

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

October 27, 2003

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RE: Volair Contractors, Inc. v. Wohlsen Dashiell, Inc.
C.A. No. 01L-09-008

Dear Counsel:

This is my decision on Plaintiff Volair Contractors, Inc.'s ("Volair") Motion to Enforce Stipulation and Order (the "Stipulation"). This case arose out of a dispute between Volair and Defendant Wohlsen Dashiell, Inc. ("Wohlsen") over \$335,545.61 allegedly owed by Wohlsen to Volair for Volair's work on the Atlantic Sands Hotel (the "Sands Project"). Wohlsen was the general contractor for the Sands Project and Volair was one of its subcontractors. Volair, in an effort to collect the \$335,545.61, filed a complaint in the Superior Court against Wohlsen and the owner of the Sands Project. Volair's complaint set forth a mechanics' lien claim, a breach of contract claim, a quantum meruit claim, and a claim pursuant to 6 *Del. C.* § 3501. Volair also filed a demand for arbitration with the American Arbitration Association (the "AAA") against Wohlsen. Wohlsen posted a bond (the "Bond") issued by the Fireman's Fund Insurance Company with the Superior Court so that the Sands Project could be discharged from Volair's mechanics' lien claim.

The Stipulation that Volair and Wohlsen signed provides that the Superior Court proceedings will be stayed pending the resolution of the AAA proceedings. Volair and Wohlsen have moved forward with the AAA proceedings and an arbitrator has been selected. However, a dispute has arisen between Volair and Wohlsen as to the claims that the arbitrator may hear and what effect, if any, a decision by the arbitrator may have on Volair's claim against the Bond. Specifically, the disputed issues are:

1. Whether Wohlsen may pursue in the AAA proceedings, as a set-off, a claim Wohlsen allegedly has against Volair for work done by Volair as a subcontractor for Wohlsen on a project at the University of Maryland Eastern Shore (the "UMES Project").

2. Whether Wohlsen's claim on the UMES Project must be finally resolved outside of the AAA proceedings before it can be raised as a set-off in the AAA proceedings.

3. Whether Volair's mechanics' lien claim still exists.

4. Whether the arbitrator may hear Volair's mechanics' lien claim.

5. Whether Wohlsen's claim on the UMES Project may be set-off against Volair's mechanics' lien claim.

6. Whether the Bond may only be used to satisfy Volair's mechanics' lien claim.

Disputes over arbitration are generally a matter for the Court of Chancery to resolve.¹ However, to the extent that the disputed issues impact the Bond, I will resolve them. Issues 1, 2 and 4 relate to the nature and scope of the arbitration process. As such, they are matters for the arbitrator to decide.² I will note, as an aside, that I am not aware of anything that would prevent the arbitrator from resolving Volair's four claims and Wohlsen's set-off claim. It certainly would make sense for the parties to resolve all of their outstanding claims against each other at one time. Wohlsen's contract with Volair for the Sands Project clearly provides for the right of set-off. The contract for the UMES Project, as it was described for me at the hearing on Volair's motion, appears to give Wohlsen the option of pursuing any claim that Wohlsen may have against Volair on the UMES Project with the AAA. Lastly, although the arbitrator is apparently of the opinion that Wohlsen's claim on the UMES Project must first be finally resolved outside of the AAA proceedings, I am not aware of any reason for such an opinion. Thus, it seems to me that the arbitrator may resolve all of the pending claims between the parties. Nevertheless, these are issues for the arbitrator to decide.

¹10 *Del. C.* § 5701.

²*Pettinaro Constr. Co. v. Harry C. Partridge & Sons*, 408 A.2d 957, 963 (Del. Ch. 1979).

As to issue 3, Volair's mechanics' lien claim still exists. It is clear, both logically³ and as a matter of law,⁴ that the posting of a bond does not extinguish a mechanics' lien claim. The bond only serves as a substitute for the real property that was the subject of the mechanics' lien claim. The party pursuing a mechanics' lien claim still has the burden of proving the mechanics' lien claim in order to ultimately seek recovery under the bond. Volair will have to prove, either before the arbitrator or in another appropriate forum, its mechanics' lien claim in order to recover against the Bond. As to issue 5, Wohlsen's claim on the UMES Project may not, as a matter of law, be set off against Volair's mechanics' lien claim on the Sands Project because it is not related to the Sands Project.⁵ However, it may be set off against the other three claims that Volair raised in its complaint.⁶

As to issue 6, the Bond may only be used to satisfy Volair's mechanics' lien claim. The Bond was only posted to satisfy Volair's mechanics' lien claim. It is not available to satisfy Volair's three other claims in the event that Volair prevails on one or more of them, but does not prevail on its mechanics' lien claim.

In order for this matter to ultimately be resolved, the arbitrator's order must include a separate ruling on each of Volair's claims that are presented to, and considered by, the arbitrator and, if applicable, a ruling on Wohlsen's set-off claim if it is presented to, and considered by, the arbitrator. To the extent that any part of this decision seems to conflict with the Stipulation, it is because I have concluded that the disputed issues were not contemplated by the parties when they signed the Stipulation and, therefore, they are not governed by the Stipulation.

Very truly yours,

E. Scott Bradley

ESB:tl

cc: Prothonotary's Office
David I. Davis, Esquire

³Obviously, if a party only filed a one-count mechanics' lien action, the posting of a bond would not dispose of the matter.

⁴*Smith v. Carter*, 1998 WL 283379 (Del. Super. 1998).

⁵*Stockman v. McKee*, 71 A.2d 875 (Del. Super. 1950).

⁶*McElroy and Co. v. Chris Episcopo Constr. Co., Inc.*, 621 A.2d 794, 796 (Del. Super. 1992).