Docket #0030 Date Filed: 6/15/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	
WELDED CONSTRUCTION, L.P. *et al*.,	Chapter 11
Debtors.	Case No. 18-12378 (CSS)
	(Jointly Administered)
EARTH PIPELINE	
Plaintiff,	Adv. Pro. No. 19-50274 (CSS)
v.	
COLUMBIA GAS TRANSMISSION LLC,	
Defendant.	

REPLY BRIEF TO EARTH PIPELINE SERVICES AND COLUMBIA GAS TRANSMISSION LLC'S OBJECTIONS TO MERSINO DEWATERING'S MOTION TO INTERVENE

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ARGUMENT

A. West Virginia's Preservation and Intervention Statute Means Mersino's Lien Is Preserved.

Proposed Intervenor, Mersino Dewatering, Inc. ("Mersino") states that its pending Intervention Motion turns on the interpretation of a specific Statute, W. Va. Code § 38-2-34 (the "Preservation and Intervention Statute").

> [A] suit commenced by any person having [a construction] lien shall, for the purpose of preserving the same, inure to the benefit of all other persons having a lien under this article on the same property, and such persons may intervene in such suit for the purpose of enforcing their liens, in the same manner as in other chancery suits.

The Preservation and Intervention Statute serves 2 objectives – each related to protection of construction subcontractors. First, the Statute says that the commencement of a construction lien foreclosure case inures to the benefit of all other persons, preserving their liens on the same property. Second, the Statute says that a multiplicity of suits are not needed. Instead, a lienholder may intervene in such suit for the purpose of enforcing a lien, rather than being required to file a separate suit.

Notwithstanding the plain language of the Preservation and Intervention Statute, both parties to the pending litigation, Columbia Gas Transmission, LLC ("CGT") and Earth Pipeline Service have objected to Mersino's Motion to Intervene.

CGT ignores the Preservation and Intervention Statute, as its 17 page Brief (Doc. 24) never cites to, or responds to Mersino's rights under Preservation and Intervention Statute despite making a "preservation" argument directly refuted by the Preservation and Intervention Statute. It is always presumed that the legislature will not enact a meaningless or useless statute." *Richards v. Harman,* 217 W. Va. 206, 211 (W. Va. 2005) *citing* Syllabus Point 4, *State ex rel. Hardesty v. Aracoma–Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc.*, 129 S.E.2d

921 (W. Va. 1963). In making arguments about the matters governed by the Preservation and Intervention Statute, one may not simply write the Preservation and Intervention Statute out of West Virginia Code.

Earth Pipeline does cite to the Preservation and Intervention Statute. Earth Pipeline's argument is that Mersino's lien is not on the "same property" as Earth Pipeline's lien, because Earth Pipeline's lien covers more property than Mersino's lien. [DE 26, Brief, pg. 8]. However, as Mersino's lien overlaps with Earth Pipeline's Lien, as shown in section B of this Brief, the Court is faced with an issue of statutory interpretation. Viewed from Mersino's perspective, the Earth Pipeline Lien is on the same property. Viewed from Earth Pipeline's view, the Mersino lien is on only a portion of the property covered by the Earth Pipeline Lien. See, e.g. *Rogers v. Verlander,* 5 S.E. 847, 866 (W.V. 1880)(Liens were on 'same property' even though one of the liens also covered a second parcel of property). Interpreting the "same property" as requiring perfect identity of metes and bounds is not supported by the Preservation and Intervention Statute nor its purpose of protecting lienholders.

Since Mersino's lien is on the same property as Earth Pipeline's, Earth Pipeline's commencement of suit on March 18, 2019 which is a date on which Mersino's lien was still subject to foreclosure, the Preservation and Intervention Statute – by its plain and unambiguous language – inures to the benefit of Mersino and preserves Mersino's lien.

B. Mersino's Lien Overlaps With The Lien of Earth Pipeline Services and Is On the Same Property.

An issue raised by both parties relates to the adequacy of property description contained in Mersino's recorded Subcontractor's Notice of Mechanic's Lien (the "Lien Notice"). This issue also relates to the applicability of the Preservation and Intervention Statute and to the common subject matter necessary to Mersino's Intervention in this matter. As noted below, while Mersino's Lien Notice did not contain a metes and bounds description of the property on which it performed services, the description on the Lien Notice was sufficient.

Mersino's Lien Notice described the work performed and property subject to the mechanic's lien as follows:

> …Mersino Dewatering, Inc… was and is subcontractor with Welded Construction… who was and is general contractor for the furnishing of materials and doing of the work and labor, necessary to the completion of Dewatering/Pumping Services and/or equipment rentals on that certain building Mountaineer Xpress Pipeline Project, 1591 Wheeling Ave., Glen Dale, WV 26038 in the County of Marshall, owned by you and situated on lot number of block number as shown on the official map of and that the contract price and value of said work and materials is $330,670.00. You are further notified that the undersigned has not been paid therefore (or has been paid only $0.00 thereof) and that he claims and will claim a lien upon your interest in the said lot (or tract) of land and upon the buildings, structurers and improvements thereon to secure the payment of $330,670.00.

The address on the Notice of Lien was not the location where Mersino performed the Dewatering/Pumping Services for the pipeline. Instead, 1591 Wheeling Ave. was the staging yard for the pipeline project. The Notice of Lien does not have any lot numbers, block numbers, official map or any legal description. Nevertheless, the description is sufficient to provide notice to all parties of Mersino's lien. *L.A. Pipeline Construction, Inc. v. Glass Bagging Enterprises, Inc.*, 2016 WL 6304570 (W.V. 2016) (attached as Exhibit "1").

