NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

March 14, 2019

Mariam W. Tadros
Rees Broome, P.C.
1900 Gallows Road, Suite 700
Tysons Corner, VA 22182

David Armistead, III
Carluzzo, Rochkind & Smith, PC
9300 W. Courthouse Road
Manassas, VA 20110

Re: *Marines Plumbing, LLC* v. *Kristen M. Durbin, et al.*, CL 2018-14956

Dear Ms. Tadros and Mr. Armistead:

This matter is before the court on Defendants' motion to reconsider the court's order of January 25, 2019 denying Defendants' Motion to Dismiss Plaintiff Marines Plumbing, LLC's ("MPL") Complaint to Enforce Mechanic's Lien. For the reasons set forth below, the motion to reconsider is denied.

Background

The pertinent facts are not in dispute. MPL performed plumbing repair work on Defendants' property and Defendants did not pay for that repair work. Defendants' property is subject to a Deed of Trust (naming two trustees) securing a loan, which was recorded prior to the plumbing repair work performed by MPL. On April 18, 2018, MPL recorded its memorandum of lien against Defendants' property. On October 17, 2018, MPL timely filed the Complaint.

Defendants filed a motion to dismiss the Complaint, arguing that the Complaint was fatally deficient due to its failure to name necessary parties, to wit, the two trustees and the lender. In its opposition, MPL argued that it was not necessary to name the two trustees and the lender in the Complaint because (1) MPL is not seeking the sale of the property; and (2) MPL's mechanic's lien is inferior to that of the two trustees and the lender and, therefore, does not threaten the property interest of two trustees and the

OPINION LETTER

lender.

The court agreed with MPL that MPL's mechanic's lien is inferior to that of the two trustees and the lender and denied Defendants' motion to dismiss.

Analysis

1) Turning first to MPL's argument that the two trustees and the lender are not necessary parties because MPL does not seek the sale of the property, the court agrees with Defendants that the purpose of a mechanic's lien enforcement action is to sell the property so that the holder of the mechanic's lien can be paid. Thus, by filing the Complaint, MPL *is* seeking the sale of the property.

Further, the court agrees with Defendants, because it is "the settled practice in this State" that "the liens and incumbrances upon real estate, with their amounts and priorities, shall be ascertained and determined before it is sold," *Fidelity Loan & Trust Co. v. Dennis,* 93 Va. 504, 508, 25 S.E. 546, ___ (1896), that the court will, prior to sale, refer the matter to commissioner "to ascertain all of the liens on the property and their priorities." Motion at 4.

2) With respect to MPL's second argument, it is well-settled that a mechanic's lien must name all "necessary parties" within the time frame set forth by Virginia Code § 43-17 and that failure to do so requires dismissal. *Synchronized Const Servs., Inc. v. Pray Lodging, L.L.C.,* 288 Va. 356, 363 (2014). The Code, however, does not define the term "necessary parties" for purposes of enforcement of a mechanic's lien. What is at issue here, therefore, is whether the two trustees and the lender are "necessary parties" as a matter of law. See *Synchronized Const Servs., Inc. v. Pray Lodging, L.L.C.,* 288 Va. at 363 ("Whether a party is a necessary party to a particular claim is a question of law").

As a general proposition, a "necessary party" is "an individual" who "has an interest in [the subject matter], either in possession or expectancy, *which is likely either to be defeated or diminished by the plaintiff's claim . . . .*" *Id.* at 364 (citation omitted) (emphasis added). Thus, the court must determine whether the interest of the two trustees and the lender is likely either to be defeated or diminished by the plaintiff's claim.

In making that determination, the relevant Code provision is Code § 43-21, which provides in pertinent part:

> [L]iens filed for performing labor or furnishing materials for the *repair* or improvement of any building or structure *shall be subject to* any encumbrance against such land and building or structure of record prior to the commencement of the improvements or repairs or the furnishing of materials or supplies therefor. (Emphasis added).

