

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

KING CONSTRUCTION, INC.,)	
)	
Plaintiff,)	
)	C.A. No. 07L-08-256 PLA
v.)	
)	
PLAZA FOUR REALTY, LLC and)	
ALPHA BAPTIST CHURCH a/k/a)	
ALPHA WORSHIP CENTER, INC.,)	
)	
Defendants.)	

ON DEFENDANT PLAZA FOUR REALTY LLC'S
MOTION TO DISMISS
GRANTED

Submitted: September 2, 2008
Decided: September 29, 2008

Robert J. Leoni, Esquire, SHELSBY & LEONI, Stanton, Delaware,
Attorney for Plaintiff.

David Roeberg, Esquire, ROEBERG, MOORE & FRIEDMAN, P.A.,
Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiff King Construction, Inc. (“King”) performed construction work on property owned by Defendant Plaza Four Realty, LLC (“PFR”). The work was undertaken pursuant to a contract between King and PFR’s tenant. When the tenant allegedly failed to make payments on the contract, King filed a Statement of Claim for a mechanic’s lien against the property.

Now before the Court is PFR’s Motion to Dismiss the Statement of Claim for a Mechanic’s Lien. For reasons set forth more fully hereafter, PFR’s Motion to Dismiss is granted and King’s Statement of Claim is dismissed without prejudice.

II. Factual Background

PFR owns property located at 721 East Chestnut Hill Road, Newark, Delaware 19713 (“the property”). PFR leased the property to Alpha Baptist Church a/k/a Alpha Worship Center, Inc. (“AWC”), with the lease term commencing on January 1, 2007.¹ In December 2006, prior to the start of its lease, AWC contracted with King, a general contractor, for construction of a project known as the Alpha Worship Center (“the project”) on the property. Although the parties dispute the existence of prior written consent,² King

¹ See Docket 8 (Def. PFR’s Answer), Ex. A.

² See *id.* at ¶ 32.

asserts that on December 8, 2006, PFR's manager sent the New Castle County Department of Land Use a notarized written consent authorizing AWC to pursue a demolition or building permit for the project.³

On January 22, 2007, King began furnishing labor or materials for the project. King alleges that at some point thereafter, AWC refused to pay amounts due upon proper demand.⁴ Subsequently, King filed a Statement of Claim and Complaint in this Court on August 31, 2007, seeking a mechanic's lien for \$367,859.35 against the property owned by PFR and a personal judgment in the same amount against AWC.⁵

At the time its Statement of Complaint was filed, King was still supplying labor and materials to the project.⁶ King contends that the claim amount represents the balance owed on a revised contract sum of \$1,028,943.77.⁷ King states that the value of its completed work as of the filing date is \$967,992.52.⁸ The Statement of Claim does not mention the

³ See Docket 14 (Pl.'s Resp. to Mot. to Dismiss), Ex. A.

⁴ See Docket 1 (Statement of Claim and Compl.), ¶¶ 7-10.

⁵ See *id.* at ¶¶ 20, 25.

⁶ *Id.* at ¶ 7.

⁷ *Id.* at ¶¶ 5, 7, 16.

⁸ *Id.* at ¶ 7.

December 2006 letter from PFR to the Department of Land Use, nor does it otherwise allege that PFR had given prior written consent.

III. Parties' Contentions

PFR filed the instant Motion to Dismiss King's Statement of Claim on June 19, 2008. PFR argues that there are three defects in King's Statement of Claim each of which require dismissal: (1) King fails to allege in its Statement of Claim that PFR provided prior written consent to the contract between King and AWC; (2) the Statement of Claim contains no allegation of the time when the provision of labor or materials was finished, as required by 25 *Del. C.* § 2712(6); and (3) the Statement of Claim is premature under § 2711(b) because it was filed before King completed performing labor or made the final delivery of materials under the contract.⁹

In response, King argues that the pleading defects alleged by PFR are not required elements of a Statement of Claim. First, King submits that it is not necessary to plead the prior written consent of a property owner with particularity because prior written consent is not among the pleading requirements for mechanics' liens set forth in § 2712(b).¹⁰ Furthermore, King asserts in its Response—as it did not in its Statement of Claim—that

⁹ Docket 11 (Def. PFR's Mot. to Dismiss), at 1.

