



Virginia's Mechanic's Lien and the Supreme Court's Latest Ruling

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Commentators like to discuss the possibility of a uniform, national mechanic's lien law; some in favor, some not. Until there is a uniform mechanic's lien law, and in our opinion there is no current groundswell for one, those of you in the construction industry must know the unique aspects of the mechanic's lien law applying where you own, develop or work on a construction project.

In a 2012 Construction Alert, we pointed out the then new changes to North Carolina's mechanic's lien law. Now, in this Construction Alert we bring to your attention the February 28, 2013 decision from the Virginia Supreme Court on the unique requirements of the Virginia mechanic's lien law. In *Glasser & Glasser, PLC v. Jack Bays, Inc., et al.*, the Virginia Supreme Court addressed in one decision many of the hurdles under Virginia's mechanic's lien law, including such issues as: (1) did the lien claimant join all the necessary parties in the lien enforcement lawsuit; (2) did the lien claimant meet the 90-day rule for recording its lien; (3) does the lien amount include sums outside the 150-day count-back rule; (4) does the mechanic's lien have priority over deeds of trust recorded on the property; and (5) does the lienor have a duty to mitigate its damages?

While the Court's decision was dependent on the specific facts of the case, the Court's application of Virginia's mechanic's lien law to the facts is instructive. Here is our take on the ruling.

History of the Case

The project at the center of the case was the construction of a new church in Woodbridge, Virginia. Before completion, the project owner exhausted the construction financing. The general contractor and subcontractors, nonetheless, continued working for several months without payment based on the owner's statements that new financing was being sought. When new financing did not happen, the general contractor ceased work and notified its subcontractors that further work by them would be at their risk.

Certain of the subcontractors continued working for several more weeks thereafter, primarily demobilizing and making safe the project site. The general contractor stayed on site some six weeks, claiming it was demobilizing, but, as the Court noted, the general contractor also increased its percentage of completion from 92% to 94% during that time.

Eventually, the general contractor and 12 subcontractors recorded mechanic's liens against the project property, and thereafter filed separate lawsuits to enforce their respective liens. In a consolidated

proceeding, a Commissioner in Chancery upheld the validity of the liens and ordered the property sold. The Circuit Court of Prince William County upheld the Commissioner's findings and ordered the property sold at public auction, with the sale proceeds to satisfy the mechanic's liens in order of priority. Lenders with secured mortgage liens on the property to be sold appealed to the Virginia Supreme Court. The Supreme Court upheld the Circuit Court decision except for the order to sell the property, which the Court reversed and remanded for further findings.

Necessary Parties

One of the first issues for the Supreme Court was whether the lienors had named all necessary parties in the lawsuits to enforce the mechanic's liens. By statute, suits to enforce mechanic's liens must name all "necessary" parties, and the failure to do so requires dismissal of the lawsuit.

In this case, in their lawsuits to enforce the liens, the lienors had named the trustees and trust beneficiaries under the deed of trust encumbering the property. The deed of trust, however, also incorporated a Trust Indenture for the benefit of certain bondholders and named a Trustee for the Trust Indenture. The lienors named the Trustee for the Trust Indenture in their lawsuits, but did not name the bondholders of the Trust Indenture. The lenders contended the bondholders should have been named as necessary parties in the lawsuits and that the lienors' failure to name the bondholders was fatal to the lien lawsuits. The Court did not agree with the lenders, reasoning that in naming the deed of trust beneficiaries and the Trustee for the Trust Indenture, the lienors had met the purpose of naming necessary parties having a substantial interest in being given the opportunity to challenge the lien.

The 90-Day Rule

The Virginia mechanic's lien statute requires a lien to be recorded not later than 90 days from the end of the last month in which the lienor performs labor or furnishes material, and in no event later than 90 days from the time the building, structure or railroad is completed or the work "otherwise terminated". Here, it was undisputed that the general contractor ceased work on September 28, 2007, and recorded its lien on December 28, 2007. The lenders argued that work "otherwise terminated" on September 28, 2007, thus the 90 day filing period expired on December 27, 2007, one day before the general contractor actually filed its mechanic's lien. The general contractor argued that it had 90 days from the last day of September to file its mechanic's lien, and therefore had timely filed on December 28, 2007.

The Supreme Court held that the general contractor timely filed its lien, holding that "otherwise terminated" under the mechanic's lien statute means all work terminated, not just the work of the general contractor. Because the subcontractors continued to work after the general contractor ceased its work, the work was not "otherwise terminated," and the 90-day filing period began from the end of September and not September 28.

The 150-Day Count-Back Rule

Under the Virginia mechanic's lien law, a lien claimant cannot include in the memorandum of lien sums due for labor or materials furnished more than 150 days prior to the last day labor or material was furnished to the job preceding the filing of the lien memorandum. Retainage is not subject to this exclusionary rule and can be included in the memorandum of lien even if outside the 150 day count-back period. This rule is often a basis of challenge because non-compliance, with few exceptions, will invalidate the lien.

In this case, the lenders first argued that the 150 day count-back rule did not apply separately to each lien claimant, but rather was a unitary date range for all lien claimants. Citing the express terms of the mechanic's lien statute, the Court rejected the lenders' argument, and noted the 150 day count-back rule is calculated for each lien claimant based on that particular claimant's timing of furnishing labor or

materials.

A second issue was whether the general contractor, in particular, included sums in its lien for labor or materials furnished outside the 150 day count-back period. The Commissioner in Chancery concluded the general contractor had not furnished labor or materials after it announced it was ceasing work in late September, therefore the general contractor's lien amount could include sums for labor or materials furnished in the prior 150 days. While the facts recited in the ruling could lead to a contrary conclusion, on appeal from the Circuit Court's approval of the Commissioner's findings, the Supreme Court will affirm the Circuit Court's decree unless it is "plainly wrong or without evidence to support it." Here the Court concluded in favor of the general contractor.

Lien Priority

The Supreme Court affirmed that, under the terms of the Virginia mechanic's lien statute, the subcontractors' mechanic's liens had priority over the general contractor's mechanic's lien, and those mechanic's liens had priority over the lenders' deeds of trust on the property.

Mitigation of Damages

The lenders also argued that the general contractor had a duty to mitigate its damages following the last owner payment, and while the owner sought new financing. Without taking a position on whether a duty of mitigation exists for a lienor under the mechanic's lien statute, the Court upheld the Commissioner's and Circuit Court's finding that the general contractor did mitigate its damages.

Conclusion

The ruling in this case, as noted at the outset, was fact driven. It is the Court's application of the Virginia mechanic's lien law to those facts that makes this decision a good one to know.

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