IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

PHILIP ARCORIA,	:	
	:	C.A. No: K13L-06-058 RBY
Plaintiff,	:	
	:	
v.	:	
	:	
RCC ASSOCIATES, INC., 3745	:	
HOLDINGS, LLC, DOES 1 THROUGH	:	
20 INCLUSIVE,	:	
	:	
Defendants.	:	

Submitted: October 21, 2013 Decided: January 8, 2014

Upon Consideration of Defendants' Motion to Dismiss DENIED

ORDER

Philip Arcoria, Pro se.

Daniel F. Wolcott, Jr., Esquire, Potter Anderson & Carroon, LLP, Wilmington, Delaware for Defendant RCC Associates, Inc.

Richard L. Abbott, Esquire, Abbott Law Firm, Hockessin, Delaware for Defendant 3745 Holdings, LLC.

Young, J.

January 8, 2014

SUMMARY

Pursuant to Del. Super. Ct. Civ. R. 12 (b)(6), general contractor RCC Associates, Inc. ("Defendant RCC") moves the Court to dismiss the Complaint filed by Philip Arcoria ("Plaintiff"), President of subcontractor Rolling Co., Inc. ("Rolling"), that performed construction services for Defendant RCC. The Motion to Dismiss arises from an action by Plaintiff, a painting subcontractor, for breach of contract and foreclosure of a mechanics' lien as a result of nonpayment for construction services furnished. Defendant RCC argues that: 1) the assignment of the cause of action sued upon is tainted by champerty and maintenance; 2) the governing contract establishes Florida as the proper venue; and 3) Count I of Plaintiff's Complaint should be dismissed, because Plaintiff has not complied with the mechanics' lien statute. Defendant RCC's Motion to Dismiss is **DENIED**. because 1) Plaintiff maintains a legal interest in the subject matter of this litigation; 2) absent a demonstrated need by Defendant to transfer the venue in this action to Florida, venue in Delaware is proper; 3) the unperfected mechanics' has priority because Plaintiff is not a remote supplier; and 4) Plaintiff properly filed a Bill of Particulars with the mechanics' lien.

PROCEDURAL POSTURE

On September 18, Defendant RCC filed the instant Motion to Dismiss. On October 2, 2013, the owner of the premises upon which the construction services were performed, 3745 Holdings, LLC ("Defendant 3745"), filed a Partial Joinder to Defendant RCC's Motion to Dismiss. Defendant 3745 joined the portion of Defendant RCC's Motion that requests dismissal based upon the failure of

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Plaintiff's Complaint to allege properly that Defendant 3745 authorized the construction services to be performed, as required by the Mechanic's Lien statute at 25 *Del. C.* § 2722. Defendant 3745 also joined the portion of the Motion which seeks dismissal on the grounds of failure to set forth all necessary elements required by the Mechanics Lien statute in the Complaint and/or accompanying the Bill of Particulars.

STATEMENT OF FACTS

The painting subcontract in this matter was executed by and between Rolling and Defendant RCC. Plaintiff is the President of Rolling, the construction company that performed the services. Rolling is a licensed Maryland corporation and painting subcontractor. The real property that is the subject of this action and mechanic's lien is located at 4590 South Dupont Highway in Camden, Delaware ("Subject Property"). Defendant RCC is a Florida corporation, which, as a general contractor, hired Rolling to perform services in constructing Cheddar's Casual Café ("the Project") located at the Subject Property.

In performing construction services to the Subject Property during all relevant periods in Kent County, Delaware, Rolling, the Assignor, procured a Delaware non-resident contractor temporary license. The oral and written agreement as well as the causes of action in the Complaint were assigned to Plaintiff on May 21, 2013. Plaintiff alleges that the Delaware company, Defendant 3745, is the owner of the Subject Property. In addition, Plaintiff alleges that "Does" 1 through 20, unknown Defendants with fictitious names (herein "Defendant Owners"), have an ownership interest in the Subject Property.

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Defendant Owners purport to have an interest in the property, which is subordinate to Plaintiff's Mechanic's Lien.