The *L.A. Pipeline* case is remarkably similar to this case. In *L.A. Pipeline*, a materialman filed a mechanic's lien against a pipeline project. The mechanic's lien's described the property as:

> 1501 Wheeling Avenue, Glendale, Marshall County, West Virginia including pipeline installed by L.A. Pipeline Construction Co. for Caiman Energy LLC from December 17, 2010 to April 20, 2011 in Marshall County, West Virginia.

Id. at pg. 4.

LA Pipeline asserted that this property description was inadequate to provide sufficient notice of the lien. LA Pipeline claimed that the address used on the property description was not a location were the materials were used in construction of the pipeline, and that Glass Bagging should have provided a metes and bounds description of the pipeline's location. *Id.* at pg. 4-5.

Holding that, "[u]nlike the construction of a home, building, or bridge, for example… a pipeline is clearly different, as Glass Bagging has indicated…" the Court found that the description was sufficient. Analogizing a pipeline to a railway, where a generic description of "the railway of said corporation" had been held a sufficient description in *H.C. Houston Lumber Co. v. Wetzel & T Ry. Co.*, 69 W.Va. 682, 72 S.E. 786 (1911), the West Virginia Supreme Court of Appeals held that the mechanic's lien statute required only that the property description must be "sufficiently accurate only for identification…because of the character of a railway, traversing as it does in this case the streets and roads of a town and county, the notoriety which is necessarily given such a work of internal improvement, the description in this lien is sufficiently accurate we think for identification…the fact that the description could have been more precise does not take it out of substantial compliance [with the applicable statute… the aid of extraneous proof for the purpose of identifying the property [is often required]." *Id.* at pg. 5-6

The *LA Pipeline* Court held that a pipeline, like a railway, was sufficiently notorious to provide interested parties of notice of the scope of Glass Bagging's lien. *Id.*

This Court does not have to guess what the West Virginia Supreme Court of Appeals would do with a lien description like that done by Mersino in this case – the substantive issue has already been decided. The *LA Pipeline* case is remarkably similar to this case, down to the property address used as the generic pipeline address was a staging yard that was actually 3 doors down from the staging yard described on Mersino's lien.[1] In both cases, the lien claimant identified that its services were provided in connection with a pipeline in Marshall County, WV. In neither case is a metes and bounds description necessary.

The purpose of the mechanics' liens statutes is to protect any person who increases the value of another person's real property by furnishing labor or materials. These statutes are remedial and therefore must be construed liberally to serve the purpose for which they have been enacted. *Carolina Lumber Co. v. Cunningham*, 156 W.Va. 272, 279 (W. Va. 1972); *see, also, Fisher v. Reamer*, 118 S.E. 2d 76, 79 (W. Va. 1961) *quoting Bailey Lumber Co. v. General Construction Co.*, 133 S.E. 135, 139 (W. Va. 1926).

Not only is Mersino's description of the property covered by its lien sufficient, it also overlaps with Earth Pipeline's lien, which is the subject of this case.

The services provided by Mersino were temporary pumping services for the creek diversion for Fish Creek on the Mountaineer Express Pipe project (see Exhibit 2, Subcontract). Mersino supplied a bypass pumping system capable of pulling up to 55,000 gallons per minute, pulling from the river upstream of the temporary dam, with open discharge back into the river

[1] 1501 Wheeling Ave., the property described in LA Pipeline, is separated from 1591 Wheeling Ave., the property described in this case by an auto dealership (Staub Chrysler Dodge Jeep Ram), a sports facility (Green Acres Power Sports), and a car wash (M & M Car Wash).

downstream. Pumps "will be set into the river and will be required to discharge up a bank then parallel to the river 250 LF and back down the bank into the river."

The services were performed at the location where the Mountaineer Xpress Pipeline intersected with Fish Creek. That location was approximately Milepost 7.1 along the pipeline, as demonstrated by pages 4-56, 4-58, and 4-129 of the Environmental Impact Statement for the Pipeline (The relevant pages are attached as Exhibit "3"), *see also* Declaration of Marco Mersino, ("Mersino's services were provided along the Pipeline Right of Way where the Pipeline intersected with Fish Creek.").[2] Earth Pipeline's Lien covers services from Milepost 0.0 to Milepost 18.83 – obviously inclusive of Milepost 7.1.

Although Mersino's lien relates to a specific area along the Pipeline, it overlaps with the lien of Earth Pipeline Services.[3]

C. Mersino did not waive its lien through the General Terms and Conditions, and any such waiver would be invalid.

CGT argues that Mersino contractually waived any lien rights that Mersino may have against it or its property for the work that Mersino performed on the project, pointing to the General Terms and Conditions of the Subcontract between Welded and Mersino that, after requiring that Mersino be paid for its work provide, in pertinent part:

> **Liens**
>
> Subcontractor shall cause any Lien which may be filed or recorded against the Work, the Facility, the Work Site or any lands or property of Company to be released and discharged forthwith at the cost and expense of Subcontractor. If Subcontractor fails to release or obtain the release and discharge any such Lien, then Contractor may, but shall not be obliged to, discharge, release or

[2] The Declaration of Marco Mersino will be filed subsequent to this reply.

