal framing, joists, roof trusses and drywall.

To perform this work, Snow hired DCS, a construction staffing company.[1] As a result of these agreements, Snow was, in essence, a "sub-sub contractor" on this project.

Snow commenced work on the project on July 15, 2003 and, with the assistance of employees of DCS, installed exterior framing on each floor of the hotel, cross-braced the roof, installed exterior sheathing and installed "paper on front and back."[2] On September 12, 2003, Arena was instructed to leave the site. The University of Delaware and Blue Hen Hotel, L.L.C. (collectively the "University Defendants") also discharged MAP and Snow. While most of Arena's subcontractors were continued on the project, neither MAP nor any of its subcontractors were deemed qualified to continue to perform the work for which they were originally engaged. MAP, in turn, proved to be totally uncooperative.

Because of serious flaws and errors detected during construction, Blue Hen replaced Arena with Whiting Turner Construction Company ("Whiting Turner") as its new construction manager. Whiting Turner undertook a

[1] Originally, Diversified Staffing, Inc. ("Diversified"), with whom Snow had contracted for the provision of additional manpower, had filed a similar action against MAP and the University Defendants, as well as Snow, which were consolidated by the Court. Prior to trial, Diversified obtained a default judgment against Snow and settled its claims against the University Defendants.

[2] Defs. Univ. of Del. & Blue Hen Hotel, L.L.C.'s Findings of Fact & Conclusions of Law, at ¶ 8.

detailed and thorough inspection of the project and identified substantial problems and defects that were of such magnitude and risk to the safety and integrity of the building that the decision was made to dismantle the stud layout and framing altogether. Whiting Turner's project manager, James Fenstermacher, described the state of the construction and the remediation effort as "the most difficult thing I have done in twenty-one years of business." Fenstermacher also engaged Landis Sales Associates ("LSA"), the engineering firm retained to design the stud layout, to review the exterior and interior framing that Snow's employees constructed. LSA found numerous defects in the work, including missing screws and connections, improper studs, broken studs, nested studs, improperly constructed box headers and missing horizontal bridges. After reviewing LSA's report, the University Defendants concluded that removing Snow's work in its entirety and beginning anew was the most cost-effective way of remedying the work.

After construction delays and cost overruns caused by Arena, the hotel was finally completed in 2004. In all, the University Defendants spent $154,948.00 above the original projected cost, an amount consisting of (1) $33,657.00 to remove and replace exterior wall framing and gypshum sheathing on the fourth floor; (2) $77,698.00 to remove and replace exterior wall framing and gypshum sheathing on the second and third floors; (3)

$23,556.00 to remove and replace exterior wall framing and sheathing on the first floor; and (4) $20,037.00 to remove and replace masonry veneer at metal stud walls in order to install the vapor barrier and secure the exterior sheathing under the masonry veneer.

Snow claims he is owed about $127,500.00 for labor performed for which he has not been paid.[3] As the undisputed trial testimony reflects, a substantial portion of the work Snow claims to have performed on the project failed to conform to the plans and specifications, was not fit for the purpose intended, was defective or improperly installed, and had to be removed and replaced in its entirety. Snow also claims payment for work that was not actually performed.[4] Despite his claims, Snow failed to offer any time records, paychecks, W-2 forms, 1099 forms, or any other documentary evidence establishing time spent by his employees or money paid to his employees for work he performed on the hotel project. Although Snow did offer some time records from DCS's employees, he could not state the total amount he owes to DCS.

[3] At trial, Snow testified that he was owed "somewhere between $125,000.00 and $130,000."

[4] For example, on its July 31, 2003 invoice, Snow sought payment of $2,000.00 "[f]or labor that was not completed [d]ue to lack of material." Defs. Univ. of Del. & Blue Hen Hotel, L.L.C.'s Findings of Fact & Conclusions of Law, at ¶ 13.

B. Procedural History

Snow filed the complaint on January 7, 2004. Although service was attempted on MAP and Arena, Snow failed to perfect service. The University Defendants answered the complaint on March 5, 2004 and asserted counterclaims against Snow. Snow did not answer the counterclaims.

