
**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-10257-JMD
Chapter 7ZLGH Development, Inc.,
DebtorCitizens Bank of Massachusetts, Inc.,
Plaintiff

v.

Adv. No. 00-1082-JMD

Michael S. Askenaizer, as Chapter 7 Trustee,
PMJ Construction Co., Inc.,
Joan E. Drepanos,
Ralph A. Jolie, Renae E. Jolie,
Kevin S. Sharp, and
City of Dover, New Hampshire,
Defendants*Anthony J. Fitzpatrick, Esq.*
DUANE, MORRIS & HECKSCHER LLP
*Attorney for Citizens Bank of Massachusetts, Inc.**Andrew A. Prolman, Esq.*
PRUNIER & LEONARD, P.A.
Attorney for PMJ Construction Co., Inc.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it a complaint filed by Citizens Bank of Massachusetts, Inc. (“Citizens” or the “Bank”) seeking a determination as to the validity, priority, and perfection of competing secured claims, liens, and encumbrances pursuant to 11 U.S.C. § 506 and requesting that authority be given to Michael S. Askenaizer, the Chapter 7 trustee (the “Trustee”), to pay those claims pursuant to the terms of a carve-out agreement that was approved by the Court in the bankruptcy case of ZLGH Development, Inc. (“ZLGH” or the “Debtor”). See *In re ZLGH Dev. , Inc.*, Bk. No. 99-10257-JMD, Doc. Nos. 24 and 33. By previous orders, the Court has determined the validity, priority, and perfection of the claims of

Joan E. Drepanos, Ralph A. Jolie, Renae E. Jolie, Kevin S. Sharp, and the City of Dover, New Hampshire. See Doc. Nos. 10, 12, 13, and 20. By previous order, the Court has also approved a stipulation dismissing the cross-claims filed by the Trustee. See Doc. Nos. 53 and 54. On December 20, 2000, the Court denied a motion for partial summary judgment filed by PMJ Construction Co., Inc. (“PMJ”). See Doc. Nos. 43 and 44.

The Court conducted a two day trial of the outstanding issues in this adversary proceeding, i.e., the validity, priority, and perfection of PMJ’s asserted mechanic’s lien, on February 12 and 13, 2001. The Court ruled in a separate memorandum opinion and order dated February 13, 2001 that, pursuant to RSA 447:10, PMJ has a valid perfected mechanic’s lien attachment on the property described in the exhibit to PMJ’s petition for ex parte attachment to the extent that PMJ in fact has a valid mechanic’s lien. See Doc. No. 70. Thus, the remaining issue before the Court is whether PMJ has a valid mechanic’s lien and in what amount and priority.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

As set forth in a prior memorandum opinion, the background in this case is as follows:

At the commencement of the Debtor’s bankruptcy case on February 1, 1999, the Debtor owned and was in the process of developing certain real property known as Longhill Estates consisting of a number of lots on Fieldstone Drive in Dover, New Hampshire (the “Property”). Citizens, as successor-in-interest of USTrust and Somerset Bank, has claims against the Debtor arising from acquisition and development financing. Other entities have claims against the Debtor and its assets, including PMJ who asserts a mechanic’s lien in the amount of \$155,000.

On August 27, 1999, the Court approved a carve-out agreement that permitted the Property to be sold in bankruptcy free and clear of a variety of alleged liens and encumbrances, with the proceeds to be set aside in escrow pending a final determination of the validity, relative priority, and perfection of such liens and encumbrances. The carve-

out agreement also provided for a carve-out of twenty percent of the net sale proceeds for the benefit of the Debtor's general unsecured creditors and any administrative claimants as the Property appeared to be fully encumbered by liens and encumbrances providing no apparent equity for the benefit of the unsecured creditors of the estate or any administrative claimants. Under the agreement, the remaining eighty percent of the net sale proceeds would be set aside to benefit Citizens and any other creditor asserting a secured interest in such proceeds. All liens on the Property were to attach to the sale proceeds subject to the validity, priority, perfection, and extent of such liens.

In accordance with the carve-out agreement, Citizens commenced this adversary proceeding against creditors who asserted a lien against all or any portion of the Property so that the Court could determine the validity, priority, perfection, and extent of such liens. The validity, priority, perfection, and extent of all liens asserted by the defendants in this adversary proceeding, except the lien asserted by PMJ, have been resolved either by stipulation or by default judgment.

PMJ alleges that it served as the general contractor to the Debtor for the development of the Property and that the Debtor failed to pay PMJ for services it rendered on the project, which services were allegedly rendered from approximately 1994 through January 1998. On May 4, 1998, PMJ obtained and recorded a mechanic's lien in the amount of \$155,000 for work it performed on all or substantially all of the Property. The litigation that PMJ commenced against the Debtor prepetition was stayed upon the filing of the Debtor's involuntary bankruptcy petition by Citizens on February 1, 1999.

See Doc. No. 43.

At trial the following additional facts were revealed through the testimony of three witnesses: (1) Ronald Nestor, the president of PMJ; (2) Kenneth Kavanaugh, the loan officer at the Bank in charge of the Longhill Estates project; and (3) Jeffrey McGuire, the operator of Unidig Dirt Services, PMJ's excavating subcontractor. Mr. Nestor testified that he started working as the general contractor for ZLGH at the Longhill Estates in January of 1994. According to Mr. Nestor, PMJ had an agreement with ZLGH whereby PMJ would be paid \$58.00 per square foot for each house constructed and would receive half of any net proceeds upon the sale of each home. Mr. Nestor indicated that he decided what type of house to put on each lot which decision was driven by the current housing market. Mr. Nestor testified that he was also responsible for determining the sales price of each house, which, according to Mr. Kavanaugh, ultimately determined the amount of money the Bank would loan for construction. Mr. Nestor also proposed the construction disbursement schedule for each lot, which was a breakdown of the \$58.00 per square foot price that PMJ was to receive from ZLGH for each house.

Mr. McGuire testified that he performed site development work at Longhill Estates off and on from sometime in 1996 through sometime in January 1998. Mr. McGuire indicated that he was contracted to perform work on the development on a lot-by-lot basis. Mr. McGuire further testified that he had a meeting with Mr. Nestor on the site during the period January 12 to 16, 1998 to discuss lot layouts. Mr. McGuire stated at trial that he was doing lot layouts and excavation on three different lots, Lots 10,¹ 11, and 23, during this period in January 1998.

Mr. Kavanaugh testified as to the Bank's involvement in the project. The Bank provided both acquisition loans and construction loans to ZLGH. As each house was approved for construction, the Bank agreed to loan ZLGH eighty percent of the proposed selling price. Mr. Kavanaugh testified that a portion of the construction loan proceeds would be used to pay to the Bank the release price to partially discharge that lot from the blanket acquisition mortgage loan. In addition, some of the loan proceeds were used to pay real estate taxes on the lot and to pay interest carrying costs on the construction loan. Inspection fees also were deducted from the loan proceeds. Mr. Kavanaugh testified that any shortfalls in construction funding that resulted from paying real estate taxes, interest, and inspection fees from the loan proceeds should have been covered by the developer, ZLGH, as part of its equity contribution to the project.

According to Mr. Kavanaugh, PMJ was the party who suggested the disbursement schedule for each lot. As work was completed, Mr. Nestor submitted requisitions on behalf of ZLGH to the Bank. If a requisition was approved after an inspection, the funds would be placed in ZLGH's account and then, per ZLGH's standing instructions, the funds would be immediately transferred to PMJ. Mr. Nestor testified that PMJ never submitted separate invoices to ZLGH for payment.

Mr. Kavanaugh testified that while he was aware that PMJ was the general contractor for the development and was the day-to-day operator of the project, he was unaware of the details with respect to

¹ Mr. Nestor testified that Lots 9 and 10 were considered one lot, Lot 10, due to a lot line readjustment. He also testified that other lot lines were revised, including those of Lot 23 which became Lot 23A, as wetlands regulations had changed between the time the subdivision was originally proposed and its development, which resulted in some lot line and lot size adjustments.

any contract between ZLGH and PMJ. Rather, Mr. Kavanaugh knew only that the Bank immediately transferred funds to PMJ after ZLGH was paid per the requisitions submitted by Mr. Nestor.

III. DISCUSSION

The Court must determine whether PMJ has a valid mechanic's lien under New Hampshire law on any of the five lots on which it asserts that it does, i.e., Lots 2, 10, 11, 23, and 32. RSA 447 governs liens for labor and materials. RSA 447:2, which governs liens for buildings, specifically provides:

If any person shall, by himself or others, perform labor or furnish materials to the amount of \$15 or more for erecting or repairing a house or other building or appurtenances . . . or for consumption or use in the prosecution of such work . . . by virtue of a contract with the owner thereof, he shall have a lien on any material so furnished and on said structure, and on any right of the owner to the lot of land on which it stands.

RSA 447:2. RSA 447:9 provides further:

The lien created by RSA 447:2-7, inclusive, shall continue for 120 days after the services are performed, or the materials, supplies or other things are furnished, unless payment therefor is previously made, and shall take precedence of all prior claims except liens on account of taxes.

RSA 447:9. A mechanic's lien may be secured by attaching the property upon which the lien exists at any time while the lien continues. See RSA 447:10. The Court has previously ruled that, if PMJ has a valid mechanic's lien on any of the lots listed in exhibit A to its petition for ex parte attachment, the mechanic's lien has been validly perfected in accordance with RSA 447:10. See Doc. No. 70, Memorandum Opinion and Order dated February 13, 2001.

Here, PMJ asserts that it has a valid mechanic's lien on Lots 2, 10, 11, 23, and 32. However, the only testimony at trial that would indicate that PMJ had performed work within 120 days of obtaining its attachment on May 4, 1998 was the testimony of Mr. McGuire, who testified that he had performed work laying lot lines and excavating three lots, Lots 10, 11, and 23, sometime around January 15, 1998. PMJ presented no evidence that it was performing work on Lots 2 and 32 at any time during the 120 day window contained in RSA 447:9. PMJ argues that it is entitled to liens on Lots 2 and 32, despite not having

performed work on those lots within 120 days of its attachment, because PMJ was performing general contracting work for the entire Longhill Estates project under a whole or continuing contract.

In support of its position, PMJ cites Bodwell Dev. Trust v. Fed. Deposit Ins. Corp. (In re Bodwell Dev. Trust), 187 B.R. 63 (Bankr. D.N.H. 1995), in which this Court held that the site work subcontractor in that case only needed to notice its mechanic's lien within ninety² days after the last work was done on the total contract covering different lots in order to have priority over the Federal Deposit Insurance Corporation, who was acting for the failed bank and construction lender. As articulated by the Court, the issue in Bodwell was "whether the . . . contract in question and the statutory language [of RSA 447] should be construed to mean that [the subcontractor] should have filed a notice of lien as to each component of site lot work under the contract, after it was completed and was not paid, or whether it was permissible for [the subcontractor] to wait until the last work was done on the last component of that contract and then could file a lien for any and all unpaid components." Id. at 65. In determining that the subcontractor could wait until the last work was done on the last component of the contract and then file its lien, the Court explained that the contract in Bodwell covered all the site work that was to be done on the project in question. Id. The Court also noted that the subcontractor was obligated under the contract to perform all the site work, and it could have been sued for breach of contract and nonperformance had it failed to perform on any one of the lots notwithstanding the fact that it performed on the others. Id. The Court found that the developer also could have sought damages for delay in the other work on the project by virtue of the subcontractor's breach of contract. Id. Accordingly, the Court held that the contract was an "entire or continuous" contract and that it was "understood to be so by both the developer and the subcontractor." Id.

In this case, PMJ presented no evidence that it could be sued if it failed or refused to perform work on a lot prior to being paid for completing a house on a different lot. In addition, PMJ did not present any evidence that both PMJ and ZLGH understood their agreement to be a continuing contract. Rather, the

² When Bodwell was decided, the lien expired ninety days after the work was completed, unless the lien was perfected. The duration of the lien was subsequently extended to 120 days. See RSA 447:9.

evidence presented demonstrates that Citizens, ZLGH, and even PMJ treated the project on a lot-by-lot basis. Financing was obtained in that manner with Mr. Nestor deciding what style and size house to put on each lot and the amounts that would be requisitioned from the Bank as construction on each lot progressed. As the Bank argued, if PMJ actually thought that this was one project, it would not have sought a mechanic's lien on specific lots as outlined in exhibit A to its petition for ex parte attachment; rather, PMJ would have sought a mechanic's lien on the whole subdivision, which it did not.

Accordingly, the Court finds that the contract was not an entire or continuous contract but rather a severable contract. As a result, PMJ had an obligation to notice its mechanic's lien within 120 days after the last work was done on each lot for which it sought a mechanic's lien. The evidence in the record supports a finding that PMJ did assert its mechanic's lien within 120 days with respect to Lots 10, 11, and 23 but failed to do so with respect to Lots 2 and 32. Therefore, PMJ does not have a valid mechanic's lien on either Lots 2 or 32.

The next issue the Court must next determine is the amount of PMJ's mechanic's liens on Lots 10, 11, and 23. Pursuant to the mechanic's lien statute, PMJ must establish that it performed labor or furnished materials in the construction of houses on Lots 10, 11, and 23 under a contract with ZLGH and that ZLGH failed to pay PMJ for such work.

A. Lot 10

PMJ claims that it has a mechanic's lien in the amount of \$84,340.58 on Lot 10. PMJ did not introduce into evidence any of its own business records that would establish that PMJ performed work in the amount of \$84,340.58 on Lot 10 for which it was not paid by ZLGH. Rather, PMJ used the Bank's records in an attempt to establish its claim. The Bank's construction disbursement record for Lot 10 shows that it agreed to loan \$153,600.00 to ZLGH for this lot. See Ex. 107. Of the \$153,600.00 loaned, \$27,000.00 was used to pay off the acquisition loan with respect to Lot 10 and the balance of \$126,600.00 was available for construction of the house. See id. See also Ex. 121. Mr. Nestor testified that the amount available for construction was also the amount that PMJ was to be paid by ZLGH for its services as general

contractor. The construction disbursement record for Lot 10 shows that the Bank disbursed funds to ZLGH on a regular basis, which funds were immediately transferred to PMJ as progress payments for the work completed by PMJ and its subcontractors. See Ex. 107. In fact, the amounts disbursed by the Bank through October 17, 1997 coincide with the requisitions PMJ submitted to the Bank. See Ex. 107 and 121. The construction disbursement record indicates that there were no further disbursements after October 17, 1997 and that \$17,527.23 of loan proceeds remained at that time. However, the construction disbursement record is inconsistent with the requisition evidence that suggests that the Bank continued to disburse funds until the proceeds of the construction loan were exhausted. See Ex. 121. In Requisition 17, PMJ requested funds of \$6,300.00 for completed exterior painting and finish electric and finish plumbing work. Mr. Kavanaugh's note on Requisition 17 indicates that the requisition was "approved for balance" of \$2,936.48. Mr. Nestor testified that \$2,936.48 was the amount of the construction loan proceeds that remained available as of the date of that requisition. Despite the inconsistent evidence, which the Court attributes to a missing page from the construction disbursement record,³ the Court finds that PMJ was not paid in full for the painting, electric, and plumbing work completed during the fall of 1997. Accordingly, PMJ has a mechanic's lien for at least \$3,363.52.

