

General Contractors' Guide to Mechanic's Liens

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Richard Briansky concentrates his practice on complex construction, real estate and general commercial disputes. Mr. Briansky has represented owners, general contractors, subcontractors, suppliers, developers, sureties and financial institutions in all aspects of construction law claims. His experience includes the prosecution and defense of delay and productivity claims, extra work claims, federal and state statutory bond claims, mechanic's lien claims, indemnity claims, bid protests and all types of construction-related disputes. Mr. Briansky also represents financial institutions, title insurance companies and developers in aspects of real estate related disputes and general commercial disputes.

Mr. Briansky regularly appears in state and federal courts, before regulatory commissions and before state administrative tribunals in a wide range of matters. His experience includes drafting and negotiating construction contracts, preparing and defending complex contract claims and litigating contract disputes in state and federal courts.

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John P. Gorman is a Vice President and Assistant General Counsel for Suffolk Construction Co., Inc. (Suffolk). Suffolk is headquartered in Boston, Massachusetts, and is one of the leading privately held, general building construction firms in the country. Suffolk provides preconstruction, construction management, general contracting and design/build services to clients nationwide, with full service offices in Boston, Florida and California.

Mr. Gorman has been responsible for a variety of legal matters on behalf of Suffolk and its various subsidiaries. His more recent responsibilities include managing and supporting the legal needs of the following construction projects: (1) the John Adams Courthouse – a \$150 million renovation of the Commonwealth of Massachusetts' Supreme Judicial Court, Massachusetts Appeals Court and the Social Law Library; (2) the MBTA Silverline Maintenance Facility – a \$50 million new construction project to support and maintain the MBTA's new Silverline fleet; and (3) the Boston Convention Center Hotel – a \$135 million new construction project located on the Boston Convention Center site. Mr. Gorman has also been responsible for projects in California and Florida, as well as other Suffolk corporate legal needs.

Prior to joining Suffolk, Mr. Gorman was the Director of Claims and Changes for the Central Artery/Third Harbor Tunnel ("Big Dig") Project in Boston. He is a 1982 graduate of St. Michael's College in Winooski, Vermont, and was admitted to the Massachusetts Bar in 1995.

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Jack Curtin is President and Treasurer of Curtin International Insurance & Bonding Agency, Inc. in Lexington, Massachusetts, and a 40-year veteran of the surety business. Jack is a 1962 graduate of the University of Notre Dame, and spent four years as an Air Intelligence Officer in the United States Navy.

In 1966, Jack joined the Francis H. Curtin Insurance Agency, Inc. in Cambridge, Massachusetts, as a surety bond specialist. In 1975, he and three others purchased the Agency from the Curtin family, whereupon he became President.

Jack is a past President of the National Association of Surety Bond Producers. He has served as Chairman of numerous committees of NASBP, and has served as a member of the NASBP's William J. Angell School faculty for more than 30 years. He currently serves as the Chairman of the Massachusetts Construction Industry Council, the Board of Directors of the Associated General Contractors of Massachusetts, as well as being Chairman of their Legislative Committee.

Jack is a past Chairman of the National Construction Industry Council, past member of the Governor of Massachusetts Construction Reform Advisory Board, past Chairman of the Smaller Business Association of New England, and was an elected delegate to the first two White House Conferences on Small Business. He is a former member of the Board of Directors of the Alumni Association of the University of Notre Dame, served as Chair of the Business Advisory Committee of WGBH, Channel 2, the public broadcasting system in Boston, and participates as a visiting executive in the freshman Business Organization and Leadership course at Suffolk University.

I. INTRODUCTION

The mechanic's lien statute provides general contractors a relatively efficient, effective and simple method of securing the amount owed to them by the owner. See *Hammill-McCormick Assocs., Inc. v. New England Tel & Tel Co.*, 399 Mass. 541 (1987). Unlike other forms of prejudgment security, the lien is automatically "created" by merely recording a notice of contract at the registry of deeds. See M.G.L. c. 254, § 2. After complying with the procedural prerequisites in the statute (and establishing the debt owed to it), the general contractor may sell the property that it has improved to satisfy its debt for the labor and materials it provided in conjunction with the project. Depending upon the solvency of the owner, these lien rights may provide the only source to obtain payment.

More frequently, general contractors are required to indemnify and defend the owner in claims asserted by subcontractors and material suppliers. Although these lower-level contractors have no legal relationship to the owner, by strictly complying with the mechanic's lien statute, they, too, may secure the debt owed to them by the general contractor with a lien on the property, and if the debt is unpaid, foreclose on the lien to secure payment. See *Brick Constr. Corp v. CEI Dev. Corp.*, 46 Mass.App. Ct. 837, 840 (1999) ("In the absence of a lien perfected under M.G.L. c. 254, an owner who enters into a general contract for improvements on real property is not ordinarily liable to subcontractors whose sole contractual arrangements are with the general contractor.") Accordingly, general contractors should be familiar with the statutory prerequisites for a mechanic's lien, the amounts that may ultimately be recovered under the lien statute, and simple defenses available to quickly resolve claims.

II. CREATION OF MECHANIC'S LIEN

The following are general requirements for any mechanic's lien.

A. WRITTEN CONTRACT

To be eligible to file a lien, a general contractor, subcontractor or supplier must have a written contract.

See Noreastco Door & Millwork, Inc. v. Vajradhatu of Massachusetts, Inc., 1999 Mass.App.Div. 239 (1999)

("The crucial element...is the existence of a written contract, for without it the mechanic's lien is unenforceable.") A written contract is defined by the mechanic's lien statute as "any written contract enforceable under the laws of the commonwealth." See M.G.L. c. 254, § 2A. The writing or series of writings taken together, must contain the essential terms of a contract, such as price, quantity, and type of materials and services. For example:

- *Harris v. Moynihan Lumber, Inc.*, 1999 Mass. App. Div. 113 (1999). The Court found that a series of detailed documents taken together constituted a contract for mechanic's lien purposes.
- *Noreastco Door & Millwork, Inc. v. Vajradhatu of Massachusetts, Inc.*, 1999 Mass.App.Div. 239 (1999). The Court concluded that a one-page cover sheet characterized as an "original proposal" and a one-page reply memorandum did not constitute a contract for the purposes of the mechanic's lien.
- *Scituate Ray Precast Concrete Corp. v. Intoccia Construction Company, Inc.*, Civil Action No. 2001-00139 (Mulligan, J.). The Court concluded that a series of delivery tickets and corresponding invoices constituted a written contract.
- *National Lumber v. M.G. Murphy Construction Company, Inc.*, 1997 Mass.Super.Lexis 385 (1997). The Court concluded that a "quote" provided by the lumber company which contained a list of goods, prices and an agreed upon sum was sufficient to constitute a written contract under M.G.L.c. 254.
- *Philip Alan, Inc. v. MSarcia Construction Services, Inc.*, 19 Mass.L.Rep. 705 (Murphy, J. 2005). The Court concluded that a contract between owner and contractor that was not incorporated at the time it entered into the construction contract but later (at the time it filed the lien) was incorporated, was sufficient to bind the new company and satisfy the written contract requirement.
- *National Lumber Company v. Fort Realty Corporation*, 1999 Mass.App.Division 235 (1999). The Court concluded that a quotation that contained no price or quantity of material, invoices with no evidence of acceptance by the owner, and a credit application that disclosed no information as to the type, quantity or price of material to be delivered was insufficient to support a written contract under M.G.L.c. 254.

While a general contractor must only prove it has a written contract with the owner (which is usually not in dispute), subcontractors and suppliers must prove the existence of both a written subcontract and a written general contract. *See Ouellet v. Armstrong*, 18 Mass.L.Rep. 100 (2004) ("To find a valid mechanic's lien

pursuant to M.G.L. c. 254, § 4 there must first be an original contract between the owner of the property and the general contractor.”)

B. WORK AND MATERIALS COVERED UNDER MECHANIC'S LIEN

“A person” who performs work in the “erection, alteration, repair or removal of a building, structure or **other improvement to real property**” or for “furnishing material or rental equipment, appliances, or tools therefore,” has a right to assert a mechanic’s lien as security for payment of these services. M.G.L. c. 254, §§ 2 and 4 (emphasis added). Although the terms of the statute are broad and include “other improvement[s] to real property,” it does have limits. Recently, Courts have limited the term “other improvement” to something which “itself, in whole or in part, [is] constructed or assembled in connection with a building or structure or other construction related projects.” *Mammoet USA v. Entergy Nuclear Generation Company*, 64 Mass.App.Ct. 37 (2005). Courts have concluded that

- the transportation of a transformer and setting it on a pad was not an improvement to real property and therefore the contractor was not entitled to a lien on the property *Id.*; and
- “leveling of land for development by removing the ledge and crushing stone does not qualify as an improvement to real property.” *Boston Power Crushing Corporation v. A.F. Lucente Co., Inc.*, Middlesex Superior Court (2007)(Smith, J.).

C. RECOVERY

1. No Attorney’s Fees

Neither a subcontractor nor general contractor can collect attorney’s fees under the mechanic’s lien statute. Even if the general contractor or subcontractor has such rights in their contract, the amount of their lien is limited to the labor and materials provided. *See National Lumber Co. v. United Casualty and Surety Ins. Co.*, 440 Mass. 723 (2004) (“Nowhere in the detailed statutory framework is there a reference to interest or attorney’s fees. Contractual interest and attorney’s fees are not labor and material, nor can they be part of the amount due at the time the statement of claim is filed because they have not yet been determined.”)

2. Labor and Material

M.G.L. c. 254, §§ 2 and 4 allow for the recovery of the value of “all labor including construction management and general contractor services, and material or rental equipment, appliances or tools which shall be furnished by virtue of said contract.”

3. Overhead

Overhead is a legitimate expense incurred by a contractor to provide construction services. There are no Massachusetts decisions that directly address if such an expense may be recoverable under the mechanic's lien law. At least one Massachusetts court has held that such an expense should not be included in determining the fair and reasonable value of work performed by a general contractor. See *Peabody N.E. v. Town of Marshfield*, 426 Mass. 436 (1998). In *Peabody*, the court concluded that expenses related to overhead did not directly confer any value or benefit to the owner. "Rather, as the traditional definition of overhead suggests, the plaintiff was merely incurring 'business expenses...not chargeable to a particular part of the work or product.'" *Id.*

III. SUBCONTRACTORS (M.G.L. c. 254, § 4)

To perfect a mechanic's lien, a subcontractor (an individual having a contract directly with the general contractor) must strictly comply with the statutory requirements. See *East Coast Steel Erectors, Inc. v. Ciolfi*, 417 Mass. 602, 605 (1994); see also *National Lumber Co. v. LeFrancois Const. Corp.* 430 Mass. 663 (2000); *Mullen Lumber Co. v. Lore*, 404 Mass. 750, 752 (1989).

A. CREATION OF LIEN

A subcontractor's lien is "created" upon the recording of a notice of contract in the proper registry of deeds within:

- (i) 60 days after recording of Notice of Substantial Completion (M.G.L. c. 254, § 2A);
- (ii) 90 days after recording of Notice of Termination (M.G.L. c. 254, § 2B); or
- (iii) 90 days after the last labor or materials furnished by the **General Contractor**. (emphasis added).

M.G.L. c. 254, § 4 specifies the form for a notice of contract. It requires, among other things, the identity of the owner of the property. The failure to identify the owner of the property at the time of filing the notice of contract is fatal to a mechanic's lien. *Ouellet v. Armstrong*, 18 Mass.L.Rep. 100 (2004) (naming prior owner of the property in notice of contract was insufficient to satisfy statutory requirements and the lien was invalid); but see *National Lumber Company v. LeFrancois Construction Corp.*, 430 Mass. 663 (2000) (concluding that an owner who acquires title to property after the notice of contract has been recorded may be named as a defendant in an action to enforce a mechanic's lien.)

In addition to filing the notice of contract, the subcontractor must also give “actual notice to the owner of such filing” in order to create a mechanic’s lien. M.G.L. c. 254, § 4 (“upon filing or recording a notice, as hereinbefore provided, and giving actual notice to the owner of such filing, the subcontractor shall have a lien upon such real property”). Failure to comply with the actual notice requirement is fatal to a mechanic’s lien. *See Ouellet v. Armstrong*, 18 Mass.L.Rep. 100 (2004) (failure to provide actual notice of the recording of the notice of contract fatal to mechanic’s lien claim); *Scituate Ray Precast Concrete Corp. v. Intoccia Constr. Co.*, 15 Mass.L.Reptr. 640, 641 (Mass.Super.Ct. 2002)(Mulligan, J.) (providing that in order to succeed on summary judgment a plaintiff seeking enforcement of a mechanic’s lien must show that he “served a copy of the notice of contract upon the owner.”)

The date of filing the notice of contract and providing actual notice to the owner is of critical importance as it sets the amount of the lien claimed. Regardless of the amount that may be actually due the subcontractor from the general contractor, a subcontractor can only collect under the mechanic’s lien statute the “amount due or to become due” under the general contract as of the date actual notice is provided to the owner. M.G.L. c. 254, § 4 (“Such lien shall not exceed the amount due or to become due under the original contract as of the date notice of filing of the subcontract is given by the subcontractor.”); *BloomSouth Flooring Corp. v. Boys’ and Girls’ Club of Taunton, Inc.*, 440 Mass. 618, 620 (2003). Accordingly, even if the subcontractor complied with all of the procedural prerequisites of perfecting its lien, if at the time it provided notice to the owner, the general contractor had been paid all of the money on its contract, its lien is worthless.

In *BloomSouth*, the general contractor abandoned the project, and two subcontractors filed notices of contract 30 days after the general contractor was officially terminated. At the time they filed the notice of contract, the unpaid balance including retainage exceeded the amount of their liens. The subcontractors claimed that because the amount “due or to become due” under the general contract exceeded their liens, they were entitled to compensation from the owner. The Court rejected the simple calculation of subtracting the amount paid to the general contractor from the total contract amount. Instead, the Court employed a method designed to calculate what actually remained due under the contract based upon the

particular facts of the case. The Court denied the subcontractors' claims that any amount was due or to become due the general contractor recognizing that

the subcontractors' claims can be reduced by any setoffs or counterclaims which the owner may have against the general contractor and the owner may expend the unpaid balance of the contract price for labor and materials necessary for the completion of the job according to the original contract.

Bloomsouth, 440 Mass. at 623, 624.

In *Scituate Ray Precast Concrete Corp v. Intoccia Construction Company*, the owner attempted to avoid a mechanic's lien by maintaining that no money was due under the general contract as a result of owner's termination. The court rejected the owner's argument, holding that the "maximum amount of the lien is determined by subtracting from the total contract price from the amount unpaid at the time the owner receives the notice of contract." *Scituate Bay*, 15 Mass.L.Reptr. at 641.

