SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

September 16, 2009

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Re: ***North Star, INC. d/b/a North Star Heating and Air Conditioning v. F. Tropea Building Contractor, LLC, et al.,***
C.A. No. 07L-07-011 RFS

Date Submitted: August 7, 2009

Dear Counsel:

This is my decision regarding Robert P. Rougeau, David L. and Carol Ann Marshall, Jason Cook, William Mankiw, Jr. and Diana Pietrowiak, and Susan L. Frank and Shari L. Frankfurt (collectively "Defendants"), Motion to Dismiss Count I of Plaintiff's Second Amended Complaint. For the reasons set forth herein, the motion is denied.

PROCEDURAL AND FACTUAL BACKGROUND

North Star, Inc. ("Plaintiff"), contracted with Tropea Building Contractor, LLC ("Defendant") to perform HVAC installation work in Building 7 of the condominium

subdivision known as Sandbar Village at Nassau Bridge. The property is located in Nassau, Sussex County, Delaware. Defendant, at the time the materials were provided and labor performed, represented itself as general contractor for the owner of the property, Holiday Park, LLC.

On July 11, 2007, Plaintiff filed its Original Complaint against Defendant, and filed a Second Amended Complaint on July 30, 2007. Count I of the Complaint is the State of Claim for Mechanics' Lien. The mechanics' lien claim was filed against sixteen (16) individual condominium units in Building 7, the units being located on the first and second floor of the building only, together with their apportioned ownership in the common elements of the condominiums. The material provided and labor supplied is the same for each unit and therefore the amount claimed is apportioned evenly between the sixteen (16) units. The total amount claimed to be due is $44, 060.70. Plaintiff seeks an *in rem* judgment against the property improved by the work completed and the owners of the condominiums in proportion to the mechanics' lien apportioned against their real property.

On July 17, 2009, Defendants filed a Motion to Dismiss Count I of Plaintiff's Second Amended Complaint. Defendants avers that the Statement of Claim for Mechanics' Lien, should be dismissed because Plaintiffs failed strictly to conform to the pleading requirements set forth in 25 *Del. C.* § 2712, the statute authorizing the lien. Specifically, Defendants argue: (1) Plaintiff fails to support the Statement of Claim by affidavit in accordance with 25 *Del. C.* § 2712(c); (2) the Statement of Claim for Mechanics' Lien was filed over 120 days following the time when the doing of the labor or the furnishing of materials was completed in violation of 25 *Del. C.* § 2711 and § 2712; and (3) the Bill of Particulars is defective as it fails to provide adequate notice of the services provided.

STANDARD OF REVIEW

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.,* 1999 WL 1442009 (Del.Super.1999) at *2. The Court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as a matter of fact or law to be dismissed. *Id.* The plaintiff will have every reasonable factual inference drawn in his favor. *Ramunno v. Cawley,* 705 A.2d 1029, 1036 (Del.1998).

"Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted." *Hedenberg v. Raber,* 2004 WL 2191164 (Del.Super.2004) at *1. "Where allegations are merely conclusory, however (*i.e.,* without specific allegations of fact to support them), they may be deemed insufficient to withstand a motion to dismiss." *Lord v. Souder,* 748 A.2d 393, 398 (Del.2000).

DISCUSSION

The law in Delaware is well settled that the mechanics' lien statute requires strict compliance from those seeking a lien. *Builder's Choice v. Venzon,* 672 A.2d 1, 2 (Del.1996). Strict construction, however, does not require an unreasonable or unwarranted construction of the statute. *Pittman-Berger Co. v. Parkinson,* 180 A. 645, 648 (Del.1935). *See also Joseph Rizzo & Sons v. Cristina Momentum, L.P.,* 1992 WL 51850, at *5 (Del.Super.Ct. Feb. 21, 1992) ("The mechanics' lien provisions should be strictly, but not unreasonably construed."); *Master Mechanical Inv. V. Shoal Const.,* 2009 WL 1515591 (Del.Super.2009) (overly technical or unreasonable pleading is not required). The validity of a mechanics' lien "depends upon an

affirmative demonstration that each statutory prerequisite for the creation of such an encumbrance has been followed." *Builder's Choice,* 672 A.2d at 4. Despite the strict compliance requirements of a mechanics' lien, a mechanics' lien complaint can be amended where the nature of the lien is unchanged. *Duluca v. Martelli,* Del. Super., 200 A.2d 825 (1964).

The Defendants contend that Plaintiff's Statement of Claim for Mechanics' Lien, as set forth in the Second Amended Complaint, is defective for failure to comply with the statute and must be dismissed as: (1) Plaintiff fails to support the Statement of Claim by affidavit in accordance with 25 *Del. C.* § 2712(c); (2) the Statement of Claim for Mechanics' Lien was filed over 120 days following the time when the doing of the labor or the furnishing of materials was completed in violation of 25 *Del. C.* § 2711 and § 2712; and (3) the Bill of Particulars is defective as it fails to provide adequate notice of the services provided. Each argument is addressed individually below.

a. *Plaintiff Fails To Support Its Statement Of Claim By Affidavit*

A mechanics' lien must be supported by Affidavit. 25 *Del. C.* § 2712(c). Mechanics' liens affidavits are to be narrowly construed and not later amended. *Atlantic Millwork Corp. v. Harrington,* 2002 WL 31045223, at *3.

In the case at hand, Defendants argue that Plaintiff's failure to provide an Affidavit with Plaintiff's Second Amended Complaint to support its mechanics' lien is fatal to this action because mechanics' lien affidavits are to be narrowly construed and not later amended. However, the Original Complaint had attached an affidavit signed by Plaintiff's representative attesting to the accuracy of the complaint and claim as required by 25 *Del. C.* § 2712(c). Plaintiffs are not amending the Affidavit to the Statement of Claim but rather the Statement of Claim itself. I am

persuaded that the Affidavit attached to the Original Complaint constitutes a sufficient affidavit to avoid dismissal.

b. ***The Statement Of Claim Was Filed Over 120 Days Following The Time When The Doing Of The Labor Or The Furnishing Of Materials Was Completed***

A mechanics' lien complaint must be filed within prescribed times. 25 *Del. C.* § 2711 ("…shall file a statement of their respective claims within 120 days from the date from the completion of the labor performed or from the last delivery of materials furnished by them respectively"). The time when the doing of the labor or the furnishings of the material was finished must be provided in the Statement of Claim. 25 *Del. C.* §2712(b)(6). Perhaps more so than other areas of the law, time is of the essence in a mechanics' lien case. *J.O.B. Const. Comp. v. Jennings & Churella Services, Inc.,* 2001 WL 985106 (Del.Super.2001) (citing *Hendrix v. Kelly,* Del.Super., 143 A. 460, 461 (1928)).

In the case at hand, Defendants argue that the Statement of Claim was filed over 120 days following the time when the doing of the labor or the furnishing of materials was completed. The Original Complaint in this matter was filed with the Court on July 11, 2007 and subsequently amended on July 30, 2007. Plaintiff alleges in the Original Complaint the last date of work was March 20, 2007. This date is relied upon by the Plaintiff because on said date copper lines for servicing the units were installed as part of the rough-in process. Defendants contend that Plaintiff's latest date of contract work was on or before December 28, 2006 which is the date of the most recent Application for Payment by the Plaintiff, and as such, December 28, 2006 was the date Plaintiff's work was substantially completed. Defendants further contend that any work after December 28, 2006 appears to be trivial and was limited to punch list work, as it was not expressly provided by contract and therefore does not operate to extend the time for filing of a

mechanics' lien. Defendant argues that Plaintiff's installing of the copper lines after December 28, 2006 was insignificant and did not enlarge the filing time.

In *Breeding v. Melson,* Del.Supr., 143 A.23, 26 (1927), the Supreme Court observed that the time for filing a mechanics' lien claim is "computed from the date when the last item of work, labor or materials is done, performed or furnished." The "work" must be required by the contract and performed in good faith to preclude the superficial extension of the filing time. This period cannot be extended by "the performance of labor or supply of materials of a trivial nature, not expressly provided for in the contract, and completed after the improvement itself had been substantially completed." *Id.*

In this regard, the Court has found that a plaintiff substantially completed a contract the date work on the punch list was finished. Such work is not necessarily trivial. *Lawson v. McIlvaine Constr.,* 1988 WL 141168, at *2 (Del.Supr.1988). In *Breeding,* the Court held that what constituted a substantial completion of the building must be determined from the evidence introduced at trial, shown by the record, and is normally a jury question. *Breeding,* 153 A. at 25.

In the case at hand, Defendants contend that December 28, 2006 is the date the work was completed, the time for filing commenced, and the claim was late. Defendants, the moving party, have presented evidence to support their argument that December 28, 2006 was the last date of any work of a substantial nature was performed. However, Plaintiff has provided sufficient evidence showing a genuine issue of material fact for trial. Plaintiff submitted an affidavit demonstrating that the work was completed on March 20, 2007 and that work after December 20, 2006 as not trivial. The conflicting evidence about the date of substantial completion raises a jury question and is sufficient to avoid dismissal.

c. *Plaintiff's Bill Of Particulars Is Defective*

A Bill of Particulars serves to "inform the defendants of the basis for the plaintiff's claim." *Duluca v. Martelli,* 200 A.2d 825, 826 (Del.Super.1964). *See also Capossere v. Levine,* 2008 WL 484442, at *3 (Del.Super.2008) (a plaintiff's offering of agreement dates, work type, labor and material costs and memorializing invoices provided sufficient notice to the defendant). It should "be a detailed of the facts and must set forth the facts upon which plaintiff basis his claim with sufficient particularity that the interested parties can have no doubt as to the details of the claim." *Id.* (citing *Thomas v. Goldhahn,* 156 A. 363, 364 (Del.Super.1929)). When parties have contracted for labor and materials to be collected as a lump sum, an itemized list of charges is unnecessary. *Rizzo & Sons v. Christina Momentum, L.P.,* 1992 WL 51850, at *4 (Del.Super.Ct.1992) (citing *Mayor & Council of Wilmington v. Recony Sales & Eng'g,* 185 A.2d 68, 69 (Del.1962)); *see also Taylor v. Brentwood Constr. Co.,* 189 A.2d 414, 416 (Del.1963) (a plaintiff's statement of claim with amount of the entire job met the statutory requirement).

In the case at hand, Defendant appears to demand the Bill the Particulars to establish exacting calculations of the claimed amounts. Paragraph 1 of the Amended Complaint identifies the Plaintiff as an HVAC installer. Paragraph 7 of the Amended Complaint identifies the Contract and references the Contract as being attached as Exhibit A. Paragraph 7 further states that Defendant Tropea and Plaintiff entered into a contract to install the HVAC work. Paragraphs 10 and 11 of the Amended Complaint explain that work was completed on certain units within the Building and commences to allocate the total amount owed between those units to which material and labor were supplied. Also attached to the Amended Complaint were multiple applications and certificates for payment establishing the progression of work and Plaintiff's calculation of what was due. I am persuaded that the Original Complaint, Amended Complaint,

and the Contract which establish the amount due for the entire building in a lump sum and then apportions the amount due to the individual units against which the liens are asserted constitute a sufficient bill of particulars to avoid dismissal.

CONCLUSION

Based on the foregoing, the Defendant's Motion to Dismiss is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

Original to Prothonotary