PMJ has not presented any other evidence that would show that it performed other work on Lot 10 for which it was not paid. In order to reach PMJ's figure of \$84,340.58 for its mechanic's lien, the Court would be required to find that PMJ is entitled to assert a mechanic's lien on Lot 10 for work done on Lots 16 and 26 in the amount of \$59,617.58, which work allegedly was not paid for by ZLGH. The Court cannot permit PMJ's mechanic's lien to cover work on Lots 16 and 26 even though PMJ asserts that it used the funds it received in payment for work performed on Lot 10 to perform work on Lots 16 and 26. If PMJ was not paid for work on Lots 16 and 26, it should have claimed a mechanic's lien on those lots. It

³ To support the inference that the second page of the construction disbursement record is missing, the Court notes that other construction disbursement schedules admitted into evidence show that the Bank made a payment on or about the first of each month for the interest due on each construction loan and no such disbursements are reflected in Exhibit 107 for the months after October 1997. The other records show interest payments being made through February 1998.

did not. PMJ's attempt to claim a mechanic's lien on Lot 10 for that work is not permissible under the statute.

With respect to the balance of \$21,359.48 for which PMJ asserts a mechanic's lien on Lot 10, the Court finds that there is no evidence in the record to support such a mechanic's lien. PMJ suggests that it is owed additional amounts for extra work that was performed on Lot 10, including additional excavation, relocating the underground telephone line, electrical extras, etc. PMJ failed to present any evidence that ZLGH had agreed to pay PMJ for any extras. PMJ also attempts to charge ZLGH for the interest carry on the construction loan when there is no basis for doing so. Accordingly, PMJ's mechanic's lien with respect to Lot 10 is limited to the amount of \$3,363.52.

B. Lot 11

PMJ claims a mechanic's lien in the amount of \$46,724.35 on Lot 11. PMJ attempted to prove the existence of its lien, not through its own business records, but rather through the Bank's records. The Bank's construction disbursement record shows that the Bank agreed to loan ZLGH \$201,500.00 for Lot 11, a portion of which was used to pay off the acquisition loan for the land. See Ex. 108. The construction disbursement record shows that when the last disbursement was made on Lot 11 on February 9, 1998, there was \$70,875.04 in loan proceeds remaining to complete construction of the house. See id. Nonetheless, PMJ argues that it is owed money for work performed but not paid. The evidence, however, does not support such an assertion.

Part of PMJ's claim, \$6,864.35, is for work PMJ completed on Lots 16 and 26 with funds from Lot 11. As explained above with respect to Lot 10, if ZLGH did not pay PMJ for work done on Lots 16 and 26, PMJ should have claimed a mechanic's lien on Lots 16 and 26. PMJ cannot claim such a lien on Lot 11 as the Court has determined that a continuing contract did not exist in this case.

The other elements of PMJ's claim apparently include extras in the amount of \$4,350.00 and construction disbursements remaining with ZLGH in the amount of \$12,330.00. However, PMJ did not present any evidence that would support a finding that ZLGH had agreed to pay PMJ for additional work on

Lot 11 or that the Bank paid ZLGH for work on Lot 11 for which PMJ was not subsequently paid by ZLGH. Accordingly, PMJ does not have a mechanic's lien for these amounts.

The remaining portion of PMJ's claim is based on PMJ's assertion that it was entitled to \$106,360.00 for work completed on Lot 11. However, there is no basis in the record to support such a finding. PMJ has not asserted that it submitted any requisitions for work completed that were not paid. See Ex. 108. Rather, PMJ's claim is based upon some calculation regarding the percentage of completed work versus non-completed work. The record does not support making such a calculation. Accordingly, the Court finds that PMJ has failed to satisfy its burden of establishing that it performed work for which it was not paid; as a result, PMJ is not entitled to claim a mechanic's lien on Lot 11.

C. Lot 23

PMJ claims a mechanic's lien of \$2,950.50 on Lot 23. PMJ's asserted lien consists of two items: \$1,782.50 for monies used to pay subcontractors on Lots 16 and 26 and \$1,168.00 for unpaid work. As discussed above, PMJ cannot assert a mechanic's lien on Lot 23 for work performed on Lots 16 and 26. PMJ arrives at a figure of \$1,168.00 for work that was allegedly completed and not paid by computing the percentage of completed work and applying that percentage to the construction loan proceeds, which amount allegedly equaled the amount PMJ was to be paid by ZLGH for the construction of Lot 23. Again, PMJ has not established any basis for using such a methodology. In addition, the Court notes that there was \$94,885.42 remaining in the construction loan as February 1998, which funds could have been used to pay PMJ for work performed. See Ex. 110. The Court further notes that PMJ has not asserted that the Bank or ZLGH failed to compensate PMJ on account of any requisitions submitted to the Bank. The Court finds that PMJ failed to meet its burden of establishing that it performed work for which it was not paid which would entitle it to a mechanic's lien on Lot 23.

D. Priority of PMJ's Lien

PMJ has established that it holds a mechanic's lien attachment in the amount of \$3,363.52 on Lot 10. RSA 447:12-a provides in relevant part:

Such [mechanic's lien] attachment shall have precedence and priority over any construction mortgage. For the purposes of this section, a construction mortgage shall mean any mortgage loan made for the purpose of financing the construction, repair or alteration of any structure on the mortgaged premises where the lien secured by such attachment arises from the same construction, repair or alteration work. However, such attachment shall not be entitled to precedence as provided in this section to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgaged premises, or upon receipt by the mortgagee from the mortgagor or his agent of an affidavit that the work on the mortgaged premises for which such disbursement is to be made has been completed and that the subcontractors and suppliers of materials or labor have been paid for their share of such work, or will be paid out of such disbursement.

RSA 447:12-a. The parties have stipulated that PMJ did not execute or deliver to Citizens any lien waivers with respect to the mechanic's lien asserted by PMJ in this case and that Citizens did not issue any joint

checks under the loans at issue. See Doc. No. 71. Accordingly, PMJ's mechanic's lien on Lot 10 has precedence over Citizens' construction mortgage.

To the extent that PMJ may claim a non-mechanic's lien based on its attachment, the Court need not decide that issue. Any non-mechanic's lien claim would be junior to the Bank's acquisition and construction mortgages and the parties have agreed that the funds in the so-called eighty percent account are insufficient to secure the Bank's claims in full. Accordingly, any additional secured claim of PMJ could only be allowed as an unsecured claim. As a result, such a claim would be paid from the twenty percent account which was set aside under the carve-out agreement for the benefit of the Debtor's general unsecured creditors and any administrative claimants. The Court notes that it was not asked to determine and, therefore, has not determined the extent and amount of PMJ's unsecured claim, if any.

IV. CONCLUSION AND ORDER

For the reasons detailed above, the Court finds that PMJ has a valid perfected mechanic's lien attachment on Lot 10 in the amount of \$3,363.52, which attachment has priority over Citizens' construction loan on Lot 10. PMJ did not establish that it is entitled to a mechanic's lien on Lots 2, 11, 23, or 32. The Court finds that PMJ's mechanic's lien of \$3,363.52 should be treated as secured and should be paid from the eighty percent account established under the carve-out agreement.

The Court grants Citizens' request in its second count of the complaint and hereby authorizes the Trustee to disburse the proceeds of the eighty percent account consistent with this opinion and prior orders of the Court. See Doc. Nos. 10, 12, 13, and 20.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 23rd day of March, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge