November 13, 2002

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Re: Bayside Builders, Inc. v. Edward Amoroso
C.A. No. 01L-11-030

Date Submitted: August 27, 2002

Dear Counsel:

This is the Court's decision on the defendant's motion for summary judgment based on claims that the plaintiff failed to comply with the Mechanic's Lien statute and the action is barred by a contractual agreement to arbitrate disputes.

FACTS

Bayside Builders, Inc. ("Bayside Builders") and Edward Amoroso ("Amoroso") entered into a contract for the construction of a new house (the "House") on Lot #1 East Side Drive, Rehoboth Beach Yacht and Country Club, Rehoboth Beach, Delaware (the "Property"). Bayside Builders agreed to construct the House according to Amoroso's specifications in return for Amoroso's payment of $440,000. Bayside Builders contends that after providing materials and services to Amoroso, Amoroso failed to pay Bayside Builders $12,400, the balance due on the contract. Bayside Builders filed suit against Amoroso, alleging Amoroso's failure to pay constituted a breach of contract. In the Complaint, Bayside Builders seeks a Mechanic's Lien on the Property and recovery in quantum meruit from Amoroso.

Amoroso contends recovery should be denied to Bayside Builders because the plaintiff failed: to state a claim for an in personam or Mechanic's Lien action, to state a claim for quantum meruit relief, to file the Mechanic's Lien in a timely manner,[1] and to provide Amoroso with the list of subcontractors required by 25 *Del. C.* § 2705. Also, Amoroso claims the House neither was completed according to the contract's specification nor in a workmanlike manner. Citing these conditions as a breach of contract, Amoroso alleges $15,000 in damages.

Amoroso filed a Motion for Summary Judgment[2] on July 17, 2002, seeking dismissal of the Mechanic's Lien claim on the grounds that Bayside Builders failed to provide him with a list of subcontractors or a release of subcontractor liens after his request for this documentation. According to Amoroso, Bayside Builders lost its right to obtain a mechanic's lien by failing to comply with the requirements of the Mechanic's Lien statute. Furthermore, Amoroso seeks dismissal of the case or a stay pending arbitration on the ground the construction contract requires the submission of all disputes to arbitration.

STANDARD OF REVIEW

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra*. If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

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[1]Amoroso initially argued Bayside Builders neglected to file the mechanic's lien within 120 days of completing the House, as required by 25 *Del. C.* § 2511. Amoroso has withdrawn this contention and it will not be considered in this Motion for Summary Judgment.

[2]Amoroso originally filed a Motion to Dismiss and Refer to Arbitration. In subsequent submissions to the Court, the motion is referred to as a Motion for Summary Judgment.

DISCUSSION

A. The Mechanic's Lien[3]

Amoroso demanded from Bayside Builders a list of subcontractors who potentially could place a lien on the Property. This letter, dated August 17, 2001, stated:

> You are required to furnish and submit to me a complete and accurate list in writing within ten days of this demand, of all persons who have furnished labor or material, or both, in connection therewith, and who may be entitled to avail themselves [of] the ability to file a mechanics [sic] lien.

Amoroso received a response, a Release of Mechanic's Lien, on January 4, 2002. This correspondence listed subcontractors, their role in construction, and released subcontractor liens on the Property.

Bayside Builders contends that its response to Amoroso's August 17 letter complied with 25 *Del. C.* § 2511. Allegedly, Amoroso was informed that the Release of Liens was complete on July 2, 2002. Bayside Builders argues that a property owner's right to the list of subcontractors is contingent upon the general contractor's receipt of payment. Bayside Builders contends that when the list was requested, Amoroso owed Bayside Builders $12,400. Therefore, Bayside Builders believes Amoroso was not entitled to the list.

The Mechanic's Lien statute requires strict construction. *Builder's Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995). The relevant passage in the Mechanic's Lien statute provides:

> The owner of any structure built, repaired or altered by any contractor or subcontractor may require such contractor or subcontractor from time to time to furnish and submit to him a complete and accurate list in writing of all persons who have furnished labor or material, or both, in connection therewith, and who may be entitled to avail themselves of the provisions of this chapter. Should any such contractor or subcontractor fail to furnish such list for 20 days after demand made therefor by such owner, he shall be entitled to receive no further payments from the owner until such list be furnished and shall not be entitled to avail himself of any of the provisions of this chapter.

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[3]The letters were not entered by affidavit, however, the parties have not disputed the content of the letters.

25 *Del. C.* § 2705. Amoroso's request for the list of subcontractors followed the language of § 2705. Although Amoroso requested a response ten days before the statutory deadline, Bayside Builders did not answer within the time allowed by § 2705. The Release of Liens was received by Amoroso on January 4, 2002, almost five months after his August 17, 2001 request. Furthermore, the statute contains no indication that a property owner's right to this information is contingent upon full payment to the contractor. To the contrary, the language contemplates that payments may still be due for one consequence of not complying is that the contractor is not entitled to payments until the list is furnished.

Section 2705 provides that if a general contractor fails to comply with a homeowner's request for information, the contractor "shall not be entitled to avail himself of any of the provisions of this chapter." Thus, a contractor who fails to comply with the Mechanic's Lien statute cannot use a mechanic's lien to secure a debt. *Hoffman v. Siegel*, Del. Super., Civ. A. Nos. 90L-11-005, 90L-08-008, Graves, J. (June 13, 1991), at 10. Therefore, Bayside Builders cannot seek a mechanic's lien on the House. Amoroso's Motion for Summary Judgment on the mechanic's lien claim is GRANTED.[4]

B. Arbitration Clause

According to Amoroso, arbitration is encouraged by the law. Amoroso contends that the contract included an agreement to arbitrate all disputes. In the contract, Amoroso cites the second sentence of paragraph 20, which provides: "In the event of a dispute, a third party (arbitrator) shall be selected and his decision shall be binding for all parties." Thus, Bayside Builders must resolve its disputes with Amoroso through arbitration. Amoroso believes the Court must dismiss the case or issue a stay pending arbitration.

Bayside Builders refutes Amoroso's claim that the contract requires arbitration. First, Bayside Builders argues that the contract does not require arbitration of this dispute. Bayside Builders contends the arbitration clause only applies to breach of warranty disputes, not all disagreements between the parties. As evidence, Bayside Builders examined paragraph 20 of the contract. The first sentence of paragraph 20 states: "The provisions of this *warranty* shall not apply if there is any money owed to the Builder on the construction contract, including extras." This discussion of warranty is followed by the disputed arbitration clause. Second, Bayside Builders believes Amoroso waived the right to arbitration by not addressing the alleged arbitration clause during the pleading stage.

This Court's examination is limited to whether there was an agreement to arbitrate, a duty to arbitrate, or a breach of the duty to arbitrate. *State v. James Julian, Inc.*, Del. Ch., C.A. No.

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[4]This ruling has no impact on the quantum meruit claim.

748, 1982, Hartnett, V.C. (Mar. 8, 1983), at 4 (citing *Pettinaro Constr. Co., Inc. v. Harry C. Partridge, Jr. & Sons, Inc.,* 408 A.2d 957 (Del. Ch. 1979)). The parties' disagreement over the extent of the arbitration clause does not equate to ambiguity. The Court will find a contract ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Insur. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)). However, when the ordinary meaning is certain, the courts will not search to find ambiguity. *Id.* Thus, in assessing whether a contract's terms are ambiguous, the Court will rely on "what a reasonable person in the position of the parties would have thought it meant." *Id.* If the contract's language is deemed unambiguous, then the contract will be interpreted "by giving the language its ordinary and usual meaning." *Manley v. Associates in Obstetrics and Gynecology, P.A.*, Del. Super., No. Civ. A. 00C-06-049, Herlihy, J. (July 27, 2001), at 8. Paragraph 19 establishes the warranty, providing: "Builder agrees to guarantee good workmanship in construction and materials, for a period of one (1) year from date of final settlement." The next paragraph contains an exception to the warranty and the disputed arbitration clause. The arbitration clause's proximity to the warranty provisions in paragraphs 19 and 20 indicate the arbitration provision and the warranty are related. According to this contract, warranty disputes must be arbitrated. This is a contract dispute, not a disagreement over warranty. Therefore, arbitration is not required under this contract. As such, Amoroso's motion to dismiss or stay proceedings pending arbitration is DENIED.

CONCLUSION

First, the Court grants Amoroso's Motion for Summary Judgment on the mechanic's lien. Second, the Court denies Amoroso's Motion for Summary Judgment relating to the arbitration clause.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

oc: Prothonotary's Office