On January 2, 2013, Rolling and Defendant RCC entered into an oral agreement whereby Rolling would perform construction painting services. In exchange, Defendant RCC would pay the base contract amount of \$21,866.00. Thereafter, representative Mark Fetting, project manager for Defendant RCC, both orally and in writing directed, consented to, and authorized additional change order work in the sum of \$29,496.00, which Rolling performed. Rolling supplied labor and materials to the Project, mainly in the form of painting and staining woodwork to both the interior and exterior of Cheddar's Casual Café. Between February 14 and April 14, 2013, Plaintiff furnished labor and materials to the Project.

In the course of construction of the Project, Plaintiff was involved in the general management of the Project, including onsite supervision and overview. Although Plaintiff demanded payment from Defendant RCC, the sum of \$45,724.85, which constitutes the balance under the agreement and change orders, is still due and owing. Accordingly, Plaintiff asserts the following claims in his Complaint: Count I is the request to foreclose the mechanic's lien against Defendant Owners, one of which is Defendant 3745 Holdings; Count II is a breach of the oral contract claim against Defendant RCC; Count IV is a quantum meruit claim regarding the oral agreement between Defendant RCC and Rolling, against Defendant RCC; and Count V is a quantum meruit claim regarding the written

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contract between Defendant RCC and Rolling, against Defendant RCC.

STANDARD OF REVIEW

"A motion to dismiss under [Superior Court Civil] Rule 12(b)(6) presents the question of 'whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." "When considering a motion to dismiss, the Court must read the complaint generously, accept all well-[pled] allegations as true, and construe them in a light most favorable to the plaintiff." "A complaint is 'well-plead' if it puts the opposing party on notice of the claim being brought against it. Dismissal is warranted only when 'under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted".

DISCUSSION

I. Plaintiff maintains a legal interest in the subject matter of this litigation.

First, Defendant RCC argues that the assignment of the cause of action sued upon is tainted with champerty and maintenance, doctrines that have long been recognized in Delaware.⁴ Champerty is an agreement between an owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the

¹ Precision Air, Inc v. Standard Chlorine of Del., Inc., 654 A.2d 403, 406 (Del. 1995).

² Klein v. Sunbeam Corp., 94 A.2d 385, 391 (Del. 1952).

³ Boyce Thompson Inst. for Plant Research v. MedImmune, Inc., 2009 WL 1482237, at *4 (Del. Super. Ct. May 19, 2009).

⁴ See *Bayard v. McLame*, 3 Del. (3 Harr.) 139, 208 (Del. 1840); *Street Search Partners*, *LP v. Ricon International*, LLC, 2006 WL 1313859, at *3-4 (Del. Super. May 12, 2006); *Hall v. State*, 65 A.2d 827, 829-31 (Del. Super. 1994).

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proceeds with the owner, if they prevail.⁵ The champertor must carry on the suit at his own expense. However, the doctrine of champerty prohibits such agreements only when there are strangers to the action, there are those who have no legal interest in the subject matter of the dispute, or those who have no relation to either of the parties to a dispute. Similarly, maintenance is "an officious intermeddling in a suit which in no way belongs to the intermeddler by maintaining or assisting either party to the action, with money or otherwise, to prosecute or defend it." An agreement is not champertous if the assignee has some legal or equitable interest in the subject matter of the litigation that does not merely stem from terms of the assignment.

Defendant RCC alleges that Plaintiff filed suit solely as a result of an assignment from Rolling; that, therefore, Plaintiff's only legal interest in the subject matter stems from the assignment he received, which positions him as an "intermeddler" or person with no legal interest in the dispute. However, Plaintiff is President of the construction company that performed the services. Plaintiff was not only involved in the actual construction and onsite supervision of the work, but integrally involved in the general management of the construction project. According to Plaintiff, his sole reason for the assignment to his individual name was to prevent expensive attorney's fees if he were to hire a lawyer. For this reason, the debt in this matter was assigned to Plaintiff's name for collection. It is

⁵ Street Search Partners, 2006 WL 1313859 at *3.

⁶ *Hall*, 655 A.2d at 829.

clear that Plaintiff is not merely a stranger to the action. In fact, as President of the construction company that performed the services, Plaintiff has a direct legal interest in the subject matter of this litigation. Therefore, Plaintiff's causes of action are not tainted with champerty and maintenance.