B. ENFORCEMENT OF MECHANIC'S LIEN

After "creating" the lien by filing the notice of contract, a subcontractor must comply with the remaining statutory requirements to perfect and enforce its lien against the owner's property interest. This compliance includes recording a statement of account detailing the amount due or to become due to it from the general contractor within:

- (i) 90 days after recording Notice of Substantial Completion;
- (ii) 120 days after recording Notice of Termination;
- (iii) 120 days after the last day a person entitled to enforce a lien under section two performed or furnished labor or materials.

Unlike a notice of contract, there is no statutory form for a statement of account, but it must include the amount due or to become due, a brief description of the property and the identity of the property owners. M.G.L. c. 254, § 8. In addition, after filing the statement of account, the subcontractor has only a limited time to file the complaint (90 days). A subcontractor cannot file successive statements of account to preserve its lien rights. See *Mullen Lumber Co., Inc. v. Lore*, 404 Mass. 750 (1989) (concluding that the filing of a second statement of account had no legal effect on the mechanic's lien rights as it would provide the subcontractor an extension of time not intended by the legislature).

After recording a statement of accounting detailing the amount due or to become due from the general contractor the subcontractor must file a civil action in the appropriate county within 90 days of filing such statement of account and record the complaint within 30 days in the registry in which the land is located. M.G.L. c. 254, §§ 5 and 11.

Upon completing the above process, the subcontractor has perfected its lien. To collect on the lien, it must prosecute its underlying claim to judgment and then seek a sale of the property.

C. DEFENSES/STRATEGIC DECISIONS REGARDING SUBCONTRACTOR'S LIENS

Before construction begins there are certain precautions a general contractor can take to avoid (or limit) mechanic's liens to protect itself and the owner.

1. Subcontract Provisions

Although M.G.L. c. 254, § 32 declares void and unenforceable, as against public policy, any agreement or understanding "purporting to bar the filing of notice of contract or taking of any steps to enforce a lien," there are certain contractual provisions that may shift the risk associated with defending lien actions.

A. Indemnity

Incorporate a broad indemnity provision into the subcontract. Although an indemnity provision will not avoid the lien, it will allow the general contractor to shift the cost of defense. A sample provision is included in the forms section.

2. Blanket Lien Bond (M.G.L. c. 254, § 12)

A lien-prevention bond may be recorded before work starts on a project. The form of the bond is prescribed by statute and is recorded in the registry of deeds. After recording the lien-prevention bond, claimants cannot encumber the property.

3. Partial Waiver

A partial lien waiver is a release of lien to the extent amounts have been paid to the subcontractor. Unlike a general contractor, for which the statute specifically describes a form partial release (see M.G.L. c. 254, § 32), no form exists for subcontractors. A properly drafted lien waiver should not be a general release but merely an acknowledgement of payment and a waiver of lien rights. *See Buchanan Electric, Inc. v. Tocci*

Building Corp., 2000 Mass.Super. Lexis 291 (Brassard, J.), (enforcing lien waiver and release preventing direct claims against general by subcontractor).

4. Defensive Actions After Lien Is Filed

A. Target Lien Bond M.G.L. c. 254, § 14

The property owner may dissolve the lien by obtaining a surety bond "in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim for labor or labor and materials." M.G.L. c. 254, §14. To be effective, after recording, a notice of recording and a copy of the bond must be served upon the claimant. M.G.L. c. 254, §14 ("Notice of recording shall be given to the claimant by serving on the claimant a copy of the notice of recording together with a copy of the bond by an officer qualified to serve civil process or by delivering same to the claimant.") *Dowling Construction Co. v. Cruz Construction*, 21 Mass.L.Rep. 637 (2006) (Troy, J.) (Court concluded merely serving upon the attorney was insufficient to provide notice of the bond under the statute). Upon receiving actual notice of the lien bond, the claimant has 90 days to file suit against the surety, otherwise its rights are dissolved. Even if the claimant has "actual" notice of the recording of the bond, it still must be served to start the 90-day period. *See Fraser Engineering Company, Inc. v. Franchi Group Associates, Inc.*, 1998 Mass.Super. Lexis 51 (1998) (Hamlin, J.) ("Nothing in the statute suggests that actual notice may serve as a substitute for the notice required by the statute.")

The claimant is entitled to the same damages as it could have collected under the mechanic's lien statute – including statutory interest. *See Fraser Engineering Co., Inc. v. Franchi Group Associates, Inc.*, 1998 Mass.Super. Lexis 51 (Hamlin, J. 1998).

B. Expedited Procedure To Dissolve Lien

M.G.L. c. 254, § 15A provides a "summary procedure" to discharge liens that are amenable to immediate determination on facts and matters of public record. *See Golden v. General Builders Supply, LLC*, 441 Mass. 652, 656 (2004).

M.G.L. c. 254, § 15A states, in relevant part, that a lien can be discharged if

(b) it appears from the notice of contract or a statement of account that the claimant has no valid lien by reason of the character of, or the contract for, the labor or materials or rental equipment, appliances or tools furnished and for which a lien is claimed, (c) the notice or other instrument has not

been filed or recorded in accordance with the applicable provisions of this chapter, or (d) that for any other reason a claimed lien is invalid by reason of failure to comply with any provision of this chapter, or (e) the party's rights are foreclosed by judgment or release, or (f) that any party wrongfully refuses to execute a notice of completion required by Section two A or improperly files or records a notice of termination under Section two B.

As the Court in *Golden* concluded, “summary discharge of the lien can only be obtained for defects that will customarily appear of record or be readily ascertainable by reference to undisputed documents... .”

Golden, 441 Mass. at 656.

IV. GENERAL CONTRACTOR'S LIEN

A. CREATION OF GENERAL CONTRACTOR'S LIEN

A general contractor and other person entering “into a written contract with the owner of any interest in real property must comply with the procedure set forth in M.G.L. c. 254, § 2. Like the subcontractor, a general contractor must record a notice of contract at the proper registry of deeds within:

- (i) 60 days after recording of Notice of Substantial Completion;
- (ii) 90 days after recording of Notice of Termination; or
- (iii) 90 days after last of labor or materials furnished by the general contractor.

As with the subcontractors, M.G.L. c. 254, § 2, sets forth a statutory notice of contract which must be filed by the general contractor. Failure to comply with and file the statutory form notice is fatal to a general contractor's mechanic's lien. *See New Boston Housing Enterprises LLC v. Fitzgerald Contracting Co., Inc.*, 12 Mass.L.Rep 310 (2000) (Court dissolved mechanic's lien for failure to file a notice of contract that complied with M.G.L. c. 254, §2).

1. Last Day Worked Performed

The general rule is that:

if additional work is required for proper performance of a contract even after contractual work is substantially completed, the period for filing the lien will run from the doing of such work ...regardless of the value [thereof] if not so trivial or inconsequential that failure to do it would still leave the contract substantially performed.

Interstate Electrical Services Corporation v. Cummings Properties, LLC, 63 Mass.App.Ct. 295 (2005).

In *Interstate*, the contractor had performed all of its work under the contract but for obtaining a corrected label on a circuit breaker (which prevented the system from operating at the level of power agreed to in the contract). The court concluded that although the contractor had completed most (if not all) of the contractually required work for the system, the state law required additional work (i.e. obtaining a label) to operate as required by the contract. Accordingly, the court held that the “work” performed in attempting to obtain the labels extended the time for filing a mechanic’s lien.

The pragmatic distinction the court made was between work required under the contract and merely a gratuitous act designed to replace or remedy a defect in the original work. The *Interstate* Court adopted the general rule that if the work is performed under the contract in good faith and is necessary to complete the performance of the work, it will extend the time for a contractor to file a lien. *See generally Winer v. Rosen*, 231 Mass. 418 (1918) (removing and replacing safety valve and steam gauge following notification by state boiler inspector that changes were necessary for boiler’s lawful operation extended the time for filing under contract for installation of boiler). However, if the work performed is warranty work after the contract is completed, this will not extend the time to file a notice of contract. *See Preferred Contractors, Inc. v. Connecticut General Life Insurance Company*, 16 Mass.L.Rep. 219 (2003) (concluding that warranty work did not extend the time to file a mechanic’s lien).

B. PERFECTION AND ENFORCEMENT OF MECHANIC’S LIEN

Once the lien is “created” by recording the notice of contract, it is “perfected” by following the remaining procedural steps. The general contractor must record the statement of account within:

- (i) 90 days after recording Notice of Substantial Completion;

- (ii) 120 days after recording Notice of Termination; or
- (iii) 120 days after last labor or material furnished.

An inaccuracy in the amount stated in the statement is not necessarily fatal. See M.G.L. c. 254, § 11 (“The validity of the lien shall not be affected by an inaccuracy in description of the property to which it attaches, if the description is sufficient to identify the property, or by an inaccuracy in stating the amount for labor or material unless it is shown that the person filing the statement has willfully and knowingly claimed more than is due him”). The statement of account is only insufficient if the amount was misstated willfully. See *National Lumber Co. v. M.G. Murphy Construction Co., Inc.*, 1997 Mass.Super.Lexis 385. Accordingly, general contractors should be careful to have factual support (even if it is disputed) for the amounts claimed to avoid a claim by the owner that the amount is intentionally overstated. See *Philip Alan, Inc. v. MSarcia Construction Services, Inc.*, 19 Mass.L.Rep. 705 (2005) (Murphy, J.) (concluding that it was a disputed issue of fact as to claimant’s intent to misstate amounts set forth in statement of account).

After the statement of account is recorded, the general contractor must file a civil action in the appropriate county within 90 days of filing the statement of account and record the complaint within 30 days in the registry in the county in which the land is located. M.G.L. c. 254, §§ 5 and 11.

C. ENFORCEMENT ISSUES

1. Prosecuting Claim

After a civil action has been filed under M.G.L. c. 254, § 5, the claimant must prosecute the action and obtain a court judgment determining the fair and reasonable amount of the work it performed. After obtaining a judgment, the claimant may request that the court authorize the sale of the property to pay for the amount of the judgment. M.G.L. c. 254, § 18.

2. Execution of Lien Waivers

Although a contract requiring a general contractor not to file a mechanic’s lien is unenforceable as a matter of law, a general contractor may execute partial lien waivers and subordination agreements. See M.G.L. c. 254, § 32. These allow the general contractor to release a portion of its lien in exchange for payment. M.G.L. c. 254, § 32 provides for a statutory form. The statutory form waives all rights through the date of payment except for retainage, unpaid agreed or pending change orders and disputed claims (as set forth in

the form), and subordinates the general contractor's lien and rights to the lender to the extent of money actually advanced as of the date of execution of the lien waiver.

3. Leases

A mechanic's lien attaches to whatever interest is held in the property itself by the party on whose behalf the work is done or the material supplied. Specifically, M.G.L. c. 254, § 2 states in relevant part that

[A] person entering into a written contract with the owner of any interest in real property or with any person acting for, on behalf of, or with the consent of such owner...shall have a lien upon such real property, land, building, structure or improvement owned by the party with whom or on behalf of whom the contract was entered into, as the interest appears of record on the date when notice of said contract was filed or recorded in the registry of deed....

Consequently, a general contractor entering into a contract to perform work related to improvements for a leasee on leased property may only have as security an interest in the lease itself. Although this will be the general rule, the statute as well as case law suggest that a certain "undefined degree of lessor consent, control and benefit might enable a general contractor to enforce a lien against a lessor even where the contract has been entered into with a leasee." See *United HVAC, Inc. v. CP/HERS Somerville Corp.*, 18 Mass.L.Rep. 577 (2004). See also

- *Roxbury Painting & Decorating v. Nute*, 233 Mass. 112 (1919). "When an owner of land agrees to sell it and allows one who has agreed to buy it to take possession of the property, the owner does not thereby authorize such person to impose a lien on the land unless by implication the owner authorized the purchaser to contract for the repair and alteration of the building."
- *Conant v. Brackett*, 112 Mass. 18 (1873). "There was no agreement with or consent of the owner of the building or any person having authority from or acting for him. The lease authorized the leasee only to make repairs at his own expense. The petitioner, therefore, has no lien [against the fee holder]."
- *Hayes v. Fessenden*, 106 Mass. 228 (1870). "[A mechanic's lien] can be established only in the manner authorized by statute; which requires an agreement or consent, express or implied, on the part of the owner whose interest in the land is sought to be charged with the lien."

Accordingly, it is critical for a general contractor to obtain a copy of and review the lease before it enters into the contract to make a determination as to its potential security.

4. Priority

The recording of the notice of contract establishes the priority of the mechanic's lien. As a general matter, the lien takes priority over all other later-recorded encumbrances on the property. Thus, once filed, the

notice of contract sets the date for the lien's priority. *See Tremont Tower Condominium LLC v. George B.H. Macomber Co.*, 436 Mass. 677 (2002). The priority is prospective (i.e., in the future); the recording of the notice of contract does not relate back to take priority over prior advances made by the lender. M.G.L. c. 254, § 7.

5. Dissolution of Lien

M.G.L. c. 254, § 10, allows the person who placed a lien on the project to dissolve it by filing a notice of dissolution at the registry of deeds. The filing of a notice of dissolution does not prevent the contractor from recording another later-filed notice of contract with respect to the work covered in the same contract. *See Tremont Tower Condo, LLC v. George B.H. Macomber Co.*, 436 Mass. 667 (2002). In *Macomber*, the general contractor filed a notice of contract, dissolved the lien, and continued to work on the project. After significant work had been completed, Macomber filed another notice of contract for amounts that subsequently became due to it. The owner moved to dissolve the lien, claiming that the prior dissolution prevented Macomber from claiming a mechanic's lien. The Supreme Judicial Court held that there was nothing in the mechanic's lien statute that prevented a contractor from filing a voluntary notice of dissolution and then recording another notice of contract for the same project.

FORMS

NOTICE OF CONTRACT
M.G.L. c. 254, § 2

Notice is hereby given that by virtue of a written contract dated June 23, 2005, between Pajwy, LLC (the "Owner") and XXXXX (the "Contractor"), said Contractor is to furnish or has furnished labor and material or rental equipment, appliances or tools for the erection, alteration, repair or removal of a building, structure or other improvement on a lot of land or other interest in real property described as follows:

8 to 18 Natalie Way, Plymouth, Massachusetts which property is more fully described in a deed recorded at the Plymouth County Registry of Deeds in Book 14403, Page 321 and described in more detail in Exhibit "A" attached hereto and incorporated herein by reference.

The regular mailing address of the party recording or filing this Notice is as follows: 28 State Street, 31st Floor, Boston, MA 02109.

Contractor: South Water Construction LLC

By: _____

Its: Manager

COMMONWEALTH OF MASSACHUSETTS

_____, ss.

March , 2006

On this day, before me the undersigned Notary Public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document and acknowledged to me that he signed it freely and voluntarily for its stated purpose.