¹⁰ See Docket 14 (Pl.'s Resp. to Mot. to Dismiss), ¶ 2.

PFR issued prior written consent to the contract work by its notarized December 2006 letter to the Department of Land Use authorizing AWC to seek a building or demolition permit.¹¹

As to the timing of its Statement of Claim and the failure to plead the date on which the provision of labor or materials for the project was completed, King denies that a subcontractor must wait until after it has finished furnishing labor or materials to file a mechanic's lien.¹² King questions PFR's reliance upon *E.J. Deseta HVAC Services v. Conaty*¹³ for the proposition that a mechanic's lien is premature if filed before the project is completed or the furnishing of labor or materials is finished, suggesting that the *Deseta* opinion is unsupported by authority and "in contravention of the express language of the [mechanic's lien] statute."¹⁴ According to King, revisions to § 2711 that eliminated a 90-day waiting period after completion of a project before a contractor could file a mechanic's lien had the effect of establishing that there is no "floor" on filing times for either contractors or subcontractors under the current statute.¹⁵ Therefore, King urges that a

¹¹ Docket 14 (Pl.'s Resp. to Mot. to Dismiss), ¶ 1 & Ex. A.

¹² Docket 14 (Pl.'s Resp. to Mot. to Dismiss), ¶¶ 3-4.

¹³ 2005 WL 1950799 (Del. Super. July 29, 2005).

¹⁴ Docket 14 (Pl.'s Resp. to Mot. to Dismiss), ¶ 3.

¹⁵ *Id.*, ¶ 4; *see* 25 Del. C. § 2711.

subcontractor can initiate a mechanic's lien before it has finished supplying labor or materials to a project.¹⁶

IV. Standard of Review

As an initial matter, the Court must determine the standard of review. Although PFR's Motion to Dismiss does not rely upon materials outside the pleadings, King's Response refers to the December 2006 letter from PFR to the Department of Land Use, which is attached as an exhibit to the Response.¹⁷ The Court must therefore determine whether to adjudicate the motion as presented or convert it to a motion for summary judgment.

Superior Court Civil Rule 12(b)(6) provides that a motion to dismiss shall be treated as a motion for summary judgment under Rule 56 if "matters outside the pleading are presented to and not excluded by the Court."¹⁸ The Court does not need to consider King's exhibit to reach a decision on the alleged pleading defects, and it therefore will not convert the motion into one for summary judgment. PFR's motion to dismiss will be considered as styled.¹⁹

¹⁶ See Docket 14 (Pl.'s Resp. to Mot. to Dismiss), ¶¶ 4-5.

¹⁷ See Docket 14 (Pl.'s Resp. to Mot. to Dismiss), Ex. A.

¹⁸ Super. Ct. Civ. R. 12(b)(6).

¹⁹ See, e.g., *Reeder v. Wagner*, 2006 WL 3501664, at *2 (Del. Super. Dec. 4, 2006) (citing *Pfeiffer v. Price*, 2004 WL 3119780 (D. Del. Dec. 24, 2004)).

Upon a motion to dismiss, a complaint is subjected to a broad test of sufficiency.²⁰ Dismissal is appropriate only if it is reasonably certain “that the plaintiff could not prove any set of facts that would entitle him to relief.”²¹ The complaint will not be dismissed unless it clearly lacks factual or legal merit.²² When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.²³ In addition, every reasonable factual inference will be drawn in favor of the plaintiff.²⁴

V. Analysis

Because mechanics’ liens are in derogation of the common law, Delaware courts strictly construe the mechanic’s lien statute.²⁵ There is no right to the lien unless the statement of claim complies with all of the applicable statutory requirements.²⁶ As the Supreme Court has explained, a

²⁰ *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007).

²¹ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

²² *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

²³ *Spence v. Funk*, 396 A.2d at 968; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007) (citing *Ramunno*, 705 A.2d at 1036).

²⁴ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

²⁵ *Builder’s Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995).

²⁶ *E.J. Hollingsworth Co. v. Continental-Diamond Fiber Co.*, 175 A. 266, 268 (Del. 1934).

court “cannot assume to arrogate to itself the power to make a lien and thereby to destroy the provisions of the statute.”²⁷ Therefore, a plaintiff must affirmatively show that “every essential statutory step in creation of the lien has been followed” in order to secure a valid lien.²⁸

Here, King’s Statement of Claim fails both the pleading and timing requirements imposed upon valid mechanics’ liens. The Court will address each of PFR’s grounds for dismissal in turn.