II. Absent Defendant RCC's demonstrated need to transfer venue to Florida, venue in Delaware is proper.

Next, Defendant RCC contends that Counts II through V should be dismissed because the governing contract establishes Broward County, Florida as the "sole and exclusive venue and jurisdiction for all suits, arbitrations, or proceedings arising out of or relating to" the contract.⁷ All five claims in Plaintiff's Complaint arise out of or relate to the contract between Defendant RCC and Rolling. Four out of the five claims specifically reference this contract. Although Count II alleges a breach of oral agreement separate from the written contract, Plaintiff still describes the same agreement that the parties memorialized in the contract.

Although the contract clause in question specifies Broward County, Florida as the county of venue, that is solely the case if Florida is the *only* state with personal jurisdiction over the action. Florida is the principal place of business for Defendant RCC, but Delaware is where the Subject Property is located. Delaware also has personal jurisdiction in the instant case, because the Subject Property, the

⁷ Exhibit B to the Complaint at Paragraph 27.

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restaurant, the Project, including all of the employees and contractors that worked on the project are located in Delaware. These are sufficient contacts to establish Delaware jurisdiction. Under Delaware law, a plaintiff has the right to choose the forum state. The party seeking transfer must demonstrate a need to disturb the right of forum selection. Defendant RCC has not demonstrated its heavy burden to establish that a transfer of venue to Florida is warranted. In addition, the Plaintiff has chosen Delaware as its forum state. Therefore, venue in Delaware is proper.

III. The unperfected mechanics' lien has priority over a mortgage because Plaintiff is not a remote supplier.

Citing Gould⁹, Defendant RCC contends that Count I should be dismissed because Plaintiff has not complied with the Mechanics' Lien Statute. Defendant RCC asserts that Delaware law does not permit the assignment of unperfected mechanics' liens. The primary reason that the Court denied the mechanics' lien in Gould was the fact that, at the time of the assignment, the mechanics' lien was unperfected. The claim could not be asserted because it was by a materialman to a materialman. In Gould, the Court denied the claim, because such remote suppliers of material are not directly involved in the construction process; therefore, the owner often cannot protect itself against the remote suppliers' liens. In the instant

⁸ Hartman v. Carter, C.A. No. 81C-FE-8, slip op. At 2, Walsh, J. (Del. Super. Nov. 16, 1981).

⁹ Gould, Inc. v. Dynalectric Co., 435 A.2d 730, 733 (Del. Super. 1981).

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case, the Plaintiff is a subcontractor to the general contractor Defendant RCC. Plaintiff was not a remote supplier. Instead, Plaintiff was integrally involved in the construction process; thus this principle in *Gould* does not apply here.

Additionally, a mechanics' lien in Delaware, once created or perfected, is given priority over a mortgage, as of the first day in which labor or materials are conferred to the site. Section 2718 of the Delaware Code states that the mechanics' lien "shall become a lien upon such structure and upon the ground upon which the same is situated, erected or constructed and shall relate back to the day upon which labor was begun or the furnishing of material was commenced..." In this case, the work of improvement predated the assignment, thereby giving the mechanics' lien priority.

IV. Plaintiff properly filed the Bill of Particulars with the mechanics' lien.

Lastly, Delaware law requires that a party seeking a mechanics' lien file a Bill of Particulars attaching copies of all relevant contracts. 25 Del. C. Section b)4). Defendant argues that although Plaintiff filed a Bill of Particulars, he only attached a copy of the contract to the Complaint, excluding any of the change orders or work authorizations referenced in the Bill of Particulars. However, Section 2712 b)4) does not specify that there must be copies of all change orders attached to the Bill of Particulars. This section refers only to modifications or amendments. A change order does not amend the contract in the construction industry nor does it change any of the terms of the base contract. Therefore, it was not necessary for Plaintiff to file the change orders or work authorizations

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referenced in the Complaint to seek a mechanics' lien.

CONCLUSION

For the foregoing reasons, Defendant RCC's Motion to Dismiss and Defendant 3745's Partial Joinder to Defendant RCC's Motion to Dismiss are **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young

J.

RBY/lmc

oc: Prothonotary

cc: Counsel

Opinion Distribution

File