Notary Public

My Commission expires: _____



NOTICE OF CONTRACT PURSUANT TO MASS. GEN. L. c. 254, §4

Notice is hereby given that by virtue of a written contract dated July 12, 2005, between subcontractor, Antico Excavating, Inc. ("Antico"), and the general contractor, J.M. Realty Management, Inc., Antico furnished labor, materials and construction services in the improvement of real property for J.R. Realty Management, Inc. and the property owner, Minuteman Commons, LLC.

The improvements were performed at that certain parcel of land known and numbered as 82 Virginia Road, Lincoln, Massachusetts, with the improvements thereon, as more particularly described in a quitclaim deed from Lincolndale Realty Trust, u/d/t dated April 29, 1997 and recorded in Book 27378, Page 174, dated January 20, 2005, and registered in the Middlesex County Registry of Deeds, in Book 44521, Page 358, ~~attached as Exhibit A~~ ^{SA} and Plan marked "Plan of Land in Lincoln, Mass. Owned by William J., Jr., and Evangeline C. Parker" dated November 29, 1951 by Snelling & Hilton, Registered Land Surveyors, which plan is recorded with Middlesex South District Registry of Deeds in Book 7874 at Page 151 to which plan reference is made for a more particular description of said property.

As of the date of this Notice, an account of the Contract is as follows:

1.	Contract Price	\$	1,305,000
2.	Change Order Amount	\$	49,896
3.	Adjusted Contract Price	\$	1,354,896
4.	Work completed	\$	1,354,896
5.	Payments Received	\$	1,254,896
6.	Balance Due	\$	100,000.00

Subcontractor: Antico Excavating, Inc.

By: 

Its:

Date of Filing:

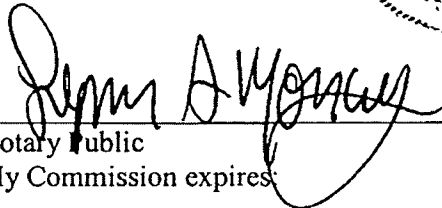
3/8/07

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

March 8, 2007

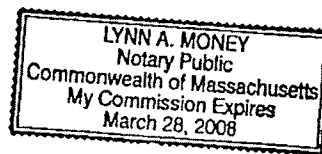
Then personally appeared the above-named Eric H. Loeffler, counsel for Antico Excavating, Inc. and acknowledged the foregoing instrument to be his free act and deed, before me.




Notary Public
My Commission expires:



Return to:
Eric H. Loeffler, Esq.
Hinshaw & Culbertson LLP
One International Place, Third Floor
Boston, MA 02110





Attest, Middlesex S. Register

Statement of Account

STATEMENT OF ACCOUNT PURSUANT TO MASS. GEN. L. c. 254, §8

Notice is hereby given that by virtue of a written contract dated July 12, 2005, between subcontractor, Antico Excavating, Inc. ("Antico"), and the general contractor, J.M. Realty Management, Inc., Antico furnished labor, materials and construction services in the improvement of real property for J.M. Realty Management, Inc. and the property owner, Minuteman Commons, LLC.

The improvements were performed at that certain parcel of land known and numbered as 82 Virginia Road, Lincoln, Massachusetts, with the improvements thereon, as more particularly described in a quitclaim deed from Lincolndale Realty Trust, u/d/t dated April 29, 1997 and recorded in Book 27378, Page 174, dated January 20, 2005, and registered in the Middlesex County Registry of Deeds, in Book 44521, Page 358, ~~attached as Exhibit A~~, and Plan marked "Plan of Land in Lincoln, Mass. Owned by William J., Jr., and Evangeline C. Parker" dated November 29, 1951 by Snelling & Hilton, Registered Land Surveyors, which plan is recorded with Middlesex South District Registry of Deeds in Book 7874 at Page 151 to which plan reference is made for a more particular description of said property.

As of the date of this Statement, an account of the Contract is as follows:

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2.	Change Order Amount	\$	49,896
3.	Adjusted Contract Price	\$	1,354,896
4.	Work completed	\$	1,354,896
5.	Payments Received	\$	1,254,896
6.	Balance Due	\$	100,000.00



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Page: 1 of 2 03/08/2007 03:37 PM

Subcontractor: Antico Excavating, Inc.

By: *[Signature]*
Its: *[Signature]*

Date of Filing:

3/8/07

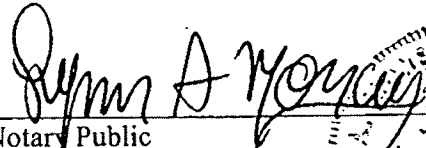
*One Information Place, 3rd Fl.
Boston, MA 02110*

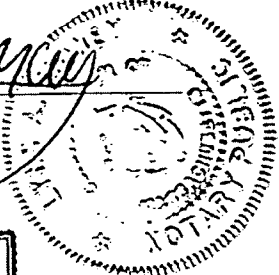
COMMONWEALTH OF MASSACHUSETTS

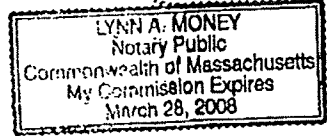
Suffolk, SS.

March 8, 2007


Then personally appeared the above-named Eric H. Loeffler, counsel for Antico Excavating, Inc. and acknowledged the foregoing instrument to be his free act and deed, before me.


Notary Public
My Commission expires:

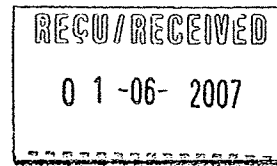




Return to:
Eric H. Loeffler, Esq.
Hinshaw & Culbertson LLP
One International Place, Third Floor
Boston, MA 02110


Susan C. Brown
Attest, Middlesex S. Register

Blanket Lien Bond
(254, s 12)



IMPORTANT NOTE ON LIEN BONDS

- The enclosed Lien Bond must be filed with the Registry of Deed named on the bond. A legal property description must be attached to the bond if not already done so.
- Subsequently, upon recording and microfilming the same bond, the Registry of Deed mails the original bond or a stamped receipt back for your own record.

It is imperative that you handle the filing of your Lien Bond properly in order to avoid additional costs on your part in the future. Please call us at (781) 681-6656 if you need further assistance. Thank you.

LIEN BOND

Bond No. 929423053

KNOW ALL MEN BY THESE PRESENTS, That we, Callahan, Inc. of 80 First Street in the County of and Commonwealth of Massachusetts, as Principal, and Western Surety Company, a surety company organized under the laws of South Dakota, and authorized to do business in the Commonwealth, as a surety company, are holden and stand firmly bound and obliged unto John R. Buckley Jr., Register of Deeds for the County of Plymouth in the principal sum of TWO MILLION EIGHT HUNDRED SIXTEEN THOUSAND TWO HUNDRED EIGHTY-THREE AND 70/100THS Dollars (\$2,816,283.70), to be paid unto said Register and his successors in said office, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, said Principal is interested in the erection, alteration, repair or removal of a building or structure on a certain lot of land situated within the Plymouth Registry District in the Commonwealth bounded and described as follows:

As set forth in exhibit 'A' attached to and made a part hereof

and desires to free said land from liens for all labor and all labor and materials entitled to lien protection under Chapter 254 and amendments thereto:

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall pay for all labor and for all labor and materials entitled to lien protection under Chapter 254 and amendments thereto under the contract referred to in the Certificate in this bond, irrespective of any agreement made between him and the owner or any other persons now interested or who may hereinafter be interested therein, then the above written obligation shall be null and void, otherwise to remain in full force and effect.

This bond is made for the use and benefit of all persons entitled to file the documents for lien protection as provided in Massachusetts General Laws, Chapter 254 and they and each of them are hereby made Obligees hereunder, and in case of the failure of the Principal to carry out the provisions of this bond made for their use and benefit they and each of them may sue hereon in their own name.

SIGNED, SEALED and delivered this 22nd day of May, 2007.

Callahan, Inc.
(Principal)

By: _____

Western Surety Company
(Surety)

By:  _____
Timothy P. Lyons Attorney-in-Fact

CERTIFICATE

Western Surety Company

POWER OF ATTORNEY APPOINTING INDIVIDUAL ATTORNEY-IN-FACT

Know All Men By These Presents, That WESTERN SURETY COMPANY, a South Dakota corporation, is a duly organized and existing corporation having its principal office in the City of Sioux Falls, and State of South Dakota, and that it does by virtue of the signature and seal herein affixed hereby make, constitute and appoint

Brian R Driscoll, Timothy P Lyons, Brian P Curry, Claire A Cavanaugh, Individually

of Norwell, MA, its true and lawful Attorney(s)-in-Fact with full power and authority hereby conferred to sign, seal and execute for and on its behalf bonds, undertakings and other obligatory instruments of similar nature

- In Unlimited Amounts -

and to bind it thereby as fully and to the same extent as if such instruments were signed by a duly authorized officer of the corporation and all the acts of said Attorney, pursuant to the authority hereby given, are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the By-Law printed on the reverse hereof, duly adopted, as indicated, by the shareholders of the corporation.

In Witness Whereof, WESTERN SURETY COMPANY has caused these presents to be signed by its Senior Vice President and its corporate seal to be hereto affixed on this 4th day of January, 2007.



WESTERN SURETY COMPANY

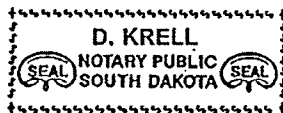
Paul T. Bruflat, Senior Vice President

State of South Dakota }
County of Minnehaha } ss

On this 4th day of January, 2007, before me personally came Paul T. Bruflat, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Sioux Falls, State of South Dakota; that he is the Senior Vice President of WESTERN SURETY COMPANY described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said corporation.

My commission expires

November 30, 2012



D. Krell, Notary Public

CERTIFICATE

I, L. Nelson, Assistant Secretary of WESTERN SURETY COMPANY do hereby certify that the Power of Attorney hereinabove set forth is still in force, and further certify that the By-Law of the corporation printed on the reverse hereof is still in force. In testimony whereof I have hereunto subscribed my name and affixed the seal of the said corporation this 2nd day of May, 2007



WESTERN SURETY COMPANY

L. Nelson, Assistant Secretary

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 02-5195

ST. PAUL MERCURY INSURANCE COMPANY, AS
ASSIGNEE AND SUBROGEE
Plaintiff,

v.

DICK CORPORATION, MIRANT KENDALL LLC, and
NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD,
Defendants.

**FIRST AMENDED COMPLAINT FOR DAMAGES AND
ENFORCEMENT OF MECHANIC'S LIEN RIGHTS**

I. INTRODUCTION

St. Paul Mercury Insurance Company ("St. Paul") as the assignee and subrogee of Harding and Smith Corporation's ("H&S") rights and remedies pursuant to a General Indemnification Agreement dated November 24, 1998 (the "Indemnity Agreement") and at common law, brings this action to recover damages as a result of services, labor and materials used and employed by Mirant Kendall, LLC ("Mirant") and Dick Corporation ("Dick") relative to the improvement, alteration, or construction of the Kendall Station Repowering Project located at 273 First Street, Parcels 1 and 2, Cambridge, Massachusetts (the "Property").

II. PARTIES, JURISDICTION AND VENUE

1. St. Paul is a Minnesota corporation with its principal place of business at 5801 Smith Avenue, Baltimore, Maryland.

2. On information and belief, Dick is a Pennsylvania corporation with a usual place of business at 1900 State Route 51, Large, Pennsylvania. Dick is registered to do business in the Commonwealth of Massachusetts.

3. On information and belief, Mirant was formerly known as Southern Energy Kendall LLC, and is a Delaware limited liability company with a usual place of business at 900 Ashwood Parkway, Suite 500, Atlanta, Georgia. On information and belief, Mirant is registered to do business in the Commonwealth of Massachusetts.

4. National Fire Insurance Company of Hartford ("National") is a Connecticut corporation with a usual place of business at CAN Plaza, 333 South Wabash Avenue, 13-South, Chicago, Illinois 60685. National is registered to do business in the Commonwealth of Massachusetts.

5. Jurisdiction for this action is proper pursuant to M.G.L. c. 223A, §3(a), (b) and/or (e) and venue for this action is proper pursuant to M.G.L. c. 223, §8 and M.G.L. c. 254, §5.

III. FACTUAL BACKGROUND

Mirant Enters Into General Contract With Dick

6. Mirant is the owner of the Property which is more particularly described on the property description attached hereto as **Exhibit A**.

7. On or about January 19, 2001, Dick entered into a written General Contract with Mirant (the "General Contract") for the construction of the Kendall Station Repowering Project located at the Property (the "Project"). The Project consists of increasing the output of the existing Kendall Station Repowering Plant by installing a heat recovery boiler and General Electric combustion turbine.

8. On or about April 26, 2001, National issued a bond to Dick as principal which secured payments to “persons supplying labor and material” to the Project (the “National Bond”). A copy of the National Bond is attached hereto as **Exhibit B**.

Dick Entered Into A Subcontract With H&S

9. On or about March 2000, Dick requested that H&S submit a bid price for the Project’s mechanical work.

10. H&S’ bid/price was based upon a design narrative, Piping and Instrumentation Drawings (“P&ID’s”) and General Arrangement Drawings (collectively, the “Bid Information”) which Dick furnished to H&S on or about March 2000.

11. Upon information and belief, Dick solicited bid prices for the Project’s mechanical work from other subcontractors which prices were to be based on the Bid Information.

12. Dick represented to H&S that the Bid Information fairly and accurately depicted the scope and design of the Project and could be used by H&S in order to prepare its bid price for the Project’s mechanical work.

13. In reliance upon the Bid Information and Dick’s representations as aforesaid, on or about April 6, 2000, H&S submitted its bid price to Dick for the Project’s mechanical work in the amount of \$13,800,000.

14. Dick accepted H&S’ bid price on or about October 2000.

15. On or about December 8, 2000, H&S entered into a subcontract with Dick to furnish and install the Project’s mechanical work (the “Subcontract”) which was based upon a reduced scope of the work as mutually agreed upon by Dick and H&S. A copy of the Subcontract without exhibits is attached hereto as **Exhibit C**. The Subcontract’s exhibits are too

voluminous to be appended to this Complaint, are available to the parties, and are available to the Court upon request.

16. Under the Subcontract, H&S agreed to furnish and install the Project's mechanical work for a lump sum price of \$12,061,182 (the "Subcontract Sum").

17. As a condition of the Subcontract, Dick required and H&S agreed to furnish payment and performance bonds to Dick.

18. Pursuant to the Subcontract, H&S requested and St. Paul issued a Payment Bond No. JZ6218 and a Performance Bond No. JZ6218 (the "St. Paul Bonds") in favor of Dick as obligee and beneficiary. Copies of the St. Paul Bonds are attached hereto as **Exhibits D and E**.