A. Failure to Plead Prior Written Consent

In order to protect lessors, the mechanic’s lien statute prohibits the imposition of a lien upon leased property “for repairs, alterations or additions, when such property has been altered, added to or repaired by or at the instance of any lessee or tenant without the prior written consent of the owner.”²⁹ Although not explicitly referenced in the pleading requirements of § 2712, the statutory requirement of prior written consent has long been construed by Delaware courts to impose a pleading requirement upon that “special class of mechanics’ liens[] for labors or supplies contracted for by

²⁷ *Id.*

²⁸ *Lakewood Builders, Inc. v. Vitelli*, 1987 WL 10533, at *1 (Del. Super. Apr. 29, 1987) (citing *Ceritano Brickwork, Inc. v. Kirkwood Indus., Inc.*, 276 A.2d 267 (Del. 1971)).

²⁹ 25 *Del. C.* § 2722.

the tenant.”³⁰ Thus, “it is clear that before a lien will attach such consent must be both [pled] and proven” by the plaintiff.³¹

King’s Statement of Claim therefore must fail for neglecting to plead the existence of prior written consent. The Statement of Claim establishes that the construction contract was between King and AWC, and nowhere alleges that PFR gave prior written consent.³² King’s argument that prior written consent need not be pleaded because it is not among the pleading requirements listed in § 2712 ignores the relevant case law and assumes without basis that § 2712 constitutes an exhaustive and exclusive catalog of all pleading requirements for mechanics’ liens. Even presuming that PFR’s December 2006 letter to the Department of Land Use would constitute adequate prior written consent, the fact that King now offers the letter in response to PFR’s Motion to Dismiss is immaterial since consent was not alleged in the pleadings.

³⁰ See *Silverside Home Mart, Inc. v. Hall*, 345 A.2d 427, 429-30 (Del. Super. 1975); see also *Lakewood*, 1987 WL 10533, at *2.

³¹ *Lakewood*, 1987 WL 10533, at *2 (citations omitted).

³² See Docket 1 (Statement of Claim and Compl.), ¶¶ 3-4 & Ex. A.

B. Timing of King's Statement of Claim

PFR also prevails on the second and third grounds presented in its motion. Specifically, King's Statement of Claim fails to plead a finishing date and the lien was prematurely filed before King had finished supplying labor or materials. King's response does not directly address the finishing date pleading requirement of § 2712(b)(6); however, it follows from King's argument—that a subcontractor may file before the furnishing of materials or labor is completed—that it could not be required to plead a finishing date when the work would not yet be finished. Therefore, the Court will discuss these interrelated grounds together.

Under the current mechanic's lien statute, filing time requirements differ for contractors and subcontractors.³³ A plaintiff who has furnished labor or materials under contract with a lessee or tenant is considered a subcontractor and subject to § 2711(b),³⁴ which provides that such plaintiffs “shall file a statement of their respective claims within 120 days from the date [of] the completion of the labor performed or from the last delivery of materials furnished by them respectively.”³⁵ Under the pleading

³³ See 25 Del. C. § 2711.

³⁴ See 25 Del. C. §§ 2702, 2711.

³⁵ § 2711(b).

requirements of § 2712(b)(6), the statement of claim must set forth “[t]he time when the doing of the labor or the furnishing of the materials was finished.”³⁶ The averment of a finishing date is deemed “essential . . . for the creation of any mechanics’ lien” in part because it is necessary to determine the running of the statute of limitations.³⁷

King contends that revisions to § 2711 reflect the legislature’s intent not to impose a timing “floor” on claims subject to § 2711(b). Section 2711(a), which sets the limitations period for contractors who have contracted directly with a structure’s owner or reputed owner, was revised in 1999 to remove language requiring contractors to wait 90 days after completing a project before filing a mechanic’s lien.³⁸ In addition, the 1999 revisions enlarged the statutory limitations periods under both § 2711(a) and (b).³⁹ Based on these changes, King advances the theory that “[h]ad the Legislature desired to establish a waiting period with respect to . . . § 2711(b), it could have changed § 2711(b) to match the language under pre-

³⁶ 25 *Del. C.* § 2712(b)(6). Section 2712(b)(6) also provides for alternative means of establishing the required completion date, which are not at issue in this case.

