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

A&E DRYWALL SERVICES, LLC d/b/a A&E DRYWALL, Plaintiff, v. EUGENE A. DELLE DONNE & SON, LP AND FOOD LION, LLC t/a FOOD LION, INC. Defendants.	)))))))))))))	C.A. No. 10L-02-049 WCC

Submitted: July 7, 2010
Decided: October 29, 2010

OPINION

On Defendants'Motion to Dismiss - DENIED

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CARPENTER, J.

Before this Court is Defendants' Eugene A. Delle Donne & Son, LP and Food Lion, LLC t/a Food Lion, Inc.'s (together "Defendants") Motion to Dismiss Plaintiff A&E Drywall Services, LLC d/b/a A&E Drywall's ("Plaintiff") Statement of Claim for Mechanic's Lien. For the reasons set forth below, the Court hereby denies the Motion to Dismiss.

Facts

This case relates to interior construction work completed during the construction of a Food Lion store located at 1607 Pulaski Highway, Bear, Delaware 19701. The name of the recorded owner of the building is Defendant Eugene A. Delle Donne & Son, LP.

General contractor Ashland Construction Company ("Ashland") entered into a subcontract with Woodland Interiors, Inc. ("Woodland") to perform interior work on the Food Lion structure. Woodland then subcontracted with Plaintiff to complete the interior drywall work and to install acoustical ceilings in the store. Plaintiff began work on June 22, 2009 and finished on October 29, 2009.

On February 4, 2010 Plaintiff filed a Statement of Claim for Mechanic's Lien in this Court alleging that Defendants failed to pay for the interior work completed at the Food Lion site. The amount Plaintiff seeks to regain is $37,458.58, plus interest. The issues now before the Court are whether there was a timely and

sufficient service of process in accordance with 25 *Del. C.* §2715 and Rule 4 of the Superior Court Rules of Civil Procedure and whether the Plaintiff failed to join an indispensable party.

Standard of Review

Upon a motion to dismiss, the Court subjects a statement of claim to a broad test of sufficiency.[1] 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."[2] Unless plaintiff's claim clearly lacks factual or legal merit, the claim will not be dismissed.[3] When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.[4] In addition, every reasonable factual inference will be drawn in favor of the plaintiff.[5]

Discussion

I. Whether Plaintiff's Writ of Scire Facias Was Properly Served

This case involves the interaction between two statutes, 10 *Del. C.* §3105 and 25 *Del. C.* §2715 and their relationship to Rule 4(f)(4) of the Superior Court Civil Rules. Unfortunately these statutes and Rule are not perfectly harmonized, and the

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[1] *King Const., Inc. v. Plaza Four Realty, LLC*, 2008 WL 4382798, at *2 (Del. Super. Sept. 29, 2008) (citing *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007)).
[2] *Id.* (citing *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)).
[3] *Id.* (citing *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970)).
[4] *Id.* (citing *Ramunno*, 705 A.2d at 1036).
[5] *Id.* (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

Court can appreciate the confusion over how a mechanic's lien action should be served evidenced by this litigation. Therefore, any analysis of this issue requires the Court to first determine what is meant by each statute and how it relates to the Rules of this Court.

Chapter 31 of Title 10 sets forth the statutory framework for the commencement of litigation and the proper service of that action. Section 3105 of that chapter relates specifically to writs of scire facias and states the following:

> In every case in which a writ of scire facias may by law be issued, it shall be served and returned in the same manner as is provided in case of an original summons.

Both Delle Donne and Son LP and Food Lion LLC are limited liability companies and therefore the method of service of process is set forth in 6 *Del. C.* §18-105 which states:

> Service of legal process upon any domestic limited liability company shall be made by delivering a copy personally to any manager of the limited liability company in the State of Delaware or the registered agent of the limited liability company in the State of Delaware, or by leaving it at the dwelling house or usual place of abode in the State of Delaware of any such manager or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the limited liability company in the State of Delaware.