19. Beginning in November 2000 H&S commenced work under the Subcontract.

20. During the course of construction, H&S discovered that the design and scope of the Project's mechanical work had changed materially and substantially from the mechanical work's scope and design as contained in the Bid Information.

21. Between the time when Dick had furnished the Bid Information to H&S and requested that H&S submit a bid price for the Project's mechanical work, Dick had either caused portions of the Bid Information to be changed or had actual knowledge of such changes, and failed to provide that information to H&S before the execution and delivery of the Subcontract.

22. H&S did not learn of the substantial and material changes in the scope and design of the Project's mechanical work until Dick's release of the engineering plans which occurred in or around August 2001 -- approximately eight months after the Subcontract had been executed and delivered and, approximately ten months after H&S began construction of the Project.

23. As a result of the substantial and material changes to the scope and design of the Project's mechanical work, and the scope and design of the Project in general, H&S was forced

to expend or became liable for additional expenses, costs and fees and sustained damages for, without limitation, the following:

- a. Compensatory delays resulting from Dick's failure to timely produce engineering drawings, the late delivery of equipment, and by Dick's failure to adequately coordinate activities of its other subcontractors with H&S so as not to delay, interfere or hinder with H&S' work and by failing to respond timely to H&S' requests for information;
- b. Compensatory delays sustained as a result of the late completion of the Project by other subcontractors;
- c. Additional time extensions beyond the time period set forth in the Subcontract in which H&S had to complete its Subcontract work; and
- d. Additional costs and fees incurred as a result of changes in the scope and design of the Project's mechanical work and the scope and design of the Project in general.

24. As a result of all of the changes in the scope and the design of the Project's mechanical work and to the Project, generally, and Dick's failure to compensate H&S for its extra work and other costs and expenses related therein, H&S was financially unable to complete the Subcontract.

25. Consequently, on or about May 2002, St. Paul began completing the Subcontract work.

26. St. Paul has become subrogated to the rights to H&S to all Subcontract proceeds, claims, funds, property, rights, rights to payment, actions and accounts receivable due from Dick under the Subcontract.

27. On or about November 24, 1998, H&S, among others, entered into the Indemnity Agreement with St. Paul under which H&S agreed that, upon default of its obligations, under the St. Paul Bonds, St. Paul would have the right to:

- a. take immediate possession of any funds, property or rights;

- b. collect any sums as may be due H&S; and,
- c. collect any checks, drafts, warrants and other agreements for payment to H&S.

A copy of the Indemnity Agreement is attached hereto as **Exhibit F**.

28. By virtue of the Indemnity Agreement, H&S has assigned, among other things, all Subcontract proceeds, claims, funds, property, rights and actions and all other rights to payment which it had on account of the Subcontract to St. Paul.

29. By virtue of the Indemnity Agreement and under equitable rights of subrogation, St. Paul is entitled to prosecute this action as the assignee and subrogee of H&S.

30. St. Paul has substantially completed in good faith all Subcontract work.

31. St. Paul has fully completed all of the Subcontract work.

32. The Subcontract Sum, less previous payments made by Dick is approximately \$2,757,074.29 which amount is due and owing to St. Paul, together with costs, interest and attorneys' fees as shown on the account annexed hereto as **Exhibit I**.

33. As of this date, Dick has approved 14 change orders totaling \$449,226.08 of which Dick has paid to date the sum of \$340,420.40 as shown on the account annexed hereto as **Exhibit G** leaving a balance due to St. Paul of \$108,805.68 on such change orders.

34. St. Paul, as H&S' assignee and subrogee, is further entitled to an amount of not less than \$7,340,946.07 for the extra work, changes, change conditions and related claims and extra work orders as set forth on the account annexed hereto as **Exhibit H**, together with all direct, indirect, incidental and consequential damages related thereto, plus costs, interest and attorneys' fees.

35. St. Paul, as H&S' assignee and subrogee, is entitled to approximately \$10,206,825.94 based upon the account annexed hereto as **Exhibit I**, together with all direct,

indirect, incidental and consequential damages related thereto plus costs, interest and attorneys' fees.

36. Dick has failed and refused to pay the aforesaid amounts, in breach of the Subcontract.

37. H&S and St. Paul as H&S' assignee and subrogee incurred the aforesaid amounts with a reasonable expectation of being paid therefor.

38. Dick is liable to St. Paul as H&S' assignee and subrogee for all amounts set forth herein, together with costs, interest and attorneys' fees.

39. All conditions precedent to the maintenance of this action by St. Paul have been fully performed and satisfied.

IV. ST. PAUL'S CLAIMS

COUNT I - Breach of Subcontract - Dick Corporation

40. St. Paul repeats and realleges the allegations contained in Paragraphs 1 to 39 of the Complaint as if fully set forth herein.

41. H&S and St. Paul as H&S' assignee and subrogee fully performed the Subcontract work.

42. H&S and St. Paul as H&S' assignee and subrogee substantially performed in good faith all Subcontract work.

43. Dick breached the Subcontract by:

- a. unilaterally expanding the work of H&S beyond the scope of the Subcontract;
- b. delaying the Subcontract work;
- c. misrepresenting the scope of the work to be completed by H&S;
- d. failing to coordinate the various subtrades;

e. failing to respond timely to Requests for Information submitted by H&S and St. Paul; and,

f. failing and refusing to pay amounts due and owing under the Subcontract, including the base contract amount and amounts for extra work, delays, and impact costs.

44. St. Paul, as H&S' assignee and subrogee, has been damaged by Dick's breach of the Subcontract.

45. St. Paul, as H&S' assignee and subrogee, is entitled to all damages arising out of Dick's breach of the Subcontract, together with costs, interests and attorneys' fees.

COUNT II - Quantum Meruit - Dick Corporation

46. St. Paul repeats and realleges the allegations contained in Paragraphs 1 to 39 of the Complaint as if fully set forth herein.

47. St. Paul substantially performed the Subcontract work in good faith with the reasonable expectation of payment therefor.

48. Dick received the benefit of H&S' and St. Paul's work and has not paid for that benefit.

49. St. Paul, as H&S' assignee and subrogee is entitled to recover the fair value of the labor, material, equipment and services furnished and/or performed by it on the Project.

50. Dick is liable to St. Paul as H&S' assignee and subrogee for the fair value of the labor, material, services and equipment furnished and/or performed by it on the Project together with costs, interest and attorneys' fees.

51. Dick is liable to St. Paul for the fair value of the labor, services, material and equipment furnished and/or performed by H&S and St. Paul as assignor and subrogor in connection with the Project together with costs, interest and attorneys' fees.

COUNT III - Promissory Estoppel - Dick Corporation

52. St. Paul repeats and realleges its allegations in Paragraphs 1 to 39 as if fully set forth herein.

53. Dick by its conduct including oral and written representations to H&S should have expected to induce action or forbearance of a definite and substantial nature.

54. Dick's promise to compensate H&S for all work performed and materials installed induced H&S to continue to provide labor and materials, which were beyond the scope of the Subcontract to accommodate Dick's construction schedule.

55. H&S provided work and materials to Dick with the reasonable expectation of being paid therefor.

56. An injustice can be avoided only by enforcement of Dick's promise to pay H&S.

COUNT IV - M.G.L. C. 93A, § 2 and 11 - Dick Corporation

57. H&S repeats and realleges its allegations in Paragraphs 1 to 39 as if fully set forth herein.

58. At all times material and relevant hereto, H&S and Dick, or their agents engaged in the conduct of trade or commerce.

59. All acts engaged in by Dick relative to the instant complaint occurred primarily and substantially in the Commonwealth of Massachusetts.

60. Dick has engaged in unfair and deceptive acts and practices in violation of M.G.L. c. 93A, §§2 and 11 including, without limitation, the following:

- a. failing to disclose material information to H&S before entering into the Subcontract; and
- b. misrepresenting the scope of the work in the Subcontract to H&S.

61. Dick's above described actions were done knowingly, willingly and/or intentionally.

62. As a result of Dick's unfair and deceptive acts, H&S has sustained actual damages, including, but not limited to delay cost, material cost, and labor costs and is liable to St. Paul for the balance of the work completed under the Subcontract.

COUNT V - Mechanics Lien - Mirant

63. St. Paul repeats and realleges its allegations in Paragraphs 1 to 39 as if fully set forth herein.

64. Mirant is the owner of the Property.

65. Mirant entered into the General Contract to erect, alter, repair or remove a building or structure upon the real estate described above.

66. H&S entered into the Subcontract pursuant to which H&S has furnished labor or material, or both labor and material, rental equipment, appliances or tools for the building located on the property described above. An account of the amount owed to H&S by Dick as of December 2002 is annexed hereto as **Exhibit I**.

67. On June 19, 2002, H&S recorded a Notice of Contract in the Middlesex South District Registry of Deeds. A copy of the Notice of Contract is attached hereto as **Exhibit J**.

68. On September 13, 2002, St. Paul recorded a Statement of Account in the Middlesex South District Registry of Deeds. A copy of the Statement of Account is attached hereto as **Exhibit K**.

69. On September 17, 2002, H&S recorded a Statement of Account in the Middlesex South District Registry of Deeds. A copy of the Statement of Account is attached hereto as **Exhibit L**.

70. H&S provided copies of the Notice of Contract and Statement of Account to Mirant and Dick. A copy of the letter providing notification is attached hereto as **Exhibit M**.

71. By virtue of the parties' contracts, the Notice of Contract and Statement of Account, and the use of H&S and St. Paul as H&S's assignee and subrogee's materials and labor for the construction of the Project contracted for by Mirant, St. Paul as H&S's assignee and subrogee claims a lien upon said real estate to secure it for the unpaid balance of its account and interest thereon.

COUNT VI - Bond Claim - National

72. St. Paul repeats and realleges its allegations in Paragraphs 1 to 39 as if fully set forth herein.

73. On or about April 26, 2001, National issued the National Bond which provided for payment of Subcontractors on the Project for services rendered to and materials provided by Subcontractors including H&S on the Project.

74. H&S and St. Paul as assignee and subrogee have fully and substantially completed the Subcontract work.

75. St. Paul, as H&S's assignee and subrogee, rendered services and provided materials to Dick.

76. H&S and St. Paul as H&S's assignee and subrogee have furnished extra work as requested by Dick.

77. St. Paul has performed all conditions precedent to maintain this claim against National.

78. St. Paul is an eligible claimant under the National Bond.

COUNT VII - Account Annex - Dick

79. St. Paul repeats and realleges its allegations in Paragraphs 1 to 39 as if fully set forth herein.

80. Dick owes St. Paul as assignee and subrogee of H&S's rights the amount of which the Subcontract in the amount of \$10,236,825.94, as set forth in the Account annexed hereto as **Exhibit I**, together with all other direct, indirect, incidental and consequential damages, plus costs, interest and attorney's fees.

81. The total balance due from Dick is \$10,236,825.94, as set forth in the Account annexed hereto as **Exhibit I**, together with all other direct, indirect, incidental and consequential damages, plus costs, interest and attorney's fees.

WHEREFORE, the Plaintiff, St. Paul Mercury Insurance Company demands that:

1. Pursuant to Count I, that judgment enter against Dick in favor of St. Paul for all amounts due under the Subcontract;
2. Pursuant to Counts II and III, that judgment enter against Dick in favor of St. Paul for the fair reasonable value of the services, labor, and materials provided to it by H&S;
3. Pursuant to Counts IV and VII, that judgment enter against Dick in favor of St. Paul for the amount of its actual damages such amount to be not less than doubled nor more than trebled;
4. Pursuant to Counts V, that judgment enter against Mirant in favor of St. Paul for the fair and reasonable value of the services, labor and materials provided; and
5. Pursuant to Counts VI, that judgment enter against National in favor of St. Paul for all amounts due under the Subcontract.

Complaint to Discharge Lien

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION NO.:

SOUTH WATER CONSTRUCTION LLC,)
)
Plaintiff,)
)
v.)
)
ZENITH STEEL ERECTORS, INC.,)
)
Defendant,)
)
EASTERN BANK,)
)
Party-In-Interest.)
)

VERIFIED COMPLAINT TO DISCHARGE LIEN PURSUANT TO M.G.L.c. 254 § 15A

INTRODUCTION

1. By this action, South Water Construction, LLC (“South Water”) seeks to discharge a lien recorded by the defendant, Zenith Steel Erectors, Inc. (“Zenith”). Zenith recorded its lien on property located at 8 Natalie Way, Plymouth, Massachusetts (the “Property”) owned by Pajwy LLC (“Pajwy”) claiming that it performed work under a written contract as a subcontractor to South Water in conjunction with the construction, alteration or repair of the Plymouth Sports Dome, Plymouth, Massachusetts (the “Project”).

2. As set forth more fully below, Zenith does not have a valid lien because it failed to meet the requirements set forth in the mechanic’s lien statute, M.G.L.c. 254, § 1, *et seq.*, for perfecting and enforcing a lien against the owner of the property. Specifically, Zenith

- failed to file a civil action to enforce its lien within ninety days after the filing of its statement of account.

Accordingly, as Zenith has failed to comply with the procedural prerequisites for perfecting and enforcing its lien, Zenith's lien must be discharged.

PARTIES

3. The Plaintiff South Water is a Rhode Island limited liability company and is the general contractor on the Project.

4. The Defendant Zenith is a Massachusetts corporation with a principal place of business at 300 Granite Street, Suite 408, Braintree, Massachusetts.

5. Eastern is on information and belief a Massachusetts corporation with a principal place of business at 36 Main Street, Plymouth, Massachusetts. On information and belief Eastern holds a mortgage on the Property. Eastern is named solely as a party-in-interest based upon its alleged mortgage interest in the Property.

FACTUAL ALLEGATIONS

6. The Project involved the construction of a sixty thousand (60,000) square foot athletic complex known as the "Plymouth Sports Dome" located in Plymouth Massachusetts. The Sports Dome was designed to be one of the premier indoor athletic facilities in Massachusetts.

7. Pajwy selected South Water to perform the general contracting work on the Project.

8. On or about June 23, 2005, South Water entered into a Standard Form Of Agreement Between Owner And Contractor For A Stipulated Sum (the "Contract") with Pajwy to construct the Project. The original contract sum was \$1,935,532.

9. In conjunction with the Project, on or about August 26, 2005, South Water retained Zenith to perform the steel erection work on the Project. Zenith's original contract price was \$230,000 (the "Subcontract").

10. In or around November 2005, South Water terminated Zenith.

11. On or about February 6, 2006, Zenith recorded its Notice of Contract and Statement of Account in the Plymouth County Registry of Deeds. A copy of the Notice of Contract and Statement of Account are attached as Exhibit A and Exhibit B respectively.

12. M.G.L.c. 254, § 11 states, in relevant part that

A [mechanic's lien] shall be dissolved unless a civil action to enforce it is commenced within ninety days after the filing of the statement required by section 8.

13. Notwithstanding the plain language of the statute, it has been over ninety days since Zenith recorded its statement of account and Zenith has failed to file an action to enforce its lien.

14. Zenith's failure to meet the requirements of M.G.L.c. 254, § 11 is justification for discharging its lien.

WHEREFORE, South Water requests that this Court:

(a) discharge Zenith's lien filings against the Property pursuant to M.G.L.c. 254, § 15A; and

(b) grant South Water such other and further relief as the Court deems just.

SOUTH WATER CONSTRUCTION LLC
By its attorneys,

Richard E. Briansky, Esq. (BBO# 632709)
PRINCE, LOBEL, GLOVSKY & TYE LLP
100 Cambridge Street, Suite 2200
Boston, MA 02114
Phone: (617) 456-8052
Fax: (617) 456-8100

VERIFICATION

I, Perry Boudreau, the manager of South Water Construction LLC verify that I have read the foregoing verified complaint. The facts stated therein are based upon my personal knowledge, the investigation performed by South Water and its agents and/or employees as reported to me, public records obtained at the Plymouth County Registry of Deeds, or upon records of South Water as kept in the usual course of its business. To the best of my knowledge, information and belief, the statements contained therein are true.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS ____ DAY OF
JUNE 2006

Perry Boudreau
Manager
South Water Construction, LLC

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT
C.A. NO. 05-

SHINING ROCK GOLF COMMUNITY, LLC,
Plaintiff

v.

PUBLIC WORKS SUPPLY CO. INC.
Defendant

**VERIFIED COMPLAINT TO DISCHARGE
LIEN PURSUANT TO M.G.L. c. 254, § 15A**

1. In this action, Shining Rock Golf Community, LLC ("Shining Rock") seeks to discharge a lien improperly recorded by the defendant, Public Works Supply Co. Inc. ("Public Works"). Public Works recorded its lien on property owned, in part, by Shining Rock, claiming that it worked under a written contract as a subcontractor to Universal Golf Construction Corporation ("UGC"). As the general contractor, UGC had contracted with Shining Rock Partners, LLC ("Developer") to construct a golf course project. Public Works alleges that a balance of \$58,999.17 remains due on its contract with UGC.

2. As set forth more fully below, Public Works does not have a valid lien because it failed to meet the requirements set forth in the mechanic's lien statute, M.G.L. c. 254, § 1, *et seq.*, for perfecting and enforcing a lien against the owner of property. Specifically, Public Works:

- failed to timely record a notice of contract pursuant to M.G.L. c. 254, § 4,
- failed to timely record a statement of account pursuant to M.G.L. c. 254, § 8, and

- failed to commence this action to enforce its lien within 90 days of the last date by which it should have recorded its statement of account pursuant to M.G.L. c. 254, § 11.

The failure to meet any one of these requirements invalidates Public Works' lien, thereby entitling Shining Rock to a discharge of the lien pursuant to § 15A.

3. The plaintiff Shining Rock is a Massachusetts limited liability company, with a principal place of business located at 239 Concord Road, Lincoln, Massachusetts. Shining Rock owns certain real estate on which a golf course and associated amenities are being developed in Northbridge and Upton, Massachusetts.

4. The defendant Public Works is, upon information and belief, a Massachusetts corporation with a principal place of business at 27 Garden Street, Danvers, Massachusetts.

5. The Developer is a New Hampshire limited liability company, with an address care of Sinclair Machine Products, Airport Road, Claremont, New Hampshire, and is the developer of the Shining Rock Golf Community in Northbridge and Upton.

6. Shining Rock owns certain real estate on which a golf course and associated amenities are being developed in Northbridge and Upton, Massachusetts. The Developer entered into two separate contracts with UGC, as general contractor; the first to build the golf course and the second to build certain of the roads throughout the community. (True and correct copies of the golf course and the roads contracts (not including certain attachments and incorporated documents) are attached hereto as exhibits A and B, respectively.) As contemplated, *inter alia*, by section 11 of each general contract (entitled "Subcontracts"), UGC hired various subcontractors to complete work on the project, including, Public Works alleges, Public Works.

7. Despite being paid over \$4,000,000 between both of the contracts, UGC never completed its work, did not perform as required under its contracts, caused huge delays and

damage to the project and to the Developer and Shining Rock, and, by no later than late October 2004, had abandoned the project. On November 3, 2004, UGC recorded notices of contract and statements of account with respect to both the roads contract and the golf course contract. (See Exh. C, ¶¶ 43-46, & Exh. D.) By November 9, 2004, Shining Rock's and the Developer's lawyers had formally notified UGC that UGC "had ceased work on the Shining Rock Golf Community project and has removed its equipment from the site." (See Exh. E.)

8. In a complaint it filed in early 2005 against Shining Rock and the Developer, UGC alleged that "On or about November 10, 2004, [it] suspended its work under the Roads Contract and the Golf Course Contract." (See Exh. C, ¶ 38.) However, in a pleading that UGC filed recently in the United States Bankruptcy Court for the District of New Hampshire, UGC alleged that it "suspended work in October 2004." (See Exh. F, ¶ 3.) Therefore, while the exact date that UGC stopped work on the project may be in dispute, it cannot be disputed that UGC had ceased work on the project by no later than November 10, 2004.¹

9. On or about January 28, 2005, UGC filed its complaint against Shining Rock and the Developer, asserting claims for breach of contract and rights under the lien statute. Shining Rock (and the Developer) deny any liability to UGC and have asserted counterclaims against UGC for damages in an amount that is still increasing but will exceed \$2,000,000. UGC's mechanics lien case is pending in this Court and is entitled *Universal Golf Corp. v. Shining Rock Golf Community, LLC, et al.*, Civil Action No. 05-162A.

10. UGC also failed to pay many of its subcontractors, including, Public Works claims, Public Works, resulting in certain subcontractors commencing litigation against Shining Rock under the mechanic's lien statute in late 2004. One of those subcontractors is Eamonn

¹ Shining Rock disputes UGC's date on November 10, 2004, but adopts it herein solely for purposes of the application to discharge Public Works' lien. In fact, UGC last provided any labor or materials well before that date.

McMahon, d/b/a Extec Machinery ("Extec"), *who is represented by the same lawyer and the same law firm that represents Public Works*. Extec recorded its notice of contract and its statement of account on November 12, 2004 (*see* Exh. G), and commenced suit in this Court against Shining Rock on or about December 2, 2004, Civil Action No. 04-2342.

11. On June 16, 2005, well over seven months after UGC last provided any work on the project, Public Works commenced its own action in this Court to enforce a purported subcontractor's lien against Shining Rock. (A true and correct copy of Public Works' complaint is attached as Exhibit H.) Public Works alleges, in that action, that on May 24, 2004, it entered into a written contract with UGC to supply material for the project as a subcontractor. (Exh. H, ¶ 7.) In its complaint, Public Works alleges that it provided materials to UGC in accordance with the contract and that \$58,999.17 is due and owing to Public Works to date. (*Id.*, ¶¶ 8-9.) The complaint does not allege when the materials actually were supplied under that alleged contract, but by October 25, 2004, Public Works had sent all its invoices *to the Developer*, requesting payment of them because UGC had not paid them. (Exh. I.) The last shipment date identified in the invoices that Public Works attached to its complaint is September 30, 2004. (*Id.*)

12. On information and belief, Public Works was aware by early November 2004 that UGC had stopped work.

13. Public Works did not record its notice of contract *until February 11, 2005*. (*See* Exh. J.)

14. Public Works did not record its statement of account *until June 10, 2005*. (*See* Exh. K.)

15. Public Works did not file its complaint *until June 16, 2005*. Its sole claim against Shining Rock is pursuant to the mechanic's lien statute, M.G.L. c. 254, § 1, *et seq.*

16. M.G.L. c. 254, § 4 requires that a subcontractor record its notice of contract “*not later than the earliest of: (i) sixty days after filing or recording the notice of substantial completion under section two A; (ii) ninety days after filing or recording of the notice of termination under section two B; or (iii) ninety days after the last day a person entitled to enforce a lien under section two or anyone claiming by, through or under him performed or furnished labor or materials or both labor and materials to the project or furnished rental equipment, appliances or tools.*” (Emphasis added.)

17. Accordingly, the last day by which Public Works was required to record its notice of contract was ninety days after the last date that it or UGC performed any work on the project. Public Works has not alleged (and cannot allege) that it performed any work after UGC last provided any work or services. Assuming, for purposes of this complaint only, the truth of UGC’s judicial pleading that it “suspended” its work (which it never “restarted”) on November 10, 2004, then the last date by which Public Works was required to record its notice of contract was February 8, 2005. Indeed, since UGC itself has now alleged that it suspended its work in October 2004 and recorded its notices of contract and its statements of account on November 2, 2004 (*see* ¶ 8, *supra*), that deadline undoubtedly was no later than sometime in late January, 2005. However, Public Works did not record its notice of contract until February 11, 2005.

18. Public Works’ lien also must be discharged for the separate and independent reason that it also failed to meet the deadline, under c. 254, § 8, for the recording of its statement of account.

19. M.G.L. c. 254, § 8, required Public Works to record its statement of account “*not later than the earliest of: (i) ninety days after filing or recording the notice of substantial completion under section two A; (ii) one hundred and twenty days after filing or recording of the*

notice of termination under section two B; or (iii) *one hundred and twenty days after the last day a person entitled to enforce a lien under section two or anyone claiming by, through or under him performed or furnished labor or materials or both labor and materials to the project or furnished rental equipment, appliances or tools.*”

20. Accordingly, the last day by which Public Works was required to record its statement of account was 120 days after the last date that it or UGC performed any work on the project. For the reasons discussed above, that date began to run no later than November 10, 2004. Public Works therefore should have recorded its statement of account no later than March 10, 2005. However, Public Works recorded its statement of account on June 10, 2005, and therefore missed this separate and independent deadline by three months.

21. Finally, M.G.L. c. 254, § 11, provides that “[t]he lien shall be dissolved unless a civil action to enforce it is commenced within ninety days after the filing of the statement required by section eight [*i.e.*, the statement of account].” Public Works was required to file its statement of account by no later than March 10, 2005. If it had done so, which it did not, it would have had to file its lawsuit by no later than June 8, 2005. Public Works filed its case on June 16, 2005. That provides an additional, independent reason to order the dismissal of Public Works’ lien.

22. To the extent that Public Works claims that its untimely notice of contract included the information required by Section 8 and, thus, met the requirements set forth in Section 8, its lien still fails. The ninety day period to commence the required litigation therefore would simply have commenced earlier (February 12, 2005). That means Public Works would have been required to file its complaint by no later than May 12, 2005, over a month before its actual filing date of June 16, 2005.

23. Public Works' failure to meet each of the deadlines contained in M.G.L. c. 254, §§ 4, 8 and 11 provides separate and independent reasons for discharging its lien.

24. On July 12, 2005, counsel for Shining Rock sent to counsel for Public Works a request that Public Works voluntarily dismiss its litigation against Shining Rock and discharge its lien. (See Exh. L.) Public Works refused to do so, requiring Shining Rock to file a motion to dismiss the complaint in the Public Works case.

WHEREFORE, Shining Rock requests that this Court:

- (i) Discharge in its entirety Public Works' lien filings against Shining Rock pursuant to M.G.L. c. 254, §§ 4, 8, 11 and 15A;
- (ii) Under G. L. c. 231, § 6F, issue a separate finding that Public Works' filing of its lien and its pursuit of its complaint against Shining Rock were wholly frivolous and not advanced in good faith and, after such finding, award Shining Rock its costs, expenses and attorneys' fees; and
- (iii) Grant Shining Rock such other and further relief as the Court deems just.

Respectfully submitted,

Dated: September 7

Indemnity Provision

Section 11. INDEMNIFICATION.

To the fullest extent permitted by law, the Subcontractor further specifically obligates itself to the Contractor, Surety, Owner and any other party required to be indemnified under the Prime Contract or the Completion Agreement, jointly and severally, in the following respects, to-wit:

(a) to defend and indemnify them against and save them harmless from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent or patented right, arising in connection with this Subcontract and anything done thereunder;

(b) to defend and indemnify them against and save them harmless from any and all claims, suits or liability for damages to property including loss of use thereof, injuries to persons, including death, and from any other claims, suits or liabilities, including any fines and/or penalties imposed upon the Contractor or Surety due to violation of any State, Federal, or other laws or regulations including but not limited to fines and penalties assessed by OSHA, on account of acts or omissions of Subcontractor, or any of its subcontractors, suppliers, officers, agents, employees or servants, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Subcontractor's duty hereunder shall not arise if such claims, suits or liability, injuries or death or other claims or suits are caused by the sole negligence of a party indemnified hereunder. Subcontractor's obligation hereunder shall not be limited by the provisions of any Workers' Compensation act or similar statute;

(c) to pay for all materials furnished and Work and labor performed under this Subcontract, and to satisfy the Contractor and Surety thereupon whenever demand is made and to defend and indemnify the Contractor, Surety Owner and other indemnified parties against and save them and the premises harmless from any and all claims, suits or liens therefore by others than the Subcontractor;

(d) to obtain and pay for all permits, licenses and official inspections necessary for its Work, and to comply with all laws, ordinances and regulations bearing on the Work and the conduct thereof;

(e) the Subcontractor warrants and guarantees the Work covered by this Subcontract and agrees to make good, at its own expense, any defect in material or workmanship which may occur or develop prior to the Contractor's release from responsibility to the Surety therefor;

(f) the Subcontractor assumes toward the Contractor all obligations and responsibilities that the Contractor assumes toward the Surety and others, as set forth in the Completion Agreement, insofar as applicable, generally or specifically to Subcontractor's Work;

(g) The Subcontractor shall defend and indemnify the Contractor, Surety, Owner and other indemnified parties against, and save them harmless from, any and all loss, damage, costs, expenses and attorneys' fees suffered or incurred on account of any breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract. Notwithstanding the above, Contractor, at its sole discretion, reserves the right to defend any one or all of the following: the Owner, the Surety or other indemnified parties, Contractor's surety and itself. Such election to defend by Contractor shall not in any way limit Subcontractor's responsibility to indemnify and hold harmless as provided herein.

Section 12. LIENS AND CLAIMS.

