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Date Submitted: June 10, 2002  
Date Decided: September 12, 2002

RE: **Atlantic Millwork Corporation & Atlantic Cabinetry Corporation v. James K. Harrington, Beach Partners, L.L.C., & Beach Babies, Inc.**  
C.A. No. 02L-01-021

Dear Counsel:

Atlantic Millwork Corporation and Atlantic Cabinetry Corporation (collectively, "Atlantic") filed a Complaint against James Harrington, individually and in his business capacity as a general contractor (collectively, "Harrington"), for whom they provided services and materials. The Complaint also named as defendants Beach Partners and Beach Babies, Inc. (collectively, "Beach"), with whom Harrington was employed as a general contractor when he entered contract negotiations with Atlantic. Atlantic seeks relief in the form of mechanic's liens as well as breach of contract and quantum meruit damages. Beach has filed a Motion to Dismiss the mechanic's lien counts, which is granted, and a Motion for Judgment on the Pleadings on the other claims, which is denied.

## **FACTS**

Beach contracted with Harrington for the furnishing of labor, material, equipment, and services concerning property located at Red Mill Manor, Route 1 South, in Lewes, Delaware. Harrington, in turn, enlisted Atlantic to provide him with necessary materials, which Atlantic supplied. Harrington tendered partial payment to the subcontractors but has failed to completely settle the accounts. Thereafter, Atlantic sued both Harrington and Beach for the outstanding sums, and the aforementioned motions have been presented for decision.

## **ISSUES PRESENTED**

Beach argues that Counts 1 and 2 of the Complaint should be dismissed for noncompliance with the requirements of the mechanic's lien statute. Concerning its Motion for Judgment on the Pleadings, Beach asserts that Atlantic waived its rights to pursue any claims against Beach by executing a Release of Liens (hereinafter "Release").

## **DISCUSSION**

### **I. Standard of Review**

In deciding a motion to dismiss, all factual allegations of the complaint are accepted as true. *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super.), *aff'd* 297 A.2d 37 (Del. 1972). The test of sufficiency is whether the plaintiff may nonetheless recover under any plausible circumstances capable of proof under the complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

A motion for judgment on the pleadings has been viewed as in the general nature of a motion to dismiss because it admits, for the purpose of the motion, the allegations of the plaintiff's pleadings but contends that they are insufficient at law. *Fagani v. Integrity Finance Corp.*, 167 A.2d 67, 75 (Del. Super. 1960). The motion presents a question of law and may not be granted where the

pleadings raise any issue of material fact. *Id.*

## **II. The Mechanic's Liens**

Atlantic seeks to impose mechanic's liens Beach's property. Beach argues that each mechanic's lien fails to comply with the statutory requirements and is defective. Beach cites several omissions from the Complaint and the attached affidavits as grounds for dismissal: failure to aver that the facts contained therein are "true and correct;" failure to state whether Harrington was a general contractor or a sub-contractor; failure to state whether Atlantic entered into the contracts with the owner, agent of the owner, or sub-contractor; failure to state the specific act which established the date of completion of Atlantic's responsibilities under the contracts; and failure to identify the location of the building to which the materials were supplied.

A complaint that seeks a mechanic's lien must comply with the requirements set forth in 25 *Del. C.* § 2712. The statute reads, in relevant part:

- (b) The complaint and/or statement of claim shall set forth:
  - (1) The name of the plaintiff or claimant;
  - (2) The name of the owner or reputed owner of the structure;
  - (3) The name of the contractor and whether the contract of the plaintiff-claimant was made with such owner or his agent or with such contractor;
  - (4) The amount claimed to be due, and, if the amount is not fixed by the contract, a statement of the nature and kind of the labor done or materials furnished with a bill of particulars annexed, showing the kind and amount of labor done or materials furnished or construction management services provided; provided, that if the amount claimed to be due is fixed by the contract, then a true and correct copy of such contract, including all modifications or amendments thereto, shall be annexed;
  - (5) The time when the doing of the labor or the furnishing of the materials was commenced;
  - (6) The time when the doing of the labor or the furnishing of the material or the providing of the construction management services was finished, except that:
    - a. With respect to claims on behalf of contractors covered by § 2711(a) of this title, the date of the completion of the structure,

including a specification of the act or event upon which the contractor relies for such date, and b. With respect to claims on behalf of other persons covered by § 2711(b) of this title, the date of completion of the labor performed or of the last delivery of materials furnished, or both, as the case may be, or a specification of such other act or event upon which such person relies for such date.

(7) The location of the structure with such description as may be sufficient to identify the same;

(8) That the labor was done or the materials were furnished or the construction management services were provided on the credit of the structure;

(9) The amount of plaintiff's claim (which must be in excess of \$25) and that neither this amount nor any part thereof has been paid to plaintiff; and

(10) The amount which plaintiff claims to be due him on each structure.

(11) The time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon such structure which is granted to secure an existing indebtedness or future advances provided at least 50% of the loan proceeds are used for the payment of labor or materials, or both, for such structure.

(c) The complaint and/or statement of claim shall be supported by the affidavit of the plaintiff-claimant *that the facts therein are true and correct.*

25 Del. C. § 2712 (emphasis added).

While parts of the Complaint and affidavits are challenged, the parties focus on the requirement that a plaintiff must swear that the facts of the affidavit are “true and correct.” Mark L. Woodruff, President of Atlantic, signed the affidavits and vouched for the facts asserted in the Complaint as “true and correct to the best of my knowledge.” Beach argues that the statute must be read literally and that any additional qualifications attached to the phrase “true and correct” are fatal. However, Atlantic replies that the law provides for, and practicality requires, some qualification to the phrase.<sup>1</sup> Further, Atlantic argues that the phrase “to the best of my knowledge” could be

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<sup>1</sup> The Court believes Atlantic’s following argument is one for the legislature: The language following the words “true and correct” in the affidavit at issue does not qualify those words so much as reflect the physical reality of the universe in that a human being is making the affidavit. Without delving into the purely metaphysical, a human being cannot certify anything as being true and correct *beyond* his knowledge and belief unless it involves a matter of faith, and that would involve

eliminated by amendment.