Additional guidance regarding the service process is found in Title 25 *Del. C.* §2715 which is specifically directed to the issuance and service of scire facias in mechanic's lien actions. This statute states:

> The writ shall be issued, returnable and served in the same manner as other writs of scire facias upon the defendant therein named, if he can be found within the county. A copy of the writ shall be left with some person residing in the structure to which the labor was done or for which the materials were furnished, if occupied as a place of residence, but if not so occupied, the sheriff shall affix a copy of such writ upon the door or other front part of such structure.

When the Court analyzes these statutes before turning to Rule 4, it would appear that the service of a writ of scire facias in a mechanic's lien action involving a limited liability company would be properly served by either delivering a copy to the manager of the LLC or their registered agent or by leaving a copy at the company's business location. The second sentence in 25 *Del. C.* §2715 argued by the Defendant in support of its motion which requires a leaving of a copy of the writ where the labor was performed or material provided is only applicable if the property is a residential one and not a commercial corporate structure. As such, that portion of the statute is simply inapplicable. Therefore, if the Court simply reviewed the statutory construction of these statutes, it would find, based upon the limited facts set forth in the motions, that service has been properly made in this action.

The Court now turns to Rule 4(f)(4) that also relates to the service of scire facias. The beginning paragraph of the Rule is not applicable to the facts of our case. That paragraph specifically sets forth the procedure to follow when service is unable to be perfected by the normal service process. From the filings that have been made, it appears that there is no question that the sheriff did in fact serve the writ upon Defendant Delle Donne on March 31, 2010 and on Defendant Food Lion on March 30, 2010. It is the failure to comply with the second paragraph of the Rule that serves as the basis for the Defendant's motion. This part of the Rule states:

> Not later than ten (10) days following the filing of an action begun by scire facias, the plaintiff, or his counsel of record, shall send by certified mail, postage prepaid, return receipt requested, to holders of liens on the real estate which is the subject of such action who have acquired such liens at the time the action is filed and to tenants holding or possessing a leasehold estate for years or at will in such real estate, a notice consisting of a copy of the complaint and a written Notice to Lien Holders and Tenants of Filing of Action substantially similar to Form 36 Appendix of Forms (Superior Court). The notice shall be addressed to holders of liens at the address which appears upon the recorded or filed instrument creating the lien or upon the record of the lien, or to the counsel of record for the holder of the lien, or, if such addresses are not ascertainable from the public records, at the last known available or reasonably ascertainable address of the holders of such liens. The notice shall be addressed to tenants holding or possessing a leasehold estate for years or at will at the last known available or reasonably ascertainable address of such tenants, and in addition, the plaintiff or his counsel of

> record or a representative of the plaintiff or his counsel of record shall post such notice on the common entrance door or in a common area of any building or buildings on the real estate which is the subject of such action. No judgment shall be entered in such action unless the plaintiff or his counsel of record shall file with the Court proof of the mailing and posting of such notice which shall consist of the usual receipt given by the post office of mailing to the person mailing the certified article, the return receipt, or, in the case of an undelivered notice, the original returned envelope, and a copy of the Notice to Lien Holders and Tenants of Filing of Action mailed with such notice together with an affidavit made by plaintiff or his counsel of record or a representative of the plaintiff or his counsel of record specifying: . . .

The Rule proceeds to set forth what is required in counsel's affidavit.

After reviewing the Rule it is clear to the Court that its intent is to ensure that anyone who may have an interest in or lien on the property that is the subject of the mechanic's lien is given notice of that action. From the filings presently before the Court, it is unaware if there are any lienholders, and from what it can gather from the arguments made on the motion, Food Lion appears to be the only tenant and has been served. In spite of this, it does appear that the Plaintiff has failed to comply with all of the requirements of this Rule. However, the Court also finds that the remedy for this failure as set forth in the Rule is not a dismissal of the action but simply that no judgment can be entered until there has been compliance. While the notice mailing required under the Rule was to have occurred within 10 days of the filing of this

action, this is not a jurisdictional requirement, and thus the Court is given wide latitude to grant relief from the time frame.[6] The Court finds under the facts of this case that excusable neglect exists because of the confusion over the interaction of the various statutes applicable to a mechanic's lien and its interaction with Rule 4. Since there does not appear to be any previous specific interpretation of this process by the Court, it was not unreasonable for the Plaintiff to believe that service was proper under the procedure that was used. In addition, service was made on the party that appeared to have an interest in the property, Defendant Delle Donne, and its tenant, Defendant Food Lion. As such, there had been compliance with the intent of the Rule even if the exact procedure was not followed. In order to correct the deficiency, the Court will give the Plaintiff until November 10, 2010 to fully comply with the notice provisions of Rule 4 and until November 20, 2010 to file the appropriate affidavit. Failure to meet this time frame will result in the Court dismissing the action for failure to appropriately pursue the litigation consistent with the Court's ruling.

Based upon the reasoning set forth above, the Court finds that the Defendant's Motion to Dismiss as to the issue of service of process must be denied. It does caution counsel who practice in this area that having now interpreted the process

[6] *Ewing v. Bice*, 2001 WL 880120, at *6 (Del. Super. July 25, 2001); Del. Super. Ct. Civ. R. 6(b).

statutes and their relationship to Rule 4 in mechanic's lien matters that it will be more difficult for the Court in the future to find excusable neglect for failing to comply with the Court's rules.

II. Whether Plaintiff Was Required To Affix A Copy Of The Contract To The Statement Of Claim

Defendants next allege that Plaintiff's Statement of Claim fails for failure to affix a copy of the contract between it and Woodland as necessitated in 25 *Del C.* §2712(b)(4).[7] Plaintiff responds by indicating the contract between Woodland and Plaintiff was an oral contract and a proper reading of Section 2712(b)(4) allows submission of claims based on an oral contract if a bill of particulars is attached setting forth the nature and kind of labor and materials provided.[8] Title 25 Section 2712(b)(4) of the Delaware Code states:

> The complaint and/or statement of claim shall set forth:… (4) [t]he amount claimed to be due, and if the amount is not fixed by the contract, a statement of the nature and kind of 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[.]

[7] Defs.' Mot. to Dismiss ¶ 2.
[8] Pl.'s Resp. to Mot. to Dismiss 2.

The Court finds both oral and written contracts can be the subject of a mechanic's lien action under Section 2712(b)(4). If the contract in question is an oral contract, the Plaintiff is required to attach a bill of particulars showing the kind and amount of labor done or materials furnished or construction management services provided. However, if the contract is written, then "a correct copy of such contract must be attached." Simply put, an oral contract requires attachment of a bill of particulars, whereas a written contract requires a copy of the original agreement.

In the instant case, Plaintiff has represented that the agreement between the parties was oral thus in accordance with Section 2712(b)(4) she attached a bill of particulars to the Statement of Claim setting forth all necessary information. Therefore the question becomes whether the bill of particulars attached by the Plaintiff is sufficient under Section 2712(b)(4).

A bill of particulars serves the purpose of informing "the defendants of the basis for the plaintiff's claim."[9] The bill should be "a detailed statement of the facts and must set forth the facts upon which plaintiff bases his claims with sufficient particularity that the interested parties can have no doubt as to the details of the claim."[10] According to the Supreme Court, the bill need not provide a specific breakdown of contracted labor and materials, but simply provide the total contracted

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[9] *Deluca v. Martelli*, 200 A.2d 825, 826 (Del. Super. 1964).
[10] *Id.*

amount.[11] This is because Delaware courts view a mechanic's lien actions "not [as] an action on [a] written contract between the parties, but [sic] an action in the nature of an action of assumpsit for the price and value of work, labor and materials furnished by the claimant."[12]

Based upon the guidelines above, the Court finds that the Plaintiff's bill of particulars complies with 25 *Del. C.* §2712(b)(4). The Plaintiff has set forth pertinent information including the dates, the work performed, materials used and the sum of the work and labor.[13] As such, the Court finds that the Plaintiff has complied with the requirements of 25 *Del. C.* §2712(b)(4).

III. Whether Ashland and Woodland Were Failed To Be Joined As Indispensable Parties

Defendants also argue that Plaintiff's Statement of Claim must be dismissed for failing to join indispensable parties, general contractor Ashland and subcontractor Woodland, pursuant to Superior Court Civil Rule 19(a).[14] They assert that Plaintiff is now barred from amending its Statement of Claim to add such party defendants because the 120 day time limitation set forth in 25 *Del. C.* §2711 has expired.

The Court must agree with Defendants that general contractor Ashland and subcontractor Woodland are indispensable parties. Courts have previously held that

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[11] *Mayor & Counsel of Wilmington v. Recony Sales & Eng'g Corp.*, 185 A.2d 68, 69 (Del. 1962).
[12] *Armstrong & Latta Co. v. Wilmington Sugar Refining Co.*, 120 A. 94, 97 (Del. Super. 1922).
[13] *See* Statement of Claims, Ex. A.
[14] Defs.' Mot. to Dismiss ¶¶ 3-7.

in a suit brought by a subcontractor, based upon its relationship with a general contractor, the general contractor is an essential party to the suit.[15] The rationale behind this is that the general contractor is the only one who would know of the labor or materials provided by the subcontractor and the prices agreed to.[16] Further, the general contractor may be the only one who could allege and prove that the subcontractor's claim is unfounded or has been paid, or make any other defense and avoid the lien.[17] Following the same rationale, subcontractors who contract out to additional parties would also be essential parties to the suit.

Based upon this reasoning, both Ashland and Woodland are essential parties to the present suit. General contractor Ashland contracted with Woodland who then contracted with Plaintiff for interior work to be done at the Food Lion site. Therefore, it is reasonable to assume that both Ashland and Woodland would have knowledge as to the terms of the contract and of the labor and materials provided by the Plaintiff. Accordingly, they are indispensable parties.

Although 25 *Del. C.* §2711 does set forth a 120 day filing limitation, the court has allowed contractors to be added as a party defendant beyond the statutory filing period if the contractor was set forth in the original timely statement of claim.[18] The

[15] *Iannotti v. Kalmbacher*, 156 A. 366, 367-368 (Del. Super. 1931).

[16] *Westinghouse Elec. Supply Co. v. Franklin Inst. of State of Pennsylvania for Promotion of Mechanic Arts*, 21 A.2d 204, 207 (Del. Super. 1941).

[17] *Id.*

[18] *Id.*; *see also Iannotti*, 156 A. at 367-368.

Court reasoned that since joinder of the contractor as a party is not a statutory requirement, failure to do so could be corrected later; the only requirement was that the contractor be set forth in the statement of claim.[19]

A review of the Plaintiff's Statement of Claim shows that both Ashland and Woodland were named therein[20] and thus joinder is permissible. The Court finds this sufficient to deny the Defendants' motion and the Plaintiff has 30 days from the date of this Opinion to add these parties.

IV. Whether Plaintiff, A Foreign Corporation, Is Licensed To Do Business In Delaware

Lastly, Defendants contend that Plaintiff is a foreign corporation not licensed to do business in Delaware, therefore cannot bring forth any actions until the registration requirements of 8 *Del. C.* §383 and 8 *Del. C.* §371 are met.[21] No documentation in support of Defendants' allegation was submitted for the Court's review.

Because Defendants failed to submit documentation for the record showing Plaintiff had failed to comply with Section 383 and 371, the Court simply cannot give merit to such allegations and must deny the motion. Furthermore, in its response, Plaintiff provided a certification by the Secretary of State of the State of Delaware

[19] *See Westinghouse Electric Supply Co.*, 21 A.2d at 207.
[20] *See* Statement of Claim ¶ 3.
[21] Defs.' Mot. to Dismiss ¶ 8.

proving registration in the State as a foreign corporation. The time period of this registration is in accordance with the dates set forth in this action.

Defendants simply failed to overcome the threshold for this argument and thus it will be denied.

Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss is DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.