After the case lingered, the University Defendants filed a Motion to Consolidate the Snow action and the action brought by DCS. The Court granted the motion on December 27, 2004. Even after consolidation of the cases, no action was taken until January 6, 2006, when the Court issued a Rule 41(e) notice.[5] On February 15, 2006, Snow filed a Motion for Enlargement of Time to perfect service on MAP and Arena. The Court then granted Snow's motion on March 6, 2006, permitting him an additional thirty days to perfect service.

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[5] Rule 41(e) states, in pertinent part:

> In the case of any action which has been pending in this Court for more than six (6) months without any proceedings having been taken therein during that six (6) months, the Prothonotary shall mail, after the expiration of the six (6) months, to the parties a notice notifying them that the action will be dismissed by the Court for want of prosecution if no proceedings are taken therein within thirty (30) days. If no proceedings are taken in the action within a period of thirty (30) days after the mailing of such notice, it shall thereupon be dismissed by the Court as of course for want of prosecution.

Super. Ct. Civ. R. 41(e).

On April 4, 2006, Snow accomplished service on MAP Construction a/k/a M.A.P. Associates, Inc. a/k/a M.A.P. Construction Associates, L.P. These entities, however, were not involved in the hotel project. The correct MAP entity involved was MAP Construction & Design, LLC, a Maryland limited liability corporation with a registered agent in Maryland and its principal place of business in Pennsylvania. DCS included MAP Construction & Design, LLC in its action (the "DCS Action") before the Court consolidated the two cases. Although Snow was also a party to the DCS Action, Snow never sought to amend his complaint to include the proper party nor did he ever serve the correct MAP entity, the party with whom he had contracted.

Snow also failed to perfect service on Arena within the additional thirty days permitted by the Court. On April 10, 2006, thirty-five days after the Court's order, the sheriff served the Secretary of State and filed the return of service with the Court on May 8, 2006. Snow also sent the notice to Arena eleven days after the filing of the return of service, which was not within the seven days of filing required by Delaware law.[6]

[6] 10 *Del. C.* § 3104(d) permits a party to serve the Secretary of State as the agent for a nonresident "provided that not later than 7 days following the filing of the return of services of process in the court . . . , the plaintiff . . . shall send by registered mail to the nonresident defendant . . . a notice consisting of a copy of the process and complaint . . . .

Prior to trial, the University Defendants answered Snow's claim for a mechanic's lien by filing an Affidavit of Defense (the "Affidavit") and asserted a counterclaim as to the unjust enrichment claim asserted in the complaint. Snow never alleged any defects with the University Defendants' response in the Pre-Trial Stipulation, nor did he preserve his unjust enrichment claim. Only after the trial did Snow claim that the Affidavit was defective.

IV. Conclusions of Law

A. Snow's Failure to Comply with the Mechanic's Lien Statute

As an initial matter, the Court is aware that each of the parties have argued that various procedural errors warrant a finding in their favor.[7] Although the alleged procedural errors committed by Snow could warrant a finding that he is not entitled to a mechanic's lien, the Court finds that these errors do not require consideration because Snow has failed to establish a factual basis for a mechanic's lien. As a result, even assuming *arguendo*

[7] These failures include (1) Snow's failure to properly serve Arena within the deadline established by the Court; (2) Snow's failure to perfect service on Arena within seven days after the return of service; (3) Snow's failure to name a MAP Construction & Design, LLC, a necessary party; (4) Snow's failure to object to any deficiencies in the University Defendant's Affidavit of Defense before the Court entered its Pre-Trial Stipulation; (5) the University Defendant's failure to object to improper service before trial as required by Superior Court Civil Rule 12(h)(1); and (6) the University Defendants failure to state that they "verily" believe they have a defense to Snow's claim in their Affidavit of Defense pursuant to 25 *Del. C.* § 2716.

that Snow complied with all of the procedural requirements precisely, which he did not, Snow is still not entitled to a mechanic's lien.

Because the mechanic's lien statute is in derogation of common law, Delaware Courts strictly construe the requirements of any claim for a mechanic's lien.[8] Thus, to have a valid lien, the plaintiff must make "an affirmative showing that *every essential statutory step* in creation of the lien has been followed."[9] The Supreme Court has explained:

> The right to "obtain a lien" is subject to certain "restrictions, limitations and qualifications". . . . These statutory requirements are positive and substantial in character. It follows, therefore, that if the statement of claim fails to meet the requirements of the statute, the right to the lien is not implemented . . . . The court cannot assume to arrogate to itself the power to make a lien and thereby to destroy the provisions of the statute.[10]

The Mechanic's Lien Statute (the "Statute") has eleven requirements which must be pleaded with particularity:

> (1) The name of the plaintiff or claimant;
> (2) The name of the owner or reputed owner of the structure;
> (3) The name of the contractor and whether the contract of the plaintiff-claimant was made with such owner or his agent or with such contractor;

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[8] *Builder's Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995).

[9] *Lakewood Builders, Inc. v. Vitelli*, 1987 WL 10533, at *1 (Del. Super. Ct. Apr. 29, 1987) (citing *Ceritano Brickwork, Inc. v. Kirkwood Indus., Inc.*, 276 A.2d 267 (Del. 1971)) (emphasis added).

[10] *Id.* (citing *E.J. Hollingsworth Co. v. Continental-Diamond Fibre Co.*, 175 A. 266, 268 (Del. 1934)).

(4) The amount claimed to be due, and, if the amount is not fixed by the contract, a statement of the nature and kind of the labor done or materials furnished with a bill of particulars annexed, showing the kind and amount of labor done or materials furnished or construction management services provided; provided, that if the amount claimed to be due is fixed by the contract, then a true and correct copy of such contract, including all modifications or amendments thereto, shall be annexed;

(5) The time when the doing of the labor or the furnishing of the materials was commenced;

(6) The time when the doing of the labor or the furnishing of the material or the providing of the construction management services was finished, except that:

a. With respect to claims on behalf of contractors covered by § 2711(a) of this title, the date of the completion of the structure, including a specification of the act or event upon which the contractor relies for such date, and

b. With respect to claims on behalf of other persons covered by § 2711(b) of this title, the date of completion of the labor performed or of the last delivery of materials furnished, or both, as the case may be, or a specification of such other act or event upon which such person relies for such date.

(7) The location of the structure with such description as may be sufficient to identify the same;

(8) That the labor was done or the materials were furnished or the construction management services were provided on the credit of the structure;

(9) The amount of plaintiff's claim (which must be in excess of $25) and that neither this amount nor any part thereof has been paid to plaintiff; and

(10) The amount which plaintiff claims to be due him on each structure.

(11) The time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon such structure which is granted to secure an existing indebtedness or future advances

> provided at least 50% of the loan proceeds are used for the payment of labor or materials, or both, for such structure.[11]

Without even considering the alleged procedural errors made by Snow, the Court finds that Snow has not made an affirmative showing that he complied with every essential step of the Statute. The evidence in this trial demonstrates that Snow could not document the type of work performed or what materials were used as required by 25 *Del. C.* § 2712(b)(4). For example, the time sheets merely indicate the hours he worked without explaining the work he performed. A significant number of the time sheets also lacked signatures to validate Snow's claims of time spent on the job. Snow further failed to offer any W-2 forms or any other documentary evidence. Moreover, no one from DCS, Arena or MAP testified to support Snow's contentions. Simply stated, Snow provided little, if any, support for his claim.

More importantly, Snow has failed to show that his work benefited the hotel project. "The theory behind a mechanics' [*sic*] lien is that the property at issue has been increased in value by the labor and materials provided by a contractor."[12] Despite Snow's claims, the University Defendants provided

[11] 25 *Del. C.* § 2712(b).

[12] *Daystar Sills, Inc. v. Chilibilly's, Inc.*, 2004 WL 2419133, at *4 (Del. Super. Ct. Oct. 13, 2004).

overwhelming evidence that the work performed by Snow was of such poor quality that it needed to be removed. Fenstermacher, an engineer with over twenty years of experience, testified that repairing Snow's work was "the most difficult thing I have done in twenty-one years in business." He stated that screws were sticking through studs in the walls, that there were insufficient studs to support the wall, and that the sheathing was not correctly attached to the building. Although Fenstermacher originally wanted to salvage Snow's work, he determined that the safest and most cost-effective means to fix Snow's work was to redo it, based on the fact that the building would not be structurally sound if Snow's work were left in place. The University Defendants also produced evidence that (1) DCS had to repair studs installed by Snow because they were not thick enough and were not strong enough; (2) roof trusses were installed upside down, backwards, and in such a manner as to be incapable of bearing the weight of walls; and (3) Whiting Turner had to remove all exterior sheathing installed by Snow. Even the contract between Snow and MAP stated that "[i]nferior quality of work or failures to meet time deadlines, is cause for termination of [the] contract."[13] This evidence, which was unrefuted by Snow, established that

[13] *See* Pl.'s Ex. 1 at trial.