The law on this subject is well established. A mechanic's lien is created by statute. *Builders' Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995). Considering its departure from common law principles, Delaware courts uniformly find that the mechanic's lien statute must be strictly construed. *Id.* Every essential statutory step must be satisfied to perfect the lien. *E.J. Hollingsworth Co. v. Continental-Diamond Fiber Co.*, 175 A. 266, 268 (Del. Super. 1934). The statutory requirements are "positive and substantial in character." *Id.* Thus, "if the statement of claim fails to meet the requirements of the statute, the right to the lien is not implemented . . . . The court cannot assume to arrogate to itself the power to make a lien and thereby destroy the provisions of the statute." *Id.*

Recently, the Superior Court considered nearly identical facts. In *American East Explosives, Inc. v. Eastern States Development Co.*, Judge Babiarz considered a mechanic's lien complaint with an affidavit that stated the affiant had "personal knowledge of all of the facts set forth in the Complaint [or Amended Complaint], and to the best of my knowledge, such facts are true and correct." Del. Super., C.A. No. 99L-02-100, Babiarz, J. (Apr. 27, 2000), at 1. Citing long-standing precedent, Judge Babiarz noted that the affiant's oath failed to meet the statutory requirements. *Id.* (citing *Oscar George, Inc. v. Potts*, 115 A.2d 479 (Del. 1955)). A 1921 decision was reaffirmed that held "an affidavit in a mechanic's lien case in which the affiant swears according to the best of his knowledge and belief is not sufficient." *Heitz v. Sayers*, 113 A. 901, 902 (Del. Super. 1921). The present situation is like *Heitz v. Sayers* and *American East Explosives*.

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matters outside the jurisdiction of this Court. Were that not true, it would logically follow that merely reciting the words "true and correct" would render the matter *a fait accompli* and immune from challenge. After all, how can a defendant challenge something that is absolutely true and correct?

Atlantic suggests leave to amend their affidavit, albeit presented in a vague manner. Nevertheless, Beach filed a response in opposition. Because Delaware courts have squarely addressed this issue, only a brief comment is necessary.

In this regard, the *American East Explosives* decision is instructive. It also involved a motion to amend the affidavit filed in support of the mechanic's lien. There, as here, a request for leave to amend was made after the time period for filing the lien passed. The request was rejected because the principle of *stare decisis* compelled a finding that "mechanic's lien affidavits are to be narrowly construed and not later amended." *American East Explosives* at 6. Likewise, it has been held that to allow "a complaint for a mechanics' [sic] lien to be amended after the window for filing mechanics' [sic] liens has closed is tantamount to allowing the filing of the mechanics' [sic] lien out of time." *Construction by Franco v. Reed*, Del. Super., C.A. No. 94L-09-20, Silverman, J. (Dec. 12, 1994), at 3. Consequently, the request for leave to amend is denied, and Beach's Motion to Dismiss is granted as to Counts 1 and 2.<sup>2</sup> While this result may seem unfair, the proper venue before which to argue that the statute should be revised to permit amendments is the General Assembly. See *Greenhouse v. Duncan Village Corp.*, Del. Super., [no number in original], Lynch, J. (Sept. 20, 1962).

### **III. The Release**

On November 8, 2001, representatives for Atlantic and Harrington signed a Release of Liens before a Notary Public. This Release was executed under seal and the parties purported to release any claims and/or liens they had on or against Beach and its property. Beach argues that the Release

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<sup>2</sup> Since the mechanic's lien claims are dismissed on this point, the alternative grounds for dismissal are not considered.

entitles them to a Judgment on the Pleadings covering the remaining counts of the Complaint, those for breach of contract and quantum meruit relief. Atlantic contests that the Release is void for want of consideration. As discussed below, further investigation is required, and a judgment on the pleadings, therefore, would not be appropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

First, is the Release is valid? The Release contains numerous blanks; neither the materials and labor provided are described nor the parties named in the body of the document. *See Greens at Hilton Run I, L.P. v. Rollin Bldg. Supply Co.*, 589 A.2d 536, 540 (Md. Ct. Spec. App. 1991). Without additional evidence that the Release was intended to bind the parties, the document may not truly manifest an agreement.

Second, there is the question of scope of the released claims. The title of the document reads “Release of Liens” and the second page specifies that it is a “Release of Mechanic’s Liens.” There is broad, boiler plate language in the preprinted form. Are all claims arising out of the transaction released or is the waiver intended only for mechanic’s liens? *See E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 460 (Del. 1999).

Third, the effect of the seal must be reviewed. A “release under seal, *complete in its terms and duly executed*, . . . needs no consideration to support it beyond what the seal imports.” *Reznor v. Maclary*, 9 Del. 241 (1871) (emphasis added). However, as noted, whether this document is fully integrated requires further evaluation.

Accordingly, the Court cannot now conclude that the Release is preclusive.

## **CONCLUSION**

Considering the foregoing, Beach’s Motion to Dismiss is granted as to Counts 1 and 2 of the

Complaint for failure to comply with the affidavit requirements of the mechanic's lien law. Beach's Motion for Judgment on the Pleadings is denied as the pleadings raise issues of material facts.

**IT IS SO ORDERED.**

Very Truly Yours,

cc: Prothonotary's Office