Subcontractor shall, as and when requested, furnish evidence satisfactory to the Contractor, Surety, Owner and Owner's Representative that all amounts due for labor and material furnished the Subcontractor in connection with performance of this Subcontract have been paid, including union health, welfare and pension fund payments and payroll taxes. Such evidence shall be furnished in such form and manner as requested by Contractor, and all statements relative thereto shall, if called for by Contractor, be made by sworn affidavit. Subcontractor shall furnish to Contractor releases of bond rights and lien rights by persons who have furnished labor, material or other things in the performance of this

Subcontract, it being agreed that payment of money otherwise due Subcontractor need not be made by Contractor until such releases are furnished. Subcontractor shall deliver its Work free from all claims, encumbrances and liens.

Lien Waiver

DATE

REC#

EXHIBIT D - SUBCONTRACTOR WAIVER OF LIEN

General Contractor: SUFFOLK CONSTRUCTION

Project:

Month Funded For:

Total Amount Previously
Paid:

Amount Paid This Date:

Retainage Held to Date:

In consideration of the receipt of the amount of payment set forth above and any and all past payments received from General Contractor in connection with the project, Subcontractor acknowledge and agrees that it has been paid all sums due for all labor, materials and/or equipment furnished by the Subcontractor to or in connection with the project and the undersigned hereby releases, discharges, relinquishes and waives any and all claims, suits, liens and rights under any Notice of Identification, Notice of Contract or Statement of Account or other lien enforcement procedure, as well as claims under any payment or other bond issued in connection with the Project, with respect to the Owner, the Project and/or against Suffolk and its sureties on account of any labor, materials and/or equipment furnished through the date hereof.

The Subcontractor individual represents and warrants that he is the duly authorized representative of the Subcontractor, empowered and authorized to execute and deliver this document on behalf of the Subcontractor and that this document binds the subcontractor for all purposes stated herein.

The Subcontractor represents and warrants that it has paid in full each and every sub-subcontractor, laborer and labor, material and/or equipment supplier with whom undersigned has dealt in connection with the Project and the subcontractor agrees at its sole cost and expense to defend, indemnify and hold harmless Suffolk against any claims, demands, suits, disputes, damages, costs, expenses (including attorney's fees), liens and/or claims of lien made by such sub-subcontractors, laborers and labor and/or material suppliers arising out of or in any way related to the Project. This document is to take effect as a sealed instrument.

Signed under the penalties of perjury as of this _____ day
of _____ 20____

Name of Individual/Company releasing Lien

Signature and Title

Printed Name of Individual Signing this Lien Waiver

Statutes



PRINCE, LOBEL, GLOVSKY & TYE 

100 Cambridge Street,
Suite 2200
Boston, MA 02114

254 § 2

Written contract; notice; time for filing; form

A person entering into a written contract with the owner of any interest in real property, or with any person acting for, on behalf of, or with the consent of such owner for the whole or part of the erection, alteration, repair or removal of a building, structure, or other improvement to real property, or for furnishing material or rental equipment, appliances, or tools therefor, shall have a lien upon such real property, land, building, structure or improvement owned by the party with whom or on behalf of whom the contract was entered into, as appears of record on the date when notice of said contract is filed or recorded in the registry of deeds for the county or district where such land lies, to secure the payment of all labor, including construction management and general contractor services, and material or rental equipment, appliances, or tools which shall be furnished by virtue of said contract. Said notice may be filed or recorded in the registry of deeds in the county or registry district where the land lies by any person entitled under this section to enforce a lien, and shall be in substantially the following form:

Notice is hereby given that by virtue of a written contract dated ___, between ___, owner, and ___, contractor, said contractor is to furnish or has furnished labor and material or rental equipment, appliances or tools for the erection, alteration, repair or removal of a building, structure, or other improvement on a lot of land or other interest in real property described as follows:

(INSERT DESCRIPTION)

Such person may file or record the notice of contract at any time after execution of the written contract whether or not the date for performance stated in such written contract has passed and whether or not the work under such written contract has been performed, but not later than the earliest of:

(i) sixty days after filing or recording of the notice of substantial completion under section two A;

or

(ii) ninety days after filing or recording of the notice of termination under section two B;

or

(iii) ninety days after such person or any person by, through or under him last performed or furnished labor or materials or both labor and materials.

254 § 4

Subcontractors; written contract; notice; filing; form; indirect contractual relationship; notice of identification

Whoever furnishes labor, including subcontractor construction management services, or who furnishes material, or both labor and material, or furnishes rental equipment, appliances or tools, under a written contract with a contractor, or with a subcontractor of such contractor, may file or record in the registry of deeds for the county or district where such land lies a notice of his contract substantially in the following form:

Notice is hereby given that by virtue of a written contract dated _____, between _____ contractor (or subcontractor) and _____ said _____ is to furnish or has furnished labor or material, or both labor and material, or is to furnish or has furnished rental equipment, appliances or tools, in the erection, alteration, repair or removal of a building, structure or other improvement of real property by _____, contractor, for _____, owner, on a lot of land or other interest in real property described as follows:

(Insert description)

As of the date of this notice, an account of said contract is as follows:

1. contract price _____
2. agreed change orders _____
(indicate whether addition or subtraction)
3. pending change orders: _____
(indicate whether addition or subtraction)
4. disputed claims _____
(indicate whether addition or subtraction)
5. payments received _____

The regular mailing address of the party recording or filing this notice is as follows: _____

Such person may file or record the notice of contract at any time after execution of the written contract whether or not the date for performance stated in such written contract has passed and whether or not the work under such contract has been performed, but not later than the earliest of:

(i) sixty days after filing or recording the notice of substantial completion under section two A;

or

(ii) ninety days after filing or recording of the notice of termination under section two B;

or

(iii) ninety days after the last day a person entitled to enforce a lien under section two or anyone claiming by, through or under him performed or furnished labor or materials or both labor and materials to the project or furnished rental equipment, appliances or tools.

Such notice may also be filed by a person or his assignee, agent, authorized representative or third party beneficiary to whom amounts are due or for whose benefit amounts are computed and due for or on the basis of the labor of that person performing labor under a written contract with a contractor, or with a subcontractor of such contractor and the person filing such notice shall not be required to itemize the amount of the contract, the amount of pending changes in the contract, the amount of outstanding claims or the amount paid in such notice.

Upon filing or recording a notice, as hereinbefore provided, and giving actual notice to the owner of such filing, the subcontractor shall have a lien upon such real property, land, building, structure or improvement owned by the party who entered into the original contract as appears of record at the time of such filing, to secure the payment of all labor and material and rental equipment, appliances or tools which he is to furnish or has furnished for the building or structure or other improvement, regardless of the amount stated in the notice of contract. Such lien shall not exceed the amount due or to become due under the original contract as of the date notice of the filing of the subcontract is given by the subcontractor to the owner.

If the person claiming a lien under this section has no direct contractual relationship with the original contractor, except for liens for labor by persons defined in section one of this chapter, the amount of such lien shall not exceed the amount due or to become due under the subcontract between the original contractor and the subcontractor whose work includes the work of the person claiming the lien as of the date such person files his notice of contract, unless the person claiming such lien has, within thirty days of commencement of his performance, given written notice of identification by certified mail return receipt requested to the original contractor in substantially the following form:

Notice of Identification

Notice is hereby given to ____, as contractor, that ____, as subcontractor/vendor, has entered into a written contract with ____ to furnish labor or materials, or labor and materials, or rental equipment, appliances or tools to a certain construction project located at ____ (Street Address), ____ (Town or City), Massachusetts. The amount or estimated amount of said contract is \$____. (No amount need be stated for contracts for the rental of equipment, appliances or tools).

The amount stated in any such notice of identification shall not limit the amount of the lien. Any inaccuracy in the naming of the contractor or other information in such notice shall not affect its validity provided there shall be actual notice.

254 § 5

Enforcement of lien; procedure

A lien upon land for the erection, alteration, repair or removal of a building or other structure or other improvement of real property or a lien established under section seventy-six of chapter sixty-three, section six of chapter one hundred and eighty-three A, or subsection (a) of section twenty-nine of chapter one hundred and eighty-three B shall be enforced by a civil action brought in the superior court for the county where such land lies or in the district court in the judicial district where such land lies. The plaintiff shall bring his action in his own behalf and in behalf of all other persons in interest who shall become parties. An attested copy of the complaint, which shall contain a brief description of the property sufficient to identify it, and a statement of the amount due, shall be filed in the registry of deeds and recorded as provided in section nine within thirty days of the commencement of the action, or such lien shall be dissolved. All other parties in interest may appear and have their rights determined in such action, and at any time before entry of final judgment, upon the suggestion of any party in interest that any other person is or may be interested in the action, or of its own motion, the court may summon such person to appear in such cause on or before a day certain or be forever barred from any rights thereunder. The court may in its discretion provide for notice to absent parties in interest. The terms "party in interest" and "person in interest", as used in this chapter, shall include mortgages and attaching creditors.

254 § 8

Statement of amount due; time for filing; dissolution of lien

Liens under sections two and four shall be dissolved unless the contractor, subcontractor, or some person claiming by, through or under them, shall, not later than the earliest of:

(i) ninety days after the filing or recording of the notice of substantial completion under section two A;

(ii) one hundred and twenty days after the filing or recording of the notice of termination under section two B;

or

(iii) one hundred and twenty days after the last day a person, entitled to enforce a lien under section two or anyone claiming by, through or under him, performed or furnished labor or material or both labor and materials or furnished rental equipment, appliances or tools, file or record in the registry of deeds in the county or district where the land lies a statement, giving a just and true account of the amount due or to become due him, with all just credits, a brief description of the property, and the names of the owners set forth in the notice of contract.

A lien under section one shall be dissolved unless a like statement, giving the names of the owner of record at the time the work was performed or at the time of filing the statement, is filed or recorded in the appropriate registry of deeds within the ninety days provided in said section. Nothing in this section shall prohibit the filing or recording of a statement under this section prior to the filing or recording of the notices under section two A or two

254 § 11
Action to enforce lien; time to commence;
validity of lien

The lien shall be dissolved unless a civil action to enforce it is commenced within ninety days after the filing of the statement required by section eight. The validity of the lien shall not be affected by an inaccuracy in the description of the property to which it attaches, if the description is sufficient to identify the property, or by an inaccuracy in stating the amount due for labor or material unless it is shown that the person filing the statement has wilfully and knowingly claimed more than is due him.

254 § 12

Written contract; recording of bond; form; enforcement

Any person, including the owner, in interest in connection with a written contract covered by section two or section four may cause to be recorded in the registry of deeds in the county or district where the land lies a bond of a surety company authorized to do a surety business in Massachusetts and in a penal sum equal to the contract sum or, if the contract does not contain a contract sum, in a penal sum equal to that person's fair estimate of the contract sum, all as set forth in the certificate on the bond. The bond shall describe the land in such detail as is required in a common conveyance of land, and shall be in the following form:—

Know All Men By These Presents:

That we _____ of _____ in the County of _____ and Commonwealth of Massachusetts, as principal, and _____ a surety company organized under the laws of _____ and authorized to do business in the Commonwealth as a surety company, are holden and stand firmly bound and obliged unto _____ Register of Deeds for the _____ District, County of _____, in the principal sum of _____ Dollars (\$) to be paid unto said Register and his successors in said office, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, said principal is interested in the erection, alteration, repair or removal of a building or structure on a certain lot of land situated within the ____ Registry District in the Commonwealth, bounded and described as follows:

(Insert description)

and desires to free said land from liens for all labor and all labor and materials entitled to lien protection under chapter 254 and amendments thereto;

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall pay for all labor and for all labor and materials entitled to lien protection under chapter 254 and amendments thereto under the contract referred to in the Certificate in this bond, irrespective of any agreement made between him and the owner or any other persons now interested or who may hereinafter be interested therein, then the above written obligation shall be null and void, otherwise to remain in full force and effect.

This bond is made for the use and benefit of all persons entitled to file the documents for lien protection as provided in Massachusetts General Laws, chapter 254 and they and each of them are hereby made Obligees hereunder, and in case of the failure of the principal to carry out the provisions of this bond made for their use and benefit they and each of them may sue hereon in their own name.

Signed, sealed and delivered this ____ day of ____, (insert year).

Principal

By

Surety

By

Certificate

____, principal on the above bond, hereby certify that the (estimated) contract price for the proposed work to be performed on the land described in the above bond under a written contract between ____ and ____ dated ____, ____, (insert year), is ____ Dollars (\$).

(Signed)

After the recording of any such bond no lien under this chapter shall thereafter attach in favor of any person entitled to the benefit of such bond and not named as a principal thereon for labor or for labor and materials performed under the contract in respect to which such bond is given.

The register of deeds shall refuse to record the said bond if it be defective in form or substance, but no party to any such bond shall be discharged by any defect therein as against any party who has in good faith allowed his lien to be dissolved by lapse of time in reliance on the bond. The bond may be enforced by a civil action in the superior court or district court brought by any party in interest. An attested copy of the complaint shall be filed and recorded in the registry of deeds. No suit or action on the bond shall be commenced after the expiration of ninety days after the claimant filed the statement required by section 8. Such bond shall not create any rights which the claimant would not have had, or impair any defense which the obligors would have had, in an action to enforce a lien

254 § 14

Dissolution by bond recording; labor and materials; form of bond

Any person in interest may dissolve a lien under this chapter by recording or causing to be recorded in the registry of deeds in the county or district where the land lies, a bond of a surety company authorized to do business in Massachusetts and in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim for labor or labor and materials. Upon the recording of the bond, the lien shall be dissolved. Notice of the recording shall be given to the claimant by serving on the claimant a copy of the notice of recording together with a copy of the bond by an officer qualified to serve civil process or by delivering same to the claimant. The claimant may enforce the bond by a civil action commenced within ninety days after the later of the filing of the statement required by section 8 or receipt of notice of recording of the bond, but such bond shall not create any rights which the claimant would not have had, or impair any defense which the obligors would have had, in an action to enforce a lien. The bond shall be in the following form:

Know All Men By These Presents:

That we, ___ as principal and ___ duly organized to transact business as a surety within the Commonwealth of Massachusetts, as surety, are holden and stand firmly bound and obliged unto ___ in the penal sum of ___ Dollars (\$___), to the payment of which we bind ourselves, our heirs, successors and assigns, jointly and severally by these presents.

Whereas, under date of ___, the said obligee recorded a notice of contract in the registry of deeds, as Instrument # ___, in Book ___ at Page ___ upon premises more fully described in said notice, and

Whereas, the principal desires to dissolve said lien in accordance with the provisions of section fourteen of chapter two hundred and fifty-four of the General Laws.

Now, therefore, the condition of this obligation is such that if the said principal shall pay to the said obligee all sums which shall be adjudged in favor of the said obligee in an action brought under the provisions of said section fourteen, this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the aforesaid principal and surety have executed this instrument under seal this ___ day of ___ (insert year).

Principal

by _____

Surety

by _____

254 § 32

Void and unenforceable covenants, promises, etc.; exceptions

A covenant, promise, agreement of understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance or other improvement to real property, including moving, demolition and excavating connected therewith, purporting to bar the filing of a notice of contract or the taking of any steps to enforce a lien as set forth in this chapter or purporting to subordinate such rights to the rights of other persons is against public policy and is void and unenforceable, but this section shall not apply to:

- (1) waivers of liens given by any person named as a principal on a lien bond provided under section twelve in connection with an interim or final payment received by such persons;
- (2) statements by persons entitled to file documents under this chapter of amounts due or paid to them;
- (3) dissolutions of liens under section ten;
- (4) partial waivers and subordinations of liens given by persons who have filed or recorded notices of contract under section two substantially in the following form with no material deviation therefrom:

Partial Waiver and Subordination of Lien

COMMONWEALTH OF MASSACHUSETTS: Date: _____

_____ COUNTY Application for Payment No: _____

OWNER: _____

CONTRACTOR: _____

LENDER/MORTGAGEE: _____

1. Original Contract Amount: _____

2. Approved Change Orders: _____

3. Adjusted Contract Amount: _____

(line 1 plus 2)

4. Completed to Date: _____

5. Less Retainage: _____
6. Total Payable to Date: _____
(line 4 less line 5)
7. Less Previous Payments: _____
8. Current Amount Due: _____
(line 6 less line 7)
9. Pending Change Orders: _____
10. Disputed Claims: _____

The undersigned who has a contract with ____ for furnishing labor or materials or both labor and materials or rental equipment, appliances or tools for the erection, alteration, repair or removal of a building or structure or other improvement of real property known and identified as ____ located in ____ (city or town), ____ County, Commonwealth of Massachusetts and owned by ____, upon receipt of ____ (\$____) in payment of an invoice/requisition/application for payment dated ____ does hereby:

(a) waive any and all liens and right of lien on such real property for labor or materials, or both labor and materials, or rental equipment, appliances or tools, performed or furnished through the following date:

____ (payment period), except for retainage, unpaid agreed or pending change orders, and disputed claims as stated above; and

(b) subordinate any and all liens and right of lien to secure payment for such unpaid, agreed or pending change orders and disputed claims, and such further labor or materials, or both labor and materials, or rental equipment, appliances or tools, except for retainage, performed or furnished at any time through the twenty-fifth day after the end of the above payment period, to the extent of the amount actually advanced by the above lender/mortgagee through such twenty-fifth day.

Signed under the penalties of perjury this ____ day of ____, ____.

The giving of a partial waiver and subordination of lien by any contractor under this section shall not affect the lien rights of any other person claiming a lien under any section of this chapter.

254 § 33

Mortgagee's right to withhold funding, financing or payment for labor and materials

Except with respect to any construction project containing or designed to contain at least one but not more than four dwelling units, the filing or recording of documents claiming a lien under section two, or the filing or recording of a statement pursuant to section eight in furtherance of a lien arising pursuant to section one, shall not itself be grounds for a mortgagee to withhold sums for the funding, financing or payment for the labor or labor and materials for which any such notice or statement is filed or recorded or to require dissolution of such notice or statement before providing further funding, financing or payments, and any covenant, promise, agreement or understanding relative to the improvement or alteration to real property to withhold such funding, financing or payment or to require dissolution of such notice or statement before providing further funding, financing or payments solely on that ground is against public policy and void and unenforceable; provided, however, that nothing contained in this chapter shall obligate a mortgagee to disburse sums for the funding, financing or payment for the labor or labor and materials for which any such notice or statement is filed or recorded unless such mortgagee has received an accurately completed and valid partial waiver and subordination of lien in the form set forth in clause (3) of section thirty-two from the person who filed or recorded such notice or statement; provided, further that nothing in this chapter shall in any manner limit or restrict the right of any mortgagee to withhold any and all sums for the funding, financing, or payment for labor or labor and materials based upon:

(a) the failure of the owner to comply with any other terms, conditions or requirements in any agreement providing for the funding of the loan, the repayment of the loan or of any mortgage securing any such agreement

or

(b) the filing or recording of documents claiming a lien under section four, if the right to withhold is contained in any agreement providing for the funding of the loan, the repayment of the loan, or any mortgage securing such agreement, except that such right to withhold shall not be effective to bar the filing of a notice of contract or the taking of any steps to enforce a lien.

Cases



PRINCE, LOBEL, GLOVSKY & TYE 

100 Cambridge Street,
Suite 2200
Boston, MA 02114

Dr. L.

17.0

NORFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

dated
RECEIVED & FILED
1/23/03
SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS
CIVIL ACTION NORFOLK COUNTY
NO. 2001-00139 *8*

SCITUATE RAY PRECAST
CONCRETE CORP. AND
SCITUATE RAY PIPE CORP.

12-366-0

vs.

INTOCCIA CONSTRUCTION
COMPANY, INC.

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'
MOTION FOR SUMMARY JUDGEMENT**

Plaintiffs, Scituate Ray Precast Concrete Corp. and Scituate Ray Pipe Corp., brought this action against Intoccia Construction Company, Inc., ("Intoccia") pursuant to G.L. c. 254, §4 to foreclose on the liens issued by Utica Mutual Insurance Company ("Utica"). For the reasons set forth below, the plaintiffs' request to enforce the lien bond is ALLOWED.

From June 2000 to September 2000, Scituate Ray Precast Concrete Corp. and Scituate Ray Pipe Corp., who manufacture and sell precast concrete products and pipe respectively, supplied concrete products to Michienzi Ray Corporation ("MRC"). MRC incorporated the products into improvements of real property owned by the defendant Intoccia at Deer Park Estates in Walpole Massachusetts ("Property"). MRC failed to pay the plaintiffs.

On November 2, 2000, the plaintiffs recorded at the Norfolk County Registry of Deeds the Notices of Contract and Statements of Account against the Property based on their written contracts in the form of signed delivery tickets and invoices. The same day, the plaintiffs notified the defendant of the recording of the Notices of Contract and Statements of Account.

On January 26, 2001, within 90 days of filing the Statements of Account, the plaintiffs

filed their complaint to enforce the lien with this Court. On February 16, 2001, the plaintiffs were served with notice of the defendant's recording a lien bond issued by Utica to dissolve the lien. The plaintiffs have not received any monies from the defendant or MRC for the materials supplied to the Property.

In order to succeed on their motion, the plaintiffs must demonstrate that they have complied with all the requirements of G.L. c. 254 § 4 which entitle them to a lien on the property, including: (1) record Notice of Contract at the Registry within 90 days of last furnishing labor or materials, (2) serve a copy of the Notice of Contract upon the Owner, (3) record Statement of Account at the Registry, (4) file a civil action to enforce the lien within 90 days of filing Statement of Account, and (5) record attested copy of Complaint to enforce the lien at the Registry within 30 days of commencement of the civil action. The defendant argues that the plaintiffs have not perfected the mechanics lien because: (1) the delivery tickets and invoices do not constitute a "written contract," and (2) there was no money due on the contract at the time of Notice of Contract.

The defendant argues that the plaintiffs have not complied with the provisions of G.L. c. 254, §4 because the delivery tickets and the invoices do not constitute a "written contract" as defined in G.L. c. 254, §2A and as required to form the Notice of Contract under G.L. c. 254, §4. See Gettens Electrical Supply Co. v. W.R.C. Properties, Inc., 21 Mass. App. Ct. 658, 660-661 (1986) (interpreting "written contract" to mean "an entire and continuing arrangement in writing between a supplier and subcontractor It does not mean to us merely a series of purchase orders and invoices issued from time to time ..."). However the 1996 amendment to the mechanics lien statute broadened the field that Gettens restricted.

FROM : JEANNE O'CALLAGHAN

PHONE NO. : 617-598-6655

Jan. 22 2003 01:20PM P4

General Laws c. 254, §2A defines a "written contract" as "any written contract enforceable under the laws of the Commonwealth," including any writing enforceable under the Statute of Frauds. The Statute of Frauds requires that a memorandum memorializing an oral agreement contain three elements to render the contract enforceable: (1) the writing must indicate the existence of the contract, (2) it must be signed by the party to be charged, and (3) it must indicate the quantity of goods involved. G.L. c. 106, §2-201. See Waltham Truck Equipment Corp. v. Massachusetts Equipment Co., 7 Mass. App. Ct. 580, 582 (1979) (three writings in evidence signed by a representative of Equipment, when read together, satisfied the Statute of Frauds). The writing or series of writing taken together, must contain the essential terms of a contract, such as price, quantity, and type of materials and services. Cf. Harris v. Moynihan Lumber of Beverly Inc., 1999 Mass. App. Div. 113 (1999) (finding that a series of detailed documents, taken together, constituted a contract for purposes of the statute); Norcastco Door and Millwork v. Vahradahati of Massachusetts, Inc., 1999 Mass. App. Div. 239 (1999) (fax cover sheet of "original proposal" and one page reply memo did not constitute a contract for the purposes of the statute because the essential terms such as price, quantity, and type of materials were not discernable).

Here, the series of delivery tickets and corresponding invoices satisfy the Statute of Frauds. The delivery tickets and invoices, which were un rebutted, constitute competent evidence of a contract. The delivery tickets were signed by Joe Bezauregard, MRC's superintendent, Norman Fryor, an equipment operator for MRC, and Richard Ray, a principal of MRC. These individuals routinely signed for material deliveries and MRC authorized them to do so. Finally, the delivery tickets and the invoices state the supplier, and the type and quantity of material and

goods delivered to the Project site; the invoices contain the price.

Therefore, I conclude that the series of delivery tickets and invoices satisfy the Statute of Frauds and accordingly satisfy the "written contract" requirement of G.L. c. 254 § 2A. These documents are sufficient to serve as the foundation for the lien under G.L. c. 254 § 4.

The defendant's second argument, that plaintiffs have no lien because there was no amount due under the initial contract at the time of Notice of Contract, also fails. General Laws c. 254 § 4 states: "[s]uch lien shall not exceed the amount due or to become due under the original contract as of the date notice of the filing of the subcontract is given by the subcontractor to the owner." The Court interprets the statute "according to the intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced." Glasser v. Director of the Div. of Employment Sec. 393 Mass 574, 577 (1984). The meaning assigned "must be reasonable and supported by the purpose and history of the statute" Commonwealth v. Russ R. 433 Mass. 515, 520 (2001). If the court interpreted the statute as the defendant requests, then any subcontractor, who furnishes labor and materials to a project, could not recover if the general contractor breached. Alternatively, the statute reads that the maximum amount of the lien is determined by subtracting from the total contract price the amount paid under the contract by the time the owner receives the Notice of Contract. So construed, differences in the work specified by other contractors is irrelevant to any calculation of the lien amount and the lien.

FROM : JEPANE O'CALLAGHAN

PHONE NO. : 617698693

Jan. 02 2003 01:21PM PS

ORDER


For the foregoing reasons, it is hereby ORDERED that summary judgement enter for the plaintiffs. The parties should schedule a hearing to determine the total damages.



Robert A. Mulligan
Justice of the Superior Court

DATED: October 28, 2002

A TRUE COPY

Attest: 
Deputy Assistant Clerk

10/30/02

-S-

Mechanics' Lien
No need for filing of notice of substantial completion

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 01-2637

6

FALLON DEVELOPMENT, INC.

vs.

BARRY S. TAYLOR and another¹

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

This case arises out of an agreement between the plaintiff, Fallon Development, Inc. ("FDI"), and the defendants, Barry S. Taylor and Amy Taylor (collectively "the Taylors"), whereby FDI agreed to provide labor and/or materials for the renovation to the Taylors' home ("the Property") located at 270 Winter Street, Weston, Massachusetts. FDI alleges that the Taylors owe a balance of \$75,635.04 for materials and labor. FDI has brought a claim seeking enforcement of a mechanic's lien (Count I), as well as claims alleging breach of contract (Count II), quantum meruit (Count III), goods sold and delivered (Count IV) and unjust enrichment (Count V). The Taylors have moved to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The parties have agreed to stay Counts II, III, IV and V pending arbitration proceedings.

BACKGROUND

On July 14, 2000, the Taylors and FDI entered into a written contract for the renovation of the Taylors' home. FDI provided labor and/or materials for the renovation of the Property and the Taylors agreed to pay FDI in accordance with FDI's invoices. FDI performed work from August

¹ Amy Taylor, a/k/a Amy Rose Taylor

Copies mailed 10/29/01

the last day someone affiliated with the party seeking to enforce the lien performed or furnished labor or material or both labor and materials. G. L. c. 254, §§2 and 8. The amounts of time differ under each section.

FDI alleges that it filed notices under §§2 and 8 in accordance with subsection (iii) of each section. The Taylors assert, however, that the notices were not timely filed because G. L. c. 254, §2A requires a filing of a notice of substantial completion, and that the timely filing of a notice of substantial completion is a condition precedent to filing the notices under §§2 and 8. In support of that argument, the Taylors rely primarily on a prior decision of this court which held that G. L. c. 254, §2A requires the recording of a notice of substantial completion prior to the filing of notices under §§2 and 8. NG Brothers Construction, Inc. v. John Cranney, Civil No. 994259 (Zobel, J., Middlesex Super. Ct. March 12, 2000) (granting summary judgment for the defendant as the plaintiff contractor did not file a notice of substantial completion). This court, however, respectfully disagrees with that holding.

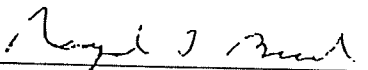
While G. L. c. 254, §2A states that a party "shall" file a notice of substantial completion, there is no part of the statute that holds that filing a notice under §2A is a prerequisite to filing notices under §§2 and 8. In fact, §§2 and 8 use the word "or" in setting forth the possible deadlines. This supports the construction that filing a notice under §2A is one of three possible options that can determine the deadline for filing a notice under the statute.

Further, G. L. c. 254, §2 allows a notice of contract to be filed any time after the contract has been executed, "whether or not the date for performance stated in such written contract has passed and whether or not the work under such written contract has been performed." G. L. c. 254, §2. This language makes clear that a notice of contract can be filed before a notice of

substantial completion. It follows, therefore, that the filing or recording of a notice of substantial completion is not a prerequisite to the filing or recording of a notice of contract. Because a notice of termination under §2B can only be filed by the landowner, a contractor who did not or could not file a notice of substantial completion can preserve its lien only by filing or recording a notice of contract within 90 days of the date work was last performed. A contractor who performs work but does not substantially complete that work is as entitled to a lien as a contractor who substantially completes. It is noted that §8 of the statute provides that "nothing in this section shall prohibit the filing or recording of a statement under this section prior to the filing or recording of the notices under section two A or two B." G. L. c. 254, §8 (emphasis added). Again, c. 254 permits a contractor to perfect a mechanic's lien although a notice of substantial completion was not filed or recorded.

ORDER

For the foregoing reasons, defendants' motion to dismiss the complaint is **DENIED**.



Raymond J. Brassard
Justice of the Superior Court

DATED: October 18, 2001

21

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

SUPERIOR COURT
CIVIL ACTION NO:
MICV2003-02801-B

BOSTON POWER CRUSHING CORPORATION

vs.

A.F. LUCENTE CO., INC. d/b/a A.F. LUCENTE
GENERAL CONTRACTOR and CHARLES P.
MANTENUTO, TRUSTEE OF STONEYBROOK TRUST**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT
CHARLES P. MANTENUTO'S, TRUSTEE OF STONEYBROOK TRUST,
RENEWED MOTION FOR SUMMARY JUDGMENT AND FOR ENTRY
OF SEPARATE AND FINAL JUDGMENT**

This matter is before the court on defendant Charles P. Mantenuto's, trustee of Stoneybrook Trust ("the Trustee"), renewed motion for summary judgment and for entry of separate and final judgment. The plaintiff, Boston Power Crushing Corporation ("Boston Power"), brought this action against the Trustee and A.F. Lucente, Inc., d/b/a Lucente General Contractor ("Lucente") after performing crushing operations on property owned by the Stoneybrook Trust ("the Trust"). Boston Power seeks to enforce a mechanic's lien on the Trust's real property.¹ For the following reasons, the Trustee's renewed motion for summary judgment and for entry of separate and final judgment is **ALLOWED**.

SUMMARY JUDGMENT RECORD

The summary judgment record contains the following undisputed and disputed facts viewed in light most favorable to Boston Power.

The trust owns an industrial-zoned lot located at 40 Green Street in Waltham, Massachusetts ("the Property"). The trustee operates an automobile salvaging business on the property. In October 2001, Anthony Lucente, president of Lucente, and the Trustee, on

¹ The complaint consists of the following counts: I) Breach of Contract (against Lucente); II) Quantum Meruit (against Lucente); III) Implied Covenant of Good Faith and Fair Dealing (against Lucente); IV) G. L. c. 93A (against Lucente); and V) Mechanic's Lien (against the Trustee).

behalf of the Trust, entered into a License Agreement.² The License Agreement allowed Lucente to remove a ledge located on the property.

The License Agreement specifically allowed Lucente to "blast, crush, process, remove and sell existing ledge from the Property," and use "personnel as are necessary to blast, crush, process and remove the ledge." License Agreement, § 1. The License Agreement was for a term of twenty months and required Lucente to pay \$20,000 per month to the Trustee, regardless of the quantity of ledge extracted. Id., §§ 2-3. Lucente was not required to pay this monthly fee if he was "unable to perform the [w]ork on the [p]roperty for four or more days in any month due to Force Majeure (as defined in Section 4(c))." Id., § 3. Section 4(c) stated that: "[Lucente] shall diligently and continuously perform the [w]ork subject to inclement weather, labor shortages or strikes or other causes reasonably beyond Licensor's reasonable control ('Force Majeure')."

The License Agreement named Boston Power as one of three companies authorized to work on the property. Soon after entering into the License Agreement, Boston Power and Lucente entered into a written contract ("Crushing Contract") for the crushing of stone already removed from the ledge. The Crushing Contract required that Lucente pay Boston Power \$3.85 per ton of crushed stone. Boston Power alleges that the purpose of both the License Agreement and Crushing Contract was to improve the Trust's property for commercial development.³ On July 3, 2003, Boston Power brought a complaint against Lucente seeking money due under the Crushing Contract. In its complaint, Boston Power also seeks to enforce a mechanic's lien against the Trust's property.

DISCUSSION

I. Summary Judgment Standard

A court grants summary judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. Cassesso v. Comm'r of Correction, 390 Mass. 419, 422 (1983); Cnty. Nat'l

² The trustee testified at a deposition that the License Agreement was created by his attorney.

³ In his deposition, the Trustee admitted to having at least two meetings with an apartment developer regarding the sale of the property. The trustee also went before the Waltham Planning Board to file a plan for a cul-de-sac on the property.

Bank v. Dawes, 360 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party has the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. Pederson v. Time, Inc., 404 Mass. 11, 17 (1989). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts demonstrating the existence of a genuine issue of material fact. Id.

A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. Flechner v. Technical Comm'n Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). A trial court ruling on defendant's motion for summary judgment properly assumes that all the facts set forth in the plaintiff's affidavits are true and that any inferences favorable to the plaintiff should be drawn. See generally Coveney v. President & Tr. of Coll. of Holy Cross, 388 Mass. 16 (1983).

II. Statutory Framework of G. L. c. 254 (Mechanic's Lien Statute)

The process of recording and enforcing a mechanic's lien is provided for by statute. Baltimore Contractors, Inc. v. Dupree, 352 Mass. 83, 85 (1967). A mechanic's lien may be sought by an individual or entity that provided certain materials or services to a property owner. See Davenport Mammoet Heavy Transp. Inc. v. Entergy Nuclear Generation Co., Civil No. 02-281 (Plymouth Super. Ct. April 22, 2003 (Troy, J.), aff'd 64 Mass. App. Ct. 37 (2005). In 1996, in response to concerns regarding the scope of the mechanic's lien statute, the legislature amended it by "expanding the group of entities entitled to lien protection, the types of work for which a lien may be claimed, and the types of property subject to the lien." Mammoet USA, Inc. v. Entergy Nuclear Generation Co., 64 Mass. App. Ct. 37, 41 n.16 (2005).

Under G. L. c. 254, § 2 ("Section 2 Lien"), a contractor who enters into a written contract for the improvement of real property with the owner of the property or the owner's agent may seek a mechanic's lien. Mammoet USA, Inc., 64 Mass. App. Ct. at 41 n.11. A Section 2 Lien may not be utilized by subcontractors. Id. The relevant language of G. L. c. 254, § 2 provides that:

"[a] person entering into a written contract with the owner of any interest in real property, or with any person acting for, on behalf of, or with the consent of such owner for the whole or part of the erection, alteration, repair or removal of a building, structure, or other improvement to real property, . . . shall have a lien upon such real property"

Under G. L. c. 254, § 4 ("Section 4 Lien"), a lien claimant must have a written contract with a person who has a contract with an owner of real property. The purpose of a Section 4 Lien is to provide security to subcontractors for the value of their services provided to improve an owner's real property. See Rosano-Davis, Inc. v. Sastre, 2004 Mass. App. Div. 55, 56 (2004) (providing background and scope of a mechanic's lien in Massachusetts). The relevant language of G. L. c. 254, § 4 provides that:

"Whoever furnishes labor, including subcontract construction management services, or who furnishes material, or both labor and material, or furnishes rental equipment, appliances or tools under a written contract with a contractor, or with a subcontractor of such contractor, may file or record in the registry of deeds for the county or district where such land lies a notice of his contract"

III. Analysis

In his renewed motion for summary judgment, the Trustee argued that Boston Power cannot enforce its recorded mechanic's lien. The trustee's arguments can be summarized as follows: 1) there was no contract for the improvement of real property; 2) Boston Power did not improve the Trust's real property; 3) Lucente was not acting "for, on behalf of, or with the consent of" the Trustee when entering into the Crushing Contract with Boston Power; and 4) Boston Power was not a subcontractor to Lucente.

A. Boston Power Cannot Obtain a Mechanic's Lien Pursuant to G. L. c. 254, § 2

In order to enforce a Section 2 Lien, there are two main requirements. First, there must be a written contract for the "erection, alteration, repair or removal of a building, structure, or other improvement to real property" G. L. c. 254, § 2 (emphasis added). Second, this written contract must be entered into with "the owner of any interest in real property, or with any person acting for, on behalf of, or with the consent of such owner" Id. (emphasis added). Boston Power argues that its performance under the Crushing Contract resulted in an improvement to the Trust's real property. It is further argued that

Lucente, in entering into the Crushing Contract, was "acting for, on behalf of, or with the consent of" the Trustee.

1. *Improvement to Real Property*

The purpose of the Crushing Contract between Lucente and Boston Power was not the improvement of real property.⁴ The words "or other improvement" are undefined and there is no pertinent legislative history discussing the use of the words in the mechanic's lien statute. G. L. c. 254, § 2; Mammoet USA, Inc., 64 Mass. App. Ct. at 40 (discussing lack of definition for the word "improvement" in the context of a Section 4 Lien). The Appeals Court, however, has defined an improvement as "a permanent addition to or betterment of real property that enhances its capital value." Finn v. McNeil, 23 Mass. App. Ct. 367, 372 (1987) (citations omitted).

A general, all-encompassing word at the end of a list of specific items takes on the character of those items. Mammoet USA, Inc., 64 Mass. App. Ct. at 41, citing Ferguson v. Host Int'l, 53 Mass. App. Ct. 96, 103-104 (2001). In the context of a Section 2 Lien, the words "building" and "structure" immediately precede "or other improvement." "[B]uilding' and 'structure,' in common parlance connotes something that has been constructed or assembled out of a combination of materials or parts to form a physical object purposefully created for human habitation or for use in the place where it has been assembled." Mammoet USA, Inc., 64 Mass. App. Ct. at 41-42. "The statutory context in which the phrase 'improvement of real property' is placed . . . strongly indicates that something is not an improvement unless it is itself, in whole or in part, constructed or assembled in connection with a building or structure or other construction-related project." Id. at 43 (emphasis added).

The activity called for by the Crushing Contract, i.e. crushing stone, was not "constructed or assembled in connection with a building or structure or other construction-

⁴ The trustee, in his memorandum, argues that the License Agreement was not a contract for the improvement to real property. In determining whether Boston Power is entitled to a mechanic's lien under G. L. c. 254, § 2, it is immaterial whether the License Agreement could be considered a contract for the improvement to real property. The relevant agreement is the Crushing Contract. The terms of the License Agreement are relevant for determining whether Lucente was a "person acting for, on behalf of, or with the consent of" the Trustee. Further, the characterization of the License Agreement as a contract is crucial to obtaining a Section 4 Lien.

related project." Mammoet USA, Inc., 64 Mass. App. Ct. at 43. Therefore, the leveling of land for development by removing the ledge and crushing stone does not qualify as an "other improvement to real property." The fact that the Trustee may have considered selling the land to a commercial developer does not change this result. Even if the Trustee considered the work performed under the Crushing Contract as improving the land by increasing its sale value, the express statutory language controls.

2. Acting for, on Behalf of, or with the Consent of the Trustee

Lucente was not a "person acting for, on behalf of, or with the consent of" the Trustee when it entered into the Crushing Contract with Boston Power. As the Trustee accurately states in his memorandum, if a Section 2 Lien were available to any person or company who performs services for someone who has an existing contract with a property owner, it would render G. L. c. 254, § 4 (allowing a subcontractor to place a lien on real property) superfluous. Indeed, "[a] basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." Wolfe v. Gormally, 440 Mass. 699, 704 (2004) (citations and quotations omitted). "The statute must be viewed as a whole; it is not proper to confine interpretation to the one section to be construed." Id. A court must also consider the purpose and history of the statute. See Sterilite Corp. v. Constitutional Cas. Co., 397 Mass. 837, 839 (1986).

Here, the statutory language allowing a Section 2 Lien cannot reasonably be interpreted as allowing Boston Power to obtain a mechanic's lien against the Trust Property. Lucente was not acting as an agent of the Trustee when signing the Crushing Contract. Rather, the Crushing Contract was a separate agreement between Lucente and Boston Crushing, in which Lucite had no part. The fact that the License Agreement named Boston Power as a company allowed to do work on the property does not change this result. Further, as discussed above, even if Lucente could be considered an agent of the Trustee, the Crushing Contract was not for an improvement to real property as contemplated by the statute.

B. Boston Power Cannot Obtain a Mechanic's Lien Pursuant to G. L. c. 254, § 4

For this court to find a valid mechanic's lien pursuant to G.L. c. 254, § 4, there must be an original contract between the owner of the property and a general contractor. See Ouellet v. Armstrong, Civil No. 02595 (Plymouth Super. Ct. May 28, 2004) (Troy, J.), citing Nat'l Lumber Co. v. Epstein, 2000 Mass. App. Div. 317, 319 (2000). Additionally, the subcontractor must have had a written contract⁵ with the contractor or subcontractor of such contractor. *Id.*

Here, the License Agreement between the Trust and Lucente was not a construction contract. It was simply a license that allowed Lucente to enter the Trust's property to remove a ledge. The clear and unambiguous language of the License Agreement indicates that it was nothing more than a license. A license is defined as "an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein." Black's Law Dictionary (8th ed. 2004); see also Stratis v. McLellan Stores Co., 311 Mass. 525, 529 (1942), overruled on different grounds by Tindall v. Denholm & McKay Co., 347 Mass. 100 (1964) (stating that a license to do an act upon land involves the exclusive occupation of the land by the licensee so far as necessary to do such act and no further). Unlike a contract to improve land, the License Agreement required Lucente to pay the Trustee \$20,000 for the right to enter the property and remove stone.

Boston Power's argument that the *Force Majeure* clause converts the License Agreement to a contract for services is unavailing. As the Trustee accurately states in his memorandum, the *Force Majeure* clause serves only to specify circumstances where Lucente could be excused from paying the monthly fee. If Lucente wanted to avail itself of the *Force Majeure* clause, thereby excusing payment of its fee to the Trust, it would have to show that it diligently and continuously performed the work. This language cannot reasonably be interpreted as a written contract requiring Lucente to diligently and continuously remove the ledge.

⁵ A written contract is "any written contract enforceable under the laws of the commonwealth." G. L. c. 254, § 2A.

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Additionally, Lucente cannot be categorized as a general contractor based on the License Agreement. Rather, Lucente was merely a licensee. Therefore, Boston Power cannot obtain a mechanic's lien pursuant to G. L. c. 254, § 4.

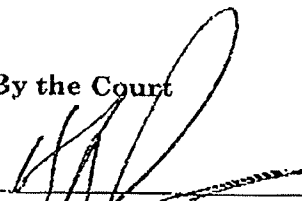
ORDER

For the foregoing reasons, it is hereby **ORDERED** that Charles P. Mantenuto's, Trustee of Stoneybrook Trust, Renewed Motion For Summary Judgment is **ALLOWED** as to Count V. It is further **ORDERED** that Charles P. Mantenuto's, Trustee of Stoneybrook Trust, Request For Separate and Final Judgment is **ALLOWED** as there is no just reason for delay where the moving party's absence as a party will have no bearing on any remaining issue or the claims of any remaining party in the case. Separate and Final Judgment of dismissal shall enter forthwith in favor of defendant Charles P. Mantenuto, Trustee of Stoneybrook Trust

DATED: March 16, 2007

Entered: 3/20/07

By the Court


H. J. Smith, Jr.
Justice of the Superior Court