

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WILLIAM A. HAZEL, INC.,

Plaintiff

v.

Case No. CL-63714

SYCOLIN CENTER, LLC, *et. al.*,

Defendants

MEMORANDUM OPINION

This action was initiated by the filing of a petition by plaintiff to enforce its mechanic's lien. Plaintiff, William A. Hazel, Inc., was retained by Dietz Construction Group, Inc., to provide site work and infrastructure improvements in connection with the development of a three lot subdivision on lands owned by Sycolin Center LLC, and located in Loudoun County, Virginia. It has been represented that the general contractor, Dietz Construction Group, Inc., filed for bankruptcy in May of 2010. It is further alleged that the other defendants may have an interest in the property by reason of security interests or mechanic's liens.

In response to the petition to enforce, Sycolin Center, LLC, filed, *inter alia*, a motion to dismiss and to determine the validity of the lien of the plaintiff. Va. Code Ann. § 43-17.1. The Court, for reasons previously stated to the record, permitted the filing of such motion, to which counsel for the plaintiff noted his exception. Other of the defendants have joined in the request for the Court to make such a determination.

Stipulations of Fact are made a part of the record. Both written and oral argument was received, and the matter taken under advisement by the Court.

Plaintiff provided labor and materials for the entire property as well as off-site improvements. Pursuant to Section 43-3 B, on July 29, 2010, plaintiff filed a required disclosure statement with the clerk of this Court. That Disclosure Statement claimed a total cost of labor and materials as \$2,873,376.95 and that the amount allocated to each lot, was,

[T]hat fractional part of the total cost of such labor and materials as is obtained by using 'one' as the numerator and the number of lots in the subdivision as the denominator. There being three lots in the subdivision, the amount allocated to each lot is \$957,792.30. If the allocation or amount claimed is inconsistent with the allocation or amount allowed by statute, the amount shall be determined in the manner provided by statute.

Subsequent to the filing of the disclosure statement, the plaintiff filed its Memorandum of Mechanic's Lien in furtherance of its attempted recovery for labor and materials. The Memorandum states:

...

2. Amount Claimed: \$821,020.74, plus interest allocated \$410,510.37 to each of the below referenced lots per § 43-3B and the Disclosure Statement recorded as Instrument # 20100729-0044430 and incorporated herein by reference.

...

4. Brief Description and Location of Real Property sought to be Charged: The claimant hereby declares an intention to claim the benefit of a mechanic's lien on the property interest of the owner pursuant to Va. Code § 43-3, et. seq. and

on the building or structure and so much of the land described herein as shall be necessary for the convenient use and enjoyment thereof, to wit:

Lots 2 and 3 Sycolin Center as described in Instrument # 200907090046140. PIN # 190-35-7919-000, TM#/48/Y/8/////2/ and PIN # 190-35-7659-000, TM#48/Y/8/////3/.

...

IT IS THE INTENTION OF THE UNDERSIGNED TO CLAIM THE BENEFIT OF A LIEN ON THE ABOVE DESCRIBED PROPERTY.

Relevant to the outcome of the petition are both a consideration of the procedural prerequisites for perfection of the lien and the applicable rules of construction. It is the contention of the property owner that both the disclosure statement and memorandum of lien are deficient.

As noted, the instant lien is sought pursuant to § 43-3 B. That section states as follows:

[a]ny person providing labor or materials for site development improvements [improvements which are provided for the development, such as project site grading, rather than for an individual lot] or for streets, stormwater facilities, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development...shall have a lien on each individual lot in the development for that fractional part of the total cost of such labor or materials as is obtained by using 'one' as the numerator and the number of lots as the denominator ...; provided, however, no such lien shall be valid as to any lot...unless the person providing such labor or materials shall, prior to the sale of such lot...file with the clerk of the circuit court of the jurisdiction in which such land lies a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot or condominium unit and a description of the development...and

shall, thereafter, comply with all other applicable provisions of this chapter.

Unlike the provisions of § 43-3 A, those of § 43-3 B would, upon proper perfection, extend the lien to parcels within a development upon which no work may have been performed. As noted by Justice Russell,

That section, as we have seen, gives a subdivision road-builder a lien on each lot, provided he apportions his lien so as to allocate to each lot its proportionate share of his claim, and provided he further files a document with the clerk setting forth the nature and amount of his claim against each lot before such lot is sold. This is the first and only example in the mechanic's lien statutes of a provision for an extraterritorial lien, and it is carefully conditioned to minimize danger to purchasers without notice and other innocent parties.

Rosser v. Cole, 237 Va. 572, 578 (1989).

Had the plaintiff wished to utilize the provisions of § 43-3 A, he may have done so. In such an event, the Court would apply the prerequisites to perfection and rules of construction applicable to such liens, including those applicable to a proper allocation of the lien sought to be enforced. This might include an overburdening analysis applicable to blanket un-apportioned liens. See e.g., Addington-Beaman Lumber Co. v. Lincoln S & L, 241 Va. 436 (1991). However, it did not do so.

Of mechanic's lien statutes, it has been observed,

Because the mechanic's lien statutes are in derogation of the common law, the statutory requirements regarding the existence and the perfection of a mechanic's lien must be strictly construed. A mechanic's lien must be perfected within the specified time frame and *in the manner set forth in the statutes, or the lien will be lost.*

Britt Construction v. Magazzino Clean, LLC, 271 Va. 58, 63 (2006) (authorities omitted) (emphasis added).

In the instant case, the memorandum of lien, contrary to the express provisions of the statute providing for such lien, seeks to apportion the amount claimed between Lots 2 and 3, omitting Lot 1 of the three lot subdivision for which site improvements were made. Such an apportionment is contrary to the matrix established by the legislature and is fatal to its perfection.

Plaintiff's argument with respect to the application of either the reference to the provisions of the Disclosure Statement in the memorandum, or the remedial provisions of § 45-15 to save the lien are similarly unavailing. While the Memorandum of Lien makes reference to the Disclosure Statement in the "Amount Claimed", it at best creates an ambiguity that is incapable of being cured when subject to the scrutiny of a strict construction analysis applicable to the perfection of the lien.

As counsel have noted, § 43-15 provides that,

No inaccuracy of the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5, 43-8, and 43-10, respectively, and is not willfully false.

In construing this provision, the Supreme Court of Virginia has drawn a distinction between the inclusion in the memorandum of issues of proof from a statutory requisite to perfection of the lien. Smith Mt. Bldg. Supply, LLC v. Windstar Props., LLC, 277 Va. 387 (2009). The inclusion of the proper denominator in the memorandum of lien is a procedural prerequisite to perfection.

Accordingly, the Court finds the lien invalid as to the defendants affected by the lien and the memorandum of lien is ordered removed from the record pursuant to Va. Code Ann. § 43-17.1.

Mr. Atwill may draw an Order consistent with this opinion to which counsel for the plaintiff may note his exception.

Entered this day of April 2011

Thomas D. Horne, Chief Judge