Snow's work was of no benefit to the University Defendants and, in fact, caused them to expend more money than initially required.

The Court finds that awarding a mechanic's lien in this situation would unfairly reward Snow for failing to comply with the statute and would conflict with the theory underlying the statute. Accordingly, Snow is not entitled to a mechanic's lien.

B. Snow's Objection to the Affidavit of Defense

Despite the lack of evidence supporting his claim, Snow argues that he is entitled to a default judgment because the University Defendants' Affidavit of Defense was defective. Specifically, he argues that the affiant, David E. Hollowell, an officer of Blue Hen, did not "verily" believe that there were legal defenses to the action. Snow, however, did not raise this objection until after trial and after the Court entered a Pre-Trial Stipulation.

Superior Court Rule 16 requires the Court to entire a Pre-Trial Stipulation at the final scheduling conference between the parties to establish a plan for trial.[14] Once the Pre-Trial Stipulation is entered, it "shall control the subsequent course of the action unless modified by a subsequent order."[15] A Pre-Trial Stipulation is "not merely [a] guideline[] but ha[s] full

[14] Super. Ct. Civ. R. 16(c), (d).

[15] *Id.* R. 16(e).

force and effect as any other order of the [Superior] Court."[16] The Court will only modify the Pre-Trial Stipulation "to prevent manifest injustice."[17] As a result, parties to a case have a right to rely on the Pre-Trial Stipulation and are not permitted "to complain about living with the record [they] had a hand in creating."[18]

In this case, Snow did not raise the argument that the Affidavit did not comply with 25 *Del. C.* § 2716 until the close of his case. He did not object to the Affidavit at any time before trial, and never even mentioned it at the Pre-Trial Conference. Snow has thus failed to show manifest injustice warranting any relief.

Moreover, the Court finds that entering a default judgment against the University Defendants *after* Snow failed to object to the Affidavit and *after* the University Defendants presented their defenses at trial would be contrary to the purpose of the statute. The affidavit of defense statute permits, but does not require, a Court to enter a default judgment against a defendant for a mechanic's lien "unless the defendant has previously filed in the cause an affidavit that he verily believes there is a legal defense to the whole or part

[16] *Barrow v. Abramowicz*, 931 A.2d 424, 431 (Del. 2007).

[17] Super. Ct. Civ. R. 16(e).

[18] *Barrow*, 931 A.2d at 432 (quoting *Vandenbraak v. Alfieri*, 2005 WL 1242158, at *5 (D. Del. May 25, 2005).

of such cause of action and setting forth the nature and character of the defense."[19] The affidavit, however, is a merely intended to force a defendant to certify that litigation is required:

> The purpose of the affidavit is to insure speedy determination of litigation by permitting trials only in such case where the defendant is willing to swear that he had a valid defense. The underlying assumption is that only parties having a valid defense would in good conscience swear that the defense was valid. As a result, the affidavit of defense requirement is thought to eliminate time consumption with respect to cases having no meritorious defense.[20]

In this case, by filing the Affidavit, the University Defendants swore that they had a valid defense. Even assuming, without deciding, that the affidavit technically failed to comply with the statute, the University Defendants participated in the litigation and offered viable defenses. It is undisputed that the University Defendants made a good faith effort to defend against Snow's claim. Moreover, even where the affidavit of defense is defective, courts liberally permit amendments to avoid default judgment where the defendant chooses to offer a meritorious defense.[21] Permitting Snow to recover on the sole basis that University Defendants did not state

[19] 25 *Del. C.* § 2716.

[20] *Miller v. Master Home Builders, Inc.*, 239 A.2d 696, 697 (Del. Super. Ct. 1968).

[21] *Id.* at 698.

that they "verily" believed they had a defense at this stage of the litigation would result in manifest injustice to the University Defendants.

V. Conclusion

THEREFORE, the Court holds for Defendants the University of Delaware and Blue Hen Hotel, L.L.C.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary