THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SC&A CONSTRUCTION INC., Plaintiff,	)	
v.	)	
	)	C.A. No.: 12L-09-022 FSS
CHARLES POTTER, JR., and VELDA C. JONES-POTTER, Defendants.	)	**E-FILED**

Submitted: December 21, 2012
Decided: December 21, 2012

MEMORANDUM OPINION AND ORDER

Upon Plaintiff's Motion to Dismiss Counterclaim in Favor of Arbitration – *GRANTED*
Upon Plaintiff's Request for Sanctions - *DENIED.*

This concerns how to litigate Contractor-Plaintiff's mechanics' lien and Homeowner-Defendants' compulsory counterclaim. Allegedly, the disputed work was performed under a standard form construction agreement requiring binding arbitration, but also allowing a mechanics' lien's filing.[1] Consistent with the Agreement's plain terms, the contractor asks that its cautionary lien remain in place until the entire dispute is resolved through binding arbitration. Homeowners counter that one of them did not sign the Agreement. The court will address that first.

[1] AIA Document A107™ - 2007 Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope.

I.

From the pleadings and today's oral argument, it appears Defendants hired Plaintiff, a licensed contractor, to perform specific, extensive work on Defendants' house in North Wilmington, including installing a new roof. The contractor and one defendant, Velda Jones-Potter, signed an AIA contract[2] on May 12, 2011. It further appears this was a relatively big job, coming to over $215,000 and spanning ten months. So far, nothing supports an inference that Charles Potter did not know that substantial work was being performed by Plaintiff, month-after-month, on the house titled in his and his wife, Velda Jones-Potter's names. Potter has not plead that he was unaware. At this point, it is unreasonable to assume Potter thought a contractor had torn the roof off his house, re-framed the attic, installed a new roof and did interior work, all without a written contract. The only contract mentioned in the Complaint and Answer is the AIA agreement.

So far, Potter has not moved to dismiss. He answered the complaint and he appears to be participating in the litigation relying, at least in part, on the Agreement. His counterclaim seems to rely on the Agreement and, again, he has not plead that he was not aware of it, much less that another agreement covered his contractual relationship apart from and different than the Agreement his wife signed.

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[2] *Id.*

As this litigation plays-out, Charles Potter may show he was in the dark, or otherwise disagreed with the Agreement bearing his wife and co-owner's signature. Potter argued today that his signature does not appear on the Agreement because "he did not agree to these specific provisions." For now, however, it is reasonable to believe that even if Potter did not sign the contract, Potter knew the work on his house was being performed under the Agreement and his missing signature, viewed in context, is an insignificant omission.

Thus, at this initial stage, the court will proceed on the untested assumption that by word or conduct, both Defendants adopted the Agreement. Put another way, for now, the court accepts that Potter either acquiesced to the Agreement, or he is estopped from denying it. As discussed below, the case will be referred to compulsory arbitration and the arbitrator may revisit how it is that Potter did not sign the Agreement.

II.

Generally, the Agreement requires that disputes be submitted first to the project's architect, then mediation, then binding arbitration, if necessary. Mediation is in progress. If it comes to arbitration, the award may be entered as an enforceable judgment. The Agreement also allows the filing of a mechanics' lien.[3]

[3] *See* §§ 5.1, 21.1-21.7.

Specifically, the Agreement provides:

> § 5.1 BINDING DISPUTE RESOLUTION
>
> For any claim subject to, but not resolved by, mediation pursuant to Section 21.3, the method of binding dispute resolution shall be as follows: . . . Arbitration pursuant to Section 21.4 of this Agreement[.]

Section 21.3, referred to in § 5.1, lays out the dispute resolution procedure:

> § 21.3 The parties shall endeavor to resolve their disputes by mediation . . . .[T]he request may be made concurrently with the binding dispute resolution but, in such an event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period 60 days from the date of filing . . . .

Section 21.4, also referred to in § 5.1, ultimately provides for binding arbitration:

> § 21.4 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any claim, subject to, but not resolved by, mediation shall be subject to arbitration . . . . The award rendered by the arbitrator . . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Section 21.2, however, contemplates Contractor's filing a mechanics' lien:

> § 21.2 If a claim, dispute or other matter in question relates to or is the subject of a mechanic's lien, the party asserting such matter may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

In summary, the Agreement unambiguously calls for mediation followed by compulsory arbitration of "their disputes," but also allows timely filing of a mechanics' lien. The Agreement, however, does not directly address the procedure to follow where, as here, the contractor files a mechanics' lien and the owner responds with a compulsory counterclaim.[4]

III.

It has long been held that a mechanics' lien, which did not exist under common law, is a specific statutory remedy *in rem*.[5] The lien is against a thing, not a person. If Contractor prevails, it will have a lien on the property, not a judgment against the property's owners.

Over 100 years ago, in 1906, Judge Woolley discussed the arbitrabilty

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[4] *See Stockman v. McKee*, 71 A.2d 875, 881 (Del. Super. 1950) ("A permissive counterclaim . . . is not a proper matter of pleading in a mechanic's lien action.").

[5] *Id.* at 880.

of mechanics' liens.[6] Basically, he explained that a mechanics' lien's filing gave the contractor a cautionary lien, which stayed on the record until the case was decided at trial[7] or, if the parties agreed, by arbitration or referees. Woolley is clear that if the agreement, as here, refers all claims to alternative dispute resolution, that reference includes the mechanics' lien along with the attendant contractual disputes.[8]

In closing, this decision in no way limits the arbitrator's authority to reach any issue, including factual questions relating to arbitrability based on the partially-signed contract, or otherwise. If they choose, Defendants may argue to the arbitrator that each defendant had an individual agreement with Contractor, or however Defendants put it.

In the end, if the arbitrator finds for Contractor, the lien will remain of record until it is satisfied. If the arbitrator finds for Defendants, the lien will be discharged and a judgment on the counterclaim, if damages are awarded, will be entered against Contractor.

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[6] 2 Victor B. Woolley, *Woolley's Practice in Civil Actions*, §§ 1386, *et seq.* (1906).

[7] *Id*. at § 1403 ("The effect of filing the statement is to create a lien upon the premises . . . . This lien, however, remains cautionary, subject to be discharged or made permanent by the final determination of an action *scire facias*.").

[8] *Id.* at §§ 1338, 1410.

IV.

As for sanctions, Defendants' argument that the Agreement does not apply to one of them was not frivolous and it was rooted in Plaintiff's sloth. The court will not make Defendants pay because Plaintiff did not get its paperwork in order. Plaintiff's request for sanctions is **DENIED.**

For the foregoing reasons, Plaintiff's motion to dismiss Defendants' counterclaim in favor of arbitration is **GRANTED**, and the entire case is **REFERRED** to compulsory arbitration.

IT IS SO ORDERED.

/ s/ Fred S. Silverman
Judge

cc: Prothonotary
Donald Logan, Esquire
Samuel L. Guy, Esquire