³⁷ *See, e.g., Poole v. Oak Lane Manor, Inc.*, 118 A.2d 925, 926 (Del. Super. 1955), *aff’d* 124 A.2d 925 (Del. 1956).

³⁸ 72 Del. Laws ch. 203, § 2 (1999) (codified at 25 *Del. C.* § 2711).

³⁹ *Id.*

1999 § 2711(a), but it specifically chose not to institute such a floor in § 2711(b).”⁴⁰

King’s argument flouts both the text of § 2711 and legislative history that is directly on point. The current § 2711(b) states that claims “*shall* [be] file[d] . . . within 120 days from the date [of] the *completion* of the labor performed or from the *last* delivery of materials furnished.”⁴¹ Contrary to King’s interpretation, by removing the 90-day waiting period for contractors under § 2711(a), the legislature did not also implicitly intend to eliminate the stated requirement under § 2711(b) that completion of labor or material deliveries precede filing. A straightforward reading of the statute makes clear that the provision of labor or materials must be finished before a § 2711(b) plaintiff can file a mechanic’s lien action, and this unambiguous language must be given its intended effect.⁴² Moreover, the legislative history of the revisions to § 2711 confirms that the 120-day time period

⁴⁰ Docket 14, ¶ 4.

⁴¹ § 2711(b) (emphasis added). Section 2711(b) includes an alternative permitting a § 2711(b) claimant to file within a period running from the date final payment is due to the claimant or paid to the contractor. *See id.* This provision is not at issue in the matter before the Court.

⁴² *See State Farm Mut. Auto. Ins. v. Mundorf*, 659 A.2d 215, 220-21 (Del. 1995) (“In construing a statutory . . . provision, it is fundamental that the Court ascertain and give effect to the intent of the legislative . . . body as clearly expressed in the language of the statute In seeking to ascertain this intent, the courts of Delaware employ the plain meaning rule.”) (citations omitted).

under § 2711(b) is to be “calculated from the date of completion of the labor performed or from the last delivery of materials furnished.”⁴³

Applying the plain language of § 2711(b), King’s Statement of Claim was filed prematurely. In its Statement of Claim, King conceded that it was “continuing to supply labor and materials to the Project”⁴⁴ at the time of filing. Therefore, neither “the completion of the labor performed” nor “the last delivery of materials” had occurred to trigger the start of the 120-day filing period under § 2711(b). This holding is consistent with the language of § 2711(b) and the Court’s decision in *Deseta*. In *Deseta*, parallel language in revised § 2711(a) stating that a contractor “shall file his statement of claim [for a mechanic’s lien] within 180 days after the completion of such structure” was applied to bar a claim instituted before the structure was “complete.” As the *Deseta* Court noted, the principle that the mechanic’s lien statute must be strictly construed extends to requiring filing “*within* prescribed times.”⁴⁵ In other words, a claimant must observe not just the ending date of the statutory period, but its starting point as well.

⁴³ Del. S.B. 130 syn., 140th Gen. Assem. (1999).

⁴⁴ Docket 1 (Statement of Claim and Compl.), ¶ 11.

⁴⁵ *Id.* (quoting *J.O.B. Constr. Co. v. Jennings & Churella Servs., Inc.*, 2001 WL 985106, at *2 (Del. Super. Aug. 9, 2001)) (emphasis added).

Having determined that § 2711(b) claimants must await the completion of labor or the final delivery of materials before instituting a mechanic's lien action, the applicability of the § 2712(b)(2) finish date pleading requirement is evident. The "time when the doing of the labor or the furnishing of the material . . . was finished" is necessary to calculate the start of the statutory period and must be pleaded to comply with the statute. Because King's Statement of Claim fails to plead a finishing date in conformity with § 2712(b)(2), it must be dismissed.

VI. Conclusion

Based on the foregoing, the Court concludes that King's Statement of Claim is defective under the mechanic's lien statute. Because the Statement of Claim was prematurely filed, it will be dismissed without prejudice.⁴⁶

Defendant PFR's Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Robert J. Leoni, Esq.
David Roeberg, Esq.

⁴⁶ See *Deseta*, 2005 WL 1950799, at *4.