SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
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October 13, 2004

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RE: Daystar Sills, Inc. V. Chilibilly's, Inc., et al.
C.A. No. 02L-11-012-THG

Dear Counsel:

This is the Court's decision on the Summary Judgment Motion by the Defendant, Joseph Jeffrey Stein III Corporation. The Motion is GRANTED for the reasons set forth herein.

STATEMENT OF THE CASE

Joseph Jeffrey Stein III Corporation ("Stein") and ChilliBilly's Incorporated ("ChilliBilly's") entered into a lease agreement for the premises of 330 Rehoboth Avenue on January 14, 2002.[1] Section 7 (b) of the lease clearly sets forth that any structural improvements or nonstructural improvements with costs exceeding $20,000 require the prior written consent of the Landlord.[2] The purpose of this lease provision was to allow the Landlord to consider a "lien

[1](Lease between Stein and ChilliBilly's of 1/14/2002, at 1).

[2](Lease between Stein and ChilliBilly's of 1/14/2002, at 6).

and completion" bond from the tenant before commencing any repairs or improvements.[3] Without the written consent of the owner, the tenant could be forced to remove any improvements or additions and restore the building to its original condition under Section 7 (b) of the lease.[4]

On March 7, 2002, ChilliBilly's contracted with Daystar Sills, Inc. ("DayStar") to complete improvements on the property.[5] The Agreement cites ChilliBilly's as the "Owner" of the 330 Rehoboth Avenue premises.[6] Daystar acknowledged in oral argument that it did not inquire as to the ownership of the property before commencing work. However, Daystar claims that it extended credit for the project based on the value of the building. Daystar requests that their ignorance of the lease be excused and the owner be held liable for the costs of the improvements. Daystar neither requested nor received a copy of the lease between Stein and ChilliBilly's before beginning work on the premises. Nor did Daystar have written consent from Stein to remodel the building.

According to the agreement between the parties, Daystar commenced remodeling preparations on March 7, 2002.[7] Daystar had access to the interior of the premises on or around

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[3] *See id.*

[4] *See id.*

[5] (Agreement between ChilliBilly's and Daystar Sills, Inc. of 3/7/2002, at 1).

[6] *See id.*

[7] (Agmt. between ChilliBilly's and Daystar Sills, Inc. of 3/7/2002, at 2, Art. 2.1).

mid-March 2002.[8] Daystar last furnished services on July 10, 2002.[9] During construction, Joseph Stein, President of Stein, visited the property on several occasions.[10]

ChilliBilly's advised Stein that it planned to upgrade the facility.[11] Stein orally approved the changes.[12] Originally, the contract between ChilliBilly's and Daystar estimated the costs of the upgrades to the facility to be $411,156.10.[13] However, the project exceeded its projections. The parties executed six (6) change orders increasing the total cost of the Agreement to $529, 998.82.[14]

Daystar alleges that it has been paid all but $79,246.82 of its costs. Daystar petitioned this Court for the imposition of a mechanic's lien against Stein for the balance.

STANDARD OF REVIEW

When considering a motion for summary judgment under Superior Court Civil Rule 56, the Court may grant the motion when no material issues of fact exist.[15] The burden is on the moving party to establish that there are no material issues of fact to consider.[16] Once the moving

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[8](Sills Aff. ¶ 3).

[9](Sills Aff. ¶ 7).

[10](Sills Aff. ¶ 7; Stein Aff. ¶ 13).

[11](Stein Aff. ¶ 7-8).

[12]*See id.*

[13](Agmt. between ChilliBilly's and Daystar Sills, Inc. of 3/7/2002, at 1).

[14](Pl.'s Compl., Ex. B, Change Orders 1-5, 5a, and 6).

[15]*See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[16]*See id.*

party meets its burden, the nonmoving party must proffer any outstanding issues of fact to withstand summary judgment.[17] When reviewing the motion, the Court looks at the evidence in a light most favorable to the nonmoving party.[18] However, the Court's review of the evidence is confined to the record presented, and should not involve prospective evidence.[19] If, after drawing all reasonable inferences in favor of the nonmoving party, the Court determines that no genuine issues of material fact survive, summary judgment should be ordered.[20]

DISCUSSION

Stein petitioned this Court to grant its motion for summary judgment based on the fact that Daystar has failed to present any issue of material fact to support a mechanics' lien against its fee simple ownership interest in the premises located at 330 Rehoboth Avenue. Stein correctly asserts that, under Delaware's mechanics' lien statute, property will not be "liable to liens. . .for repairs, alterations, or additions, when such property has been altered, added to or repaired by or at the insistence of any lessee or tenant without the prior written consent of the owner or his duly authorized agent."[21] However, Daystar contends that Stein gave sufficient "prior written consent" by agreeing to a lease which contained provisions permitting certain improvements. But permitting Daystar to proceed on this stretched notion of prior written consent would violate the fundamental purpose of the mechanics' lien statute.

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[17]*See id.* at 681.

[18]*See id.* at 680.

[19]*See Rochester v. Katalan*, 320 A.2d 704, 708, n.7 (Del. 1974).

[20]*See Sweetman v. Strescon Indus.*, 389 A.2d 1319, 1324 (Del. Super. Ct. 1978).

[21]*See* 25 Del. C. § 2722.

Mechanics' liens are a statutory protection for contractors or other laborers who furnish labor or other services on a structure pursuant to a contract with its owners.[22] The protection offered by the statute, however, is not absolute. If a contractor furnishes his services to a tenant without obtaining the property owner's prior written consent to the work, he may not later file a mechanics' lien.[23] While some courts have found that prior written consent can be found in a lease agreement between the tenant and landlord, other courts require an owner's written consent to the specific work covered by the lien.[24] The motion before this Court does not require it to address either scenario, since Stein did not provide written consent in any form to ChilliBilly's or Daystar.

DayStar avers that "consent to alterations is clearly contemplated and approved within the lease."[25] While Section 7 (b) of the lease does consider the possibility of improvements and repairs, it does not permit them without limitation.[26] Instead, the lease clearly requires consent in

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[22]*See* 25 Del. C. § 2702.

[23]*See* 25 Del. C. § 2722.

[24]*Compare In Re Fleetwood Motel Corp.,* 335 F.2d 863, 866 (1964)*; Community Affairs v. M. Davis & Sons*, 412 A.2d 939, 940 (Del. 1980) (finding that lease provisions contemplating general improvements constituted prior written consent) *with Wilmington Trust Company v. Branmar, Inc.*, 353 A.2d 212, 215 (Del. Super. 1976) (holding that the property owner must consent in writing to the particular work for which the lien is sought) .

[25](Pl.'s Post-Discov. Opening Br. at 2).

[26](Lease between Stein and ChilliBilly's of 1/14/2002, at 6). The Delaware Supreme Court has previously held that a more permissive lease provision, which gave the tenant 'the privilege of making such alterations of or additions to the Project or any part thereof (including constructing new building, structure or improvement or installing any fixtures, machinery, equipment or other facilities) from time to time as it in its discretion may determine to be desirable for its uses and purposes" provided sufficient written consent to attach a mechanics' lien. *See Community Affairs v. M. Davis & Sons*, 412 A.2d 939, 944 (Del. 1980). The lease

writing for any structural repairs or nonstructural repairs exceeding a cumulative value of $20,000.[27] The provision ensures that both the landlord and tenant recognize their obligations and liability. But Daystar's reading of the lease attempts to carve out the helpful provisions while ignoring those that clearly condition Stein's approval. The lease clearly contemplates the possibility of alterations, but it cannot be read as blanket approval for any improvement the tenant desires.[28] Instead, the lease states that alterations may be made if certain conditions are met. The consent necessary to attach a mechanics' lien "must be reasonably explicit and cannot be unfairly inferred."[29] Daystar's argument ignores the conditions of consent in the lease and the statutory requirements, which it also failed to heed before beginning work on the property. The lease language, which requires prior written consent by the landlord to any structural improvements or anything non-structural over $20,000, does not translate into "prior written consent" as required by the statute.

Daystar contends that Section 7 (b) should permit it to recover a minimal amount of $20,000 since theoretically ChilliBilly's was permitted to contract for nonstructural repairs not exceeding that amount. This argument is not persuasive. Section 7 (b) is a defensive provision that was intended to prevent a tenant from requesting substantial repairs to a property, defaulting

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provision that Daystar is attempting to extract consent from is much more restrictive. As a whole, Section 7 (b) of the lease should be read as a disclaimer to the tenant who chooses to make alterations to the property without first confirming the changes in writing with Stein. This is not sufficient to qualify as prior written consent.

[27] *See id.*

[28] (Lease between Stein and ChilliBilly's of 1/14/2002, at 6).

[29] *See Lakewood Builders v. Vitelli*, 1987 Del. Super. LEXIS 1137, *20 (1987).

on the costs, and passing the bill onto the landlord. Read as a whole, Section 7 (b) clearly sets forth the landlord's expectations to be free of any charges or obligations stemming from alterations or improvements requested by the tenant. But Daystar is attempting to use this provision offensively to hold Stein accountable for the services it provided to ChilliBilly's. Even if Section 7 (b) were read liberally, any indirect liability that the lease allows has been paid. Section 7 (b) allowed for a maximum of $20,000 in non-structural changes before written consent was necessary. Daystar's services amounted to more than $500,000, of which it has been paid $450,752.00. Daystar cannot use Section 7 (b) against Stein to recover what it is owed by ChilliBilly's.

Daystar argues that any limitations in the lease that require written consent have been waived by Stein's oral approval of the plans. While it is possible that Stein waived his contractual requirements of requiring written consent, he did not waive the statutory requirements for a mechanics' lien.[30] The exercise or non-exercise, by Stein, of certain contractual provisions does not turn a negative into a positive as far as the requirements of the mechanics lien statute, which is to be strictly construed. Paragraph 7 (b) does not provide Daystar with the necessary statutory consent to comply with Section 2722.

Daystar, an experienced builder, had a statutory obligation to get prior written consent from the owner of the building if it wished to retain the possibility of filing a mechanics' lien. But the fact that Daystar was ignorant of the ownership status of the building before commencing work proves that it did not take even the most basic precautions necessary to file a mechanics'

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[30] The exercise or non-exercise, by Stein, of certain contractual provisions does not turn a negative into a positive as for the requirements of the mechanics' lien statute, which is to be strictly construed.

lien. Daystar cannot rely in hindsight on a lease provision that gives limited permission to make improvements when it was entirely ignorant of the lease before it commenced work on the project. Daystar did not take the necessary and available steps, provided by statute, to protect itself for the purposes of filing a future lien.

Any oral consent that Stein issued is not sufficient to warrant his blanket liability for all of the repairs that ChilliBilly's requested. Stein orally approved the original plans to remodel the building.[31] Although ChilliBilly's was required to obtain written consent prior to commencing any significant repairs pursuant to its lease agreement with Stein, it did not. Moreover, the plans that Stein orally approved turned into a project that exceeded its projections by almost $300,000. Fortunately, Daystar recouped $450,752.00 of its total contract expectations from the party who contracted for its work, leaving a balance of $79,246.82. Therefore, of the original contract price, Daystar has been paid and is owed only on the additional cost overruns. The mere contemplation indicated by Stein's oral consent to the original project and the provisions of the lease agreement are insufficient to warrant charging a landlord for the project overruns or the benefits that were requested by a tenant and unique to tenant's prospective business.

I think under the facts presented in this case, both the requirements of the mechanics lien statute and fairness dictate that Daystar should bear this loss. I shall not impose it upon the landlord by way of a mechanics lien. The theory behind a mechanics' lien is that the property at issue has been increased in value by the labor and materials provided by a contractor.[32] But this

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[31](Stein Aff. ¶ 7-8).

[32]*See Girdler Corp. v. Delaware Compressed Gas Comp.*, 183 A. 480, 481-82 (Del. Super. Ct. 1936).

is not a case where Daystar's work was geared towards the landlord's benefit. Instead, the pleadings indicate that a good portion of Daystar's work was done in order to make this restaurant a unique property which would benefit ChilliBilly's Inc. and not necessarily the landlord.

This case typifies the problems that arise when one relies upon oral communications instead of written consent as required by the mechanics' lien statute, and in this case, the lease. Neither the lease language nor the oral communications, which Daystar was not a party to, can substitute for the "written consent" required by the statute. The call for a written authorization from the Landlord in Title 25, Section 2722 is to ensure that a landlord knows his property will be subject to a potential lien.[33]

Under these circumstances I find that summary judgment is appropriate given that the failure of Daystar to comply with the written approval requirement of the lease and the mechanic's lien statute is fatal to its mechanics lien claim. For the foregoing reasons, the Defendant's motion for summary judgment is GRANTED.

Very truly yours,

T. Henley Graves

jfg
oc: Prothonotary

[33] *See* 25 Del. C. § 2722.