As a matter of law, therefore, MPL's lien is "subject to" the lien of the two trustees and the lender. The result is that, as a matter of law, the interest of the two trustees and the lender is not "likely either to be defeated or diminished" MPL's lien. Thus, the two trustees and the lender

are not necessary parties.

None of the cases cited by Defendants is to the contrary.

In *Walt Robbins, Inc. v. Damon Corporation,* 232 Va. 43, 348 S.E.2d 223 (1986), the Court held that the lien of a deed of trust recorded before land is improved:

> is a first lien on the land and a lien on the improvements subordinate to a mechanic's lien; *the mechanic's lien is a first lien on the improvements* and a subordinate lien on so much of the land as is necessary for the use and enjoyment of the improvements. *Federal Land Bank v. Clinchfield Co.*, 171 Va. 118, 123, 198 S.E. 437, 439 (1938) (construing statutory ancestors of Code §§ 43-3, -21).

232 Va. at 47 (emphasis added).

The reason for this holding is the following:

> Because the proceeds of a judicial sale under a decree enforcing a mechanic's lien may prove to be insufficient to pay both lien creditors in full, the beneficiary of an antecedent deed of trust has a property right which entitles him to notice and an opportunity to challenge the perfection of the mechanic's lien or to invoke the forfeiture provisions of Code § 43-23.1.

Id.

In the case at bar, the provision of Code § 43-21 quoted, *supra*, makes clear that, where the mechanic's lien was for repairs, the mechanic's lien is *not* "a first lien on the improvements" as was the case in *Walt Robbins, Inc.* Thus, the due process concern in *Walt Robbins, Inc., i.e.*, that the proceeds of a judicial sale under a decree enforcing a mechanic's lien may prove to be insufficient to pay MPL and the lien of the two trustees and the lender, is not present here.

Defendants state that *Walt Robbins, Inc.* held that "the beneficiary of an antecedent deed of trust was a necessary party despite the fact that the beneficiary was superior in priority to the mechanic's lienholder . . . ." Motion at 2. In fact, the Court held that the beneficiary of the antecedent deed of trust was superior in priority to the mechanic's lienholder *only as to the land*, but subordinate as to the improvements. 232 Va. at 47. Thus, the proceeds of a judicial sale could be insufficient to pay the beneficiary of an antecedent deed of trust, thereby making the beneficiary of an antecedent deed of trust a necessary party. In light of the provision of Code § 43-21 quoted, *supra*, this is not the case here.

In *James T. Bush Construction Co. v. Patel,* 243 Va. 84, 412 S.E.2d 703 (1992), although stating that "Bush's reliance on the antecedent/subsequent or superior/inferior status of the pertinent interest as dispositive of the necessary party determination is misplaced" (243 Va. at 87), the Court went on to explain:

> *Walt Robbins* established that this determination must be based on an analysis of the nature of the particular interest involved and the rights appurtenant to that interest in light of the relief sought. Whether an interest or encumbrance is antecedent or subsequent, superior or inferior to a mechanic's lien may be pertinent to the analysis, but it is not dispositive.

243 Va. at 87-88.[1]

This court's analysis of whether the two trustees and the lender are necessary parties is based upon "the nature of the particular interest involved and the rights appurtenant to that interest in light of the relief sought" in that the analysis takes into account not only the antecedent/subsequent or superior/inferior status of the pertinent interest, but the statutory authority (Code § 43-21) affecting that status. This court's conclusion is not that, merely because the lien of the two trustees and the lender was antecedent, or superior, to the mechanic's lien, but that the provision of Code § 43-21 quoted, *supra*, makes the mechanic's lien, as a matter of law, "subject to" the lien of the two trustees and the lender.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

---

[1] The Court also stated that it "specifically reject[s] any construction of *Monk* that would lead to the conclusion that the holder of an interest arising subsequent to a mechanic's lien is, *by definition*, a proper but not a necessary party, and that an analysis regarding the nature and rights of such interest is unnecessary in making that determination." 243 Va. at 88 (emphasis in original). As the case at bar does not involve a holder of an interest arising subsequent to a mechanic's lien, this holding has no bearing on the case at bar.