[3] When this Motion was filed, in the Proposed Complaint and Proposed Lis Pendens, Counsel provided a legal description for the property – the staging yard -- described in the lien. This legal description did not accurately reflect the location where the services were performed. Counsel apologizes to the Court and to the other parties for any confusion caused by the inaccuracy in the Proposed Complaint and Proposed Lis Pendens.

> otherwise deal with the Lien, and Subcontractor shall pay any and all costs and expenses incurred by Contractor in so releasing, discharging or otherwise dealing with the Lien, including fees and expenses of legal counsel. Any amounts so paid by Contractor may be deducted from any amounts due Subcontractor whether under the Agreement or otherwise. No amounts are payable by Contractor to Subcontractor so long as a Lien remains registered against the Work, the Facilities, the Work Site or any lands or property of Contractor, arising out of the Work.

Doc 24, pgs. 9-10 and 12-13. CGT's argument is unavailing for several reasons.

First, the above clause does not say Mersino cannot file a lien, but says, "[Mersino] shall cause any Lien which may be filed or recorded…to be released and discharged forthwith at the cost and expense of [Mersino]." That clause is referring to liens filed by Mersino's subcontractors and suppliers, not Mersino. If it were referring to liens filed by Mersino, it would much more clearly and simply say, "Mersino shall not file any lien." Indeed, CGT is aware of that fact and the weakness of its argument since it felt compelled to address that fact by stating, "Any Lien naturally includes liens filed by Mersino itself" in its response to the motion. Doc 24, pg. 13. Moreover, it does not say Mersino's subcontractors and suppliers cannot file liens. They can, but if they do, Mersino is required to cause the release of those liens ***if Mersino has been paid***.[4] The Terms and Conditions do not say a lien cannot be filed or the right to file a lien is waived as CGT argues. Since the above clause is clear and unambiguous, it should be interpreted and enforced, not as CGT argues, but as written, which would be in a manner that does not preclude Mersino from filing a lien. *See, McElroy Coal Co. v* Schoene, 813 S.E. 2d 128 (W. Va. 2018); *Village of*

[4] Page 8 of the Terms and Conditions provides that Mersino must indemnify Welded against "all Liens and claims made or liability incurred by Contractor on account of the Work performed or materials supplied by any Subcontractor, including fees and expenses of legal counsel, but only to the extent Subcontractor has been paid by Contract [sic, should be Contractor] all amounts due under this Agreement."

Edmore v. Crystal Automation Systems Inc, 911 N.W. 2d 241 (Mich. Ct. App. 2017); *In re Solutions Liquidation LLC*, 608 B.R. 384, 406 (Bankr. D. Del. 2019).[5]

Second, the case law that CGT cites to support its argument that Mersino contractually waived any lien rights that Mersino may have against it or its property for the work that it performed on the project, namely, *First Am. Title Ins. Co. v. Bowles Rice, LLP*, No. 1:16-cv-219, 2019 WL 3763001 at *10 (N.D. W.Va. Aug. 8, 2018), which cites *Bauer Enters., Inc. v. Frye*, 382 S.E.2d 71, 74 (W. Va. 1989) that holds, "Undoubtedly, a contractor may waive his right to file a mechanic's lien[,]" is distinguishable from and not applicable to this case. *Bowles Rice* deals with lien waivers provided at the time of payment, which is significantly different from a prospective lien waiver or the waiver of lien rights before construction even commences. Of course a party can waive its lien when it is paid – that is the essence of how the construction industry works.

Since *Bowles Rice* is distinguishable from and not applicable to this case, it should be ignored and CPT's argument rejected.

It is also worth noting that CGT, after citing *Bowles Rice* in its response to the motion, further states:

> Under West Virginia law, "[a] valid written instrument which expresses the intent of the party in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Id. (citing *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000)). Indeed, No-Lien provisions are routinely enforced because parties enjoy the freedom of contract to waive any statutory mechanic's lien claims as part of the consideration for entering the agreement.[3]

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[5] It is worth noting that the Subcontract between Welded and Mersino does not specify the law of the state that applies or governs as far as its interpretation and enforcement is concerned. Presumably, it is: (1) West Virginia, the stated in which the Project is located; (2) Michigan, the state in which Mersino is incorporated; or (3) Delaware, the state in which Welded is incorporated. Accordingly, Mersino provided case law from each of those states to support its argument.

Doc 24, pg. 13.

CGT cites no West Virginia law to support that argument. Rather, it cites Illinois, Connecticut, and Florida state cases. Doc 24, pg. 13.

Freedom of contract is supported by West Virginia cases not cited by CGT, in particular, by *Wellington Power Corp. v. CNA Sur. Corp.*, 614 S.E.2d 680 (W. Va. 2005) ("Our law provides that "[u]nder the broad liberty of contract allowed by law, parties may make performance of any comparatively, or apparently, trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and, in such case, the contract will be enforced and dealt with as made." and "Freedom to contract, however, is not unfettered."). *Wellington* was, however, very recently explained in the case of *Hutchinson v. Gilles*, No. 18-0644**,** 2020 WL 598321 (W. Va. Feb. 7, 2020) (attached as Exhibit "4"). There, the West Virginia Supreme Court, in addressing *Wellington*, wrote:

> Syl. Pt. 1, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005). Indeed, "[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Id.* at 35, 217 S.E.2d at 682, syl. pt. 3. **However, petitioner fails to acknowledge that "[f]orfeitures are not favored by equity. They are heavy and harsh and will not be declared or enforced unless justice clearly demands it.**" *Hill v. Vencill*, 90 W. Va. 136, 144, 111 S.E. 478, 481 (1922) (citations omitted); *see also* syl. pt. 8, *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012) ("Equity will not enforce a forfeiture.") (citations omitted). As this Court has explained, "[t]he term 'forfeiture' is defined ... as '[t]he loss of a right, a privilege, or property because of a crime, *breach of obligation*, or neglect of duty.' " *Id.* at 328, 737 S.E.2d at 662 (quoting Black's Law Dictionary 661 (7th ed. 1999)) (emphasis added). Additionally, "[p]rovisions of a contract, effecting a forfeiture or exacting a penalty, are strictly construed against the party for whose benefit they were incorporated in the instrument." *Wellington*, 217 W. Va. at 41, 614 S.E.2d at 688 (citation omitted). With these principles in mind, we turn to the specifics of the matter on appeal.

Id. at *2 (emphasis added). Assuming for argument sake that the "No-Lien Clause" in the Terms and Conditions of the Subcontract between Welded and Mersino precludes Mersino from filing a lien, that clause is clearly disfavored by West Virginia as against public policy, and therefore, should not be enforced. The same would hold true under Delaware law and Michigan law since Delaware and Michigan both have public policies against prospective lien waivers. In fact, those public policies are expressly built into their respective mechanic or construction lien statutes:

> (b) Notwithstanding the provisions of any other law, except as provided in this subsection: Any contract, any agreement or understanding whereby the right to file or enforce any lien created under this chapter is waived, shall be void as against public policy and wholly unenforceable…

25 Delaware Code § 2706(b)

> A person shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed. A waiver obtained as part of a contract for an improvement is contrary to public policy, and shall be invalid, except to the extent that payment for labor and material furnished was actually made to the person giving the waiver…

Michigan Compiled Law Annotated § 570.1115(1); s*ee also Kipin Industries, Inc. v. Van Deilen Intern., Inc.*, 182 F.2d 490, 493 (6th Cir. 1999); *CD Barnes Associates, Inc. v. Grand Haven Hideaway Ltd. Partnership*, 406 F. Supp. 2d 801, 810 (W.D. Mich. 2005).

If pre-payment lien waivers were enforceable, they would suddenly be found in every construction contract. Instead, they are disfavored by law in each of the potentially relevant states here,and should not be enforced especially where – as here – they do not provide for an unambiguous statement that the parties knowingly and intentionally agreed that an unpaid subcontractor would have no lien rights whatsoever.

D. <u>Technical Issues With Service Do Not Defeat Mersino's Lien.</u>

CGT argues that "by naming the wrong entity and listing an incorrect address on its Notice of Lien, Mersino effectively admits that it failed to serve CGT." Despite errors that existed on the

Notice of Lien, Mersino believes that discovery in this case will demonstrate that CGT, in fact, knew of Mersino's lien, and even reached out to discuss the lien on at least one occasion. Further, under West Virginia law, CGT received sufficient notice of Mersino's lien.

CGT does not deny that TransCanada, the party named on the lien, was one of the entities and/or tradenames used by CGT in connection with this project. In fact, the Affidavit of Ann Flores, attached to CGT's brief, demonstrates that she works for TransCanada USA Services, Inc., a variation of the tradename still being used presently. Arguing that the lien listed the incorrect company name is form over function – is it Mersino's job to track all of CGT's various corporate mergers to locate its name of the moment?

While W.Va. Code 38-2-9 provides that the owner of a property must receive notice of the lien, W. Va. Code 38-2-32 provides that a party need not give notice of a lien to the corporate owner of a property for a workmen's lien for material and labor provided to the project. At first glance, W. Va. Code 38-2-32 appears only to apply to an individual performing services for a corporation. However, the West Virginia Supreme Court of Appeals has applied Section 38-2-32 to the lien of a corporate subcontract providing materials and labor to the project. *Southern Erectors, Inc. v. Olga Coal Co.*, 159 W.Va. 385, 391-392 (1976)(Section 38-2-32 provides other grounds to support summary judgment for lienholder where facts were insufficient to sustain lien under Section 38-2-9).[6]

Southern Erectors is controlling to this case. Even if it were not, the actual notice of Mersino's Lien would be sufficient to perfect it. Under West Virginia law, service of a lien may be by any methods provided by law for the service of legal notice or summons. *Kendall v. Martin*, 136 W.Va. 192, 196 (1951). West Virginia law holds that a party with actual notice has been

[6] Where the issue involved is strictly one of an interest in real estate in West Virginia, West Virginia law applies.

adequately served under the law. *See, e.g. Dixon v. American Indus. Leasing Co.*, 162 W.Va. 832, 836 (W. Va. 1972) ("The only purpose for the requirement of notice is to afford the one served with an opportunity to protect himself should he choose to do so.... the record is replete with evidence that Beechurst had actual notice of the delinquency and of the termination of the lease."); *Bailey Lumber v. General Const. Co.*, 101 W.Va. 567 (W. Va. 1926) (Materialman's lien case, "where the statute is silent as to the manner of method of giving notice, it is generally sufficient if actual notice has been received by the person affected.") While Mersino may wish it used a different means of communicating its Lien to CGT, Mersino believes that CGT had actual notice of the Lien and that its Lien is perfected.

As *Southern Erectors* holds, all that is required to perfect a lien is that the lien be filed with the clerk of the county court of the county in which the work was performed or the labor or equipment was furnished or the property of the corporate owner is situated within 90 days of last performing or last furnishing the same. *Id.* at 391-392. It is undisputed that Mersino filed its Lien with the Clerk of the County of Marshall within 90 days of the last date that it performed work or furnished labor and equipment in connection with the Project. Therefore, Mersino's lien is perfected and its right and ability to enforce and seek payment relative to it is preserved. Moreover, CST cannot claim any actual prejudice with respect to not receiving notice of Mersino's lien or innocence or clean hands with respect to not being aware of Mersino's lien since: (1) CST almost certainly had notice of Mersino's lien long before this intervention took place, (2) CST has now received notice of Mersino's lien via the filing of this motion to intervene and the documentation and information submitted in connection with it, including, Mersino's lien and (3) multiple liens were filed by multiple subcontractors of Welded, and therefore, CST should have investigated the potential nonpayment of and filing of liens by all of Welded's subcontractor

upon notice of any lien filed by any of Welded's subcontractor and would have found itself involved in lien-related litigation nevertheless.

E. Mersino Has A Sufficient Interest In This Matter to Justify Intervention.

The parties do not appear to disagree over the relevant standards for mandatory or permissive intervention. In order to establish a sufficient interest, Mersino must demonstrate an interest relating to the property or transaction which is the subject of the action. *Liberty Mutual Insurance Co. v. Treesdale,* 419 F.3d 216, 220 (3d Cir. 2005). Here, as discussed above, Mersino has an interest in a portion of the property covered by Earth Pipeline's Lien. Where multiple parties claim in an interest in part or all of the same property, intervention prevents inconsistent rulings and promotes judicial economy. West Virginia Rule 24 requires intervention of right when (1) when a statute of this State confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impeded his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Here, the Preservation and Intervention Statute provides for a right to intervene, demonstrating the policy of the State of West Virginia in favor of intervention here.[7] Moreover, Mersino claims an interest in the specific property that is the subject of this action. The results of this action may impair or impeded Mersino's ability to protect its interest, and, with due respect, Earth Pipeline does not adequately represent Mersino's interest. Accordingly, mandatory intervention here is appropriate.

[7] The Preservation and Intervention Statute provides that a party "may" intervene. There is very little case law interpreting the Preservation and Intervention Statute, but Mersino believes that, under these circumstances, it should be interpreted as an unconditional right to intervene subject to prudential circumstances within the Court's discretion (such as timeliness). Even if the Preservation and Intervention Statute provides only for a conditional right to intervene, it provides strong support for the instant motion.

Even if mandatory intervention were not, permissive intervention is appropriate where (1) the motion is timely, and (2) a statute provides for a conditional right to intervene, or (3) where the applicant's claim or defense and the main action have a question of law or fact in common. Rule 24, West Virginia.

Here, this case is still at an early stage, and the motion is timely. Moreover, at a minimum, the Preservation and Intervention Statute provides a conditional right to intervention. Finally, the matters address common questions of law and fact, including the same property and the same issue of lien waiver.

As the Court will note, CGT has filed a motion to dismiss Earth Pipeline's Complaint based on the same language in the general terms and conditions of the Subcontract that it uses to assert that Mersino's intervention would be futile. That is certainly a common question of law and fact. Moreover, as there is property overlap between the liens, other common questions of law and fact will arise. Accordingly, permissive intervention is appropriate in this matter.

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CONCLUSION

For the reasons stated in this brief, the Court should permit Mersino to intervene in this matter, and should grant Mersino such other relief as is just and equitable.

Dated: June 15, 2020
Wilmington, Delaware

BAYARD, P.A.

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Exhibit 1

2016 WL 6304570
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

L.A. PIPELINE CONSTRUCTION, INC., Plaintiff Below, Petitioner
v.
GLASS BAGGING ENTERPRISES, INC., Defendant Below, Respondent

No. 15–0970
|
ISSUED: October 27, 2016

Synopsis

Background: Contractor that installed pipeline on owner's property brought action against owner, seeking to collect account receivable and other damages by enforcing its mechanic's lien against owner. Contractor named supplier of sand sacks as additional defendant. Supplier asserted counterclaims against contractor for breach of contract and unjust enrichment. Contractor and owner entered into settlement, and owner was dismissed. Contractor and supplier filed competing motions for summary judgment. The Circuit Court, Marshall County, granted summary judgment for supplier. Contractor appealed.

Holdings: The Supreme Court of Appeals held that:

[1] contractor lacked standing to challenge sufficiency of property description in supplier's mechanic's lien, and

[2] property description in supplier's lien was sufficient.

Affirmed.

West Headnotes (3)

[1] Mechanics' Liens Persons entitled to contest in general

Contractor hired by property owner to install pipeline lacked standing to challenge sufficiency of property description in mechanic's lien filed against owner's property by supplier hired by contractor; any challenge belonged to owner, and, even if contractor would have had standing to challenge supplier's lien due to adverse affect it might have had on contractor's own lien, contractor settled with owner, so that contractor no longer had a lien that could have been adversely affected. W. Va. Code Ann. § 38-2-11.

[2] Mechanics' Liens Sufficiency in general

Property owner's address, a reference to pipeline installed by contractor, and dates between which pipeline was installed constituted a sufficient property description for purposes of mechanic's lien against the property filed by supplier hired by contractor in connection with the installation, where contractor's own recorded mechanic's lien included additional details regarding numerous pipeline rights-of-way and surface agreements, so that anyone conducting title search on property traversed by the pipeline would find the various rights-of-ways, surface agreements, and mechanic's liens. W. Va. Code Ann. § 38-2-11.

[3] Mechanics' Liens Review

Supreme Court would not address timeliness of supplier's claim seeking enforcement of its mechanic's lien against property on which contractor that hired supplier built pipeline, where the issue was not addressed by the trial court. W. Va. Code Ann. § 38-2-34.

(Marshall County Nos. 11–C–70, 11–C–124, and 12–C–47)

MEMORANDUM DECISION

***1** The petitioner (plaintiff below), L.A. Pipeline Construction, Inc. ("L.A. Pipeline"), by counsel, James S. Huggins and Daniel P. Corcoran, appeals the order of the Circuit Court of Marshall County entered on August 26,

2015, granting summary judgment in favor of the respondent (defendant below), Glass Bagging Enterprises, Inc. ("Glass Bagging"). L.A. Pipeline asks this Court to vacate the circuit court's order; invalidate Glass Bagging's mechanic's lien; and immediately disburse the escrow fund established in this matter to L.A. Pipeline. In response, Glass Bagging, by counsel, Mark E. Gaydos, Buddy Turner, and Hilary M. Bright, asserts that the circuit court correctly ruled in its favor and that the summary judgment order should be affirmed.

Upon our review of the parties' arguments, the pertinent authorities, and the appendix record, we find a memorandum decision affirming the circuit court's summary judgment order is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

I. Facts and Procedural History

L.A. Pipeline [1] was contracted by Caiman Energy, LLC and Caiman Eastern Midstream, LLC (jointly referred to as "Caiman") to install a pipeline in Marshall County, West Virginia. In December of 2010, L.A. Pipeline asked Glass Bagging to deliver and supply sand sacks at the rate of $3,180 per load for L.A. Pipeline's use in the construction of the pipeline.

From December 17, 2010, through April 8, 2011, Glass Bagging delivered the sand sacks ordered by L.A. Pipeline at a total cost of $155,907.90. L.A. Pipeline then asked Glass Bagging to deliver three additional loads necessary to complete the pipeline. Relying upon L.A. Pipeline's assurances that payment for the prior loads would be forthcoming and that it would remit payment on the three final loads, cash on delivery, Glass Bagging delivered the three additional loads of materials on April 16, 18, and 20, 2011. All three checks that L.A. Pipeline provided for these three additional loads, each in the amount of $3,180, were returned for insufficient funds.

L.A. Pipeline never disputed that it owes the total amount of $165,447.90 to Glass Bagging for the sand sacks it delivered and which were used by L.A. Pipeline in the construction of the pipeline on behalf of Caiman. Because L.A. Pipeline failed to remit payment, on May 24, 2011, Glass Bagging filed a mechanic's lien in the Office of the Clerk of the County Commission of Marshall County against Caiman's property on which the pipeline was constructed for the total sum due of $165,447.90.

On July 28, 2011, L.A. Pipeline filed the instant action (Civil Action No. 11–C–124) seeking to collect its account receivable and other damages from Caiman totaling in excess of $3,000,000 by enforcing its own mechanic's lien that it had filed against Caiman. L.A. Pipeline named other lienholders as defendants in that action, including Pipeline Supply & Services, LLC ("Pipeline Supply") and Glass Bagging, which filed a counterclaim against L.A. Pipeline for breach of contract and unjust enrichment. In its complaint, L.A. Pipeline asked that its mechanic's lien be foreclosed; that "all liens be marshalled" and priorities determined; that Caiman's pipeline rights-of-way and pipeline be sold; and that the proceeds of such sale be used first to pay its mechanic's lien and that of Pipeline Supply. [2]

***2** During the course of the litigation, Caiman entered into a confidential settlement agreement with L.A. Pipeline and Pipeline Supply which resulted in the release of their respective mechanics' liens. The parties represent that under the terms of this settlement, L.A. Pipeline and Caiman jointly filed a motion pursuant to West Virginia Code § 38–2–36 (2011) seeking to establish an escrow fund or bond in exchange for the release of Glass Bagging's mechanic's lien. Through its order entered on March 5, 2012, circuit court directed the establishment of the escrow fund in the amount of $165,447.90, [3] which was the amount claimed in Glass Bagging's mechanic's lien, and ordered the execution and recording of a release of Glass Bagging's mechanic's lien to be replaced with a lien against the escrow fund. [4]

Following the establishment of the escrow fund, Caiman was dismissed from the litigation. Thereafter, L.A. Pipeline and Glass Bagging filed competing motions for summary judgment, each claiming entitlement to the escrow fund. On August 26, 2015, the circuit court entered an order granting Glass Bagging's dispositive motion, finding there was no genuine issue of material fact that L.A. Pipeline breached its contract with Glass Bagging and would be unjustly enriched if it were not ordered to pay for the materials delivered by Glass Bagging. Regarding Glass Bagging's mechanic's lien, the circuit court found that in order to perfect a materialman's mechanic's lien under West Virginia Code § 38–2–11 (2011), notice of the lien must be provided to the property owner or the owner's authorized agent. The circuit court found that although the principal contractor is a necessary party to a civil action to enforce a materialman's mechanic's lien against the owner's property, only those entitled to notice of the lien may challenge its validity. Because L.A. Pipeline

was not entitled to notice of Glass Bagging's mechanic's lien under West Virginia Code § 38–2–11, the circuit court found that L.A. Pipeline did not have standing to challenge the validity of that lien. The circuit court further ruled that even if L.A. Pipeline had standing, the property description in Glass Bagging's mechanic's lien, which L.A. Pipeline challenged, was adequate and substantially complied with the West Virginia mechanics' lien statutes. [5] The circuit court specifically noted that "where it appears from the case that there is a clear right to the lien under the statute and the controversy is whether the lienor has properly proceeded to establish his lien, a liberal construction should be applied." *Fisher v. Reamer*, 146 W.Va. 83, 89, 118 S.E.2d 76, 79 (1961) (quoting *Bailey Lumber Co. v. Gen'l Constr. Co.*, 101 W.Va. 567, 577, 133 S.E. 135, 139 (1926)). The circuit court entered judgment in favor of Glass Bagging in the amount of $165,447.90, awarding both pre-judgment and post-judgment interest, and further ordered that "the escrow fund established in the amount of $165,447.90 be released to Glass Bagging upon the entry of this order, the same shall be a credit against said Judgment."

***3** On September 1, 2015, the Circuit Clerk issued a check distributing the escrow fund to Glass Bagging. That same day, L.A. Pipeline filed an emergency motion to stop payment on the check. By order entered September 2, 2015, the circuit court granted the stay. This appeal followed.

II. Standard of Review

Our review of the circuit court's summary judgment order is plenary. *See* Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed de novo."). Against this standard, the parties' arguments will be considered.

III. Discussion

A. Standing

L.A. Pipeline asserts that the circuit court erred in ruling that it did not have standing to challenge Glass Bagging's mechanic's lien. It relies upon *Harper v. Smith,* 232 W.Va. 655, 753 S.E.2d 612 (2012), wherein this Court held that

> "[s]tanding is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syllabus Point 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

Harper, 232 W.Va. at 655, 753 S.E.2d at 613, syl. pt. 6. Arguing that it has an injury-in-fact, L.A. Pipeline maintains absent Glass Bagging having a valid mechanic's lien, which would have superior priority to L.A. Pipeline's mechanic's lien, [6] L.A. Pipeline would receive the money held in escrow. [7]

[1] Glass Bagging asserts the circuit court correctly ruled that L.A. Pipeline lacks standing to challenge its mechanic's lien because the lien is against Caiman's pipeline. Maintaining that any procedural or substantive arguments challenging the validity of its lien belonged to Caiman, Glass Bagging adds that the validity of its lien had no effect on its breach of contract claim against L.A. Pipeline. Glass Bagging argues that any interest L.A. Pipeline might have in the escrow fund because of its numerous other creditors does not give L.A. Pipeline an injury-in-fact nor standing to challenge Glass Bagging's lien. We agree.

A mechanic's lien is often filed by an entity that is not in privity of contract with the owner whose property has been improved through the work, material, or labor supplied by the mechanic's lienholder. "The basis of any [mechanic's] lien is notice to the owner, by the contractor, or any subcontractor, [or any materialman], that he has furnished material ... in the construction of a ... structure on land." *Kendall v. Martin,* 136 W.Va. 192, 197, 67 S.E.2d 42, 45 (1951). The materialman must provide notice of the mechanic's lien only to the property owner or his designated agent. W.Va. Code § 38–2–11.

The mechanic's lien statutes also provide a procedure through which the owner's property may be sold to satisfy the lien. The property owner may defend against the forced sale of the property by challenging the sufficiency of lien, such as whether the property description set forth therein was sufficient. In *Cordes v. Ralston,* 12 Pa. D. 438 (Pa. Ct. Comm.

Pls. 1903), the court addressed a situation where the property owner did not object to a subcontractor's mechanic's lien; rather, the general contractor attacked the lien for "irregularity and want of formal requirements." *Id.* As the court aptly explained:

> ***4** The [mechanic's] lien merely constitutes an encumbrance upon the owner's real estate, and in no respect touches the contractors. If the owner chooses to submit to the lien, and actually pays it, the contractors will not thereby be concluded. Their right to defend against a suit on the lien, and to prove that "the materials were never furnished for the buildings, or that the charge was excessive, or that the material had been paid for" ... will remain, and if it then appears that nothing is due from them to the sub-contractor, neither the lien nor payment of it by the owner will diminish his accountability to the contractors.

Id. (internal citation omitted). Other courts agree that challenges concerning whether a mechanic's lien meets statutory requirements for such liens belongs to the property owner. *See Williams & Works, Inc. v. Springfield Corp.*, 257 N.W.2d 160, 163 (Mich. Ct. App. 1977) ("Defendant [mortgagee] has no standing to complain of procedural deficiencies of which only the owner of the property can complain."); *Newman v Valmar Elec. Co.*, 801 N.Y.S.2d 731 (N.Y. Sup. Ct. 2005) (finding shareholders in cooperative apartment building lacked standing to challenge mechanic's lien filed against property owner). Moreover, where an owner pays its contractor "any part or all of the contract price[,]" such payment does not "affect, impair or limit the lien of the ... materialman[,]" subject to exceptions that have no application here. W.Va. Code § 38–2–21 (2011 & 2016 Supp.).

As indicated above, L.A. Pipeline asserts that it has standing to challenge the sufficiency of the property description in Glass Bagging's mechanic's lien because upholding the lien's validity would adversely affect the value of L.A. Pipeline's inferior mechanic's lien. Even if we were to agree with that argument, once L.A. Pipeline settled and released its mechanic's lien pursuant to its confidential settlement with Caiman, it simply no longer had a mechanic's lien, inferior or otherwise, that could be adversely impacted by Glass Bagging's superior lien.

Once the escrow fund was established, the fund expressly stood in the place of Caiman's pipeline as security for Glass Bagging's mechanic's lien. While West Virginia Code § 38–2–36 contemplates challenges to the mechanic's lien after an escrow fund is established, Caiman, the property owner, did not assert that Glass Bagging's mechanic's lien was insufficient in any way. Instead, Caiman was dismissed from the litigation following its settlement with L.A. Pipeline.[8] There being no party left in the litigation with standing to challenge Glass Bagging's mechanic's lien, and given the indisputable debt owed to Glass Bagging for the materials that it delivered and which were used by L.A. Pipeline in the construction of Caiman's pipeline, the circuit court correctly ordered the disbursement of the escrow fund to Glass Bagging in satisfaction of its mechanic's lien.

Even if we were to assume, *arguendo*, that L.A. Pipeline had standing to challenge the sufficiency property description in Glass Bagging's mechanic's lien, we find the property description was sufficient for the reasons set forth below.

B. Sufficiency of Property Description

West Virginia Code § 38–2–11 provides that a materialman's mechanic's lien must include "an adequate and ascertainable description of the real estate to be charged[.]" Glass Bagging's mechanic's lien set forth the following property description: "1501 Wheeling Avenue, Glendale, Marshall County, West Virginia including pipeline installed by L.A. Pipeline Construction Co. for Caiman Energy LLC from December 17, 2010 to April 20, 2011 in Marshall County, West Virginia."

***5** Citing *Duncan Box & Lumber Co. v. Stewart*, 126 W.Va. 871, 30 S.E.2d 391 (1944), L.A. Pipeline asserts that Glass Bagging's property description was inadequate to provide sufficient notice of its lien. In *Duncan Box*, this Court refused to uphold a mechanic's lien that listed the correct owner, but the entirely wrong parcel of property. L.A. Pipeline states that the street address in Glass Bagging's lien was not a location where the materials were used in the construction of the pipeline and that the reference to the pipeline in Marshall County was insufficient to provide notice to those who may be interested in the property. L.A. Pipeline argues that Glass Bagging should have provided a metes and bounds description of the pipeline's location.[9]

Noting that substantial compliance with the mechanic's lien statutes is all that is required, and that a liberal construction of the statutory requirements is to be applied given its clear right to the lien, Glass Bagging asserts that its lien contained an adequate and ascertainable description sufficient to provide

notice to the owner and interested persons. Unlike the lien under examination in *Duncan Box*, Glass Bagging points out that its lien did not identify the wrong property and argues that extraneous proof from other documents of record in the courthouse could be used to identify the property. Not knowing precisely where L.A. Pipeline placed the materials that it delivered along the course of the pipeline, Glass Bagging states that it identified the entire pipeline installed by L.A. Pipeline for Caiman in Marshall County during a specific time period. Glass Bagging adds that under West Virginia Code § 38–2–29 (2011),[10] a materialman is not required to name or describe every improvement, lot, or parcel.

As we begin our examination of the property description in Glass Bagging's mechanic's lien, we are mindful of the liberal construction to be applied to our mechanic's lien statutes:

> In perfecting his lien, the claimant of the lien is required to comply only substantially with the pertinent statutory provisions. 'Where there is a clear right to a mechanic's lien under the statute, and the controversy is whether the lienor has properly proceeded to perfect and preserve his lien, a liberal construction should be applied.'.... [W]here it appears from the case that there is a clear right to the lien under the statute and the controversy is whether the lienor has properly proceeded to establish his lien, a liberal construction should be applied.

Fisher, 146 W.Va. at 88, 118 S.E.2d at 79 (internal citations omitted). Indeed,

> [t]he purpose of the mechanics' liens statutes is to protect any person who increases the value of another person's real property by furnishing labor or materials. These statutes are remedial, and, therefore, are to be liberally construed in order that they serve the purpose for which they have been enacted.

Syl. Pt. 2, *Carolina Lumber Co. v. Cunningham*, 156 W.Va. 272, 192 S.E.2d 722 (1972). Moreover, "[m]echanics' lien statutes must be strictly construed with reference to those requirements upon which the right depends and liberally construed with reference to the manner in which the right is perfected." Syl. Pt. 1, *Earp v. Vanderpool,* 160 W.Va. 113, 232 S.E.2d 513 (1976).

***6** **[2]** Unlike the construction of a home, building, or bridge, for example, where a materialman knows precisely where its materials are being used, a pipeline is clearly different, as Glass Bagging has indicated. In fact, we find the reference in Glass Bagging's lien to the pipeline constructed for Caiman in Marshall County is not unlike the property description this Court deemed sufficient in *H.C. Houston Lumber Co. v. Wetzel & T. Ry. Co.*, 69 W.Va. 682, 72 S.E. 786 (1911). In *H.C. Houston Lumber*, the company that furnished material used in the construction of a railway described the property on which its mechanic's lien was claimed as " 'the railway of said corporation situate in the counties of Wetzel and Tyler and extending from the city of Sistersville in Tyler county to the town of Brooklyn in Wetzel county.' " *Id.* at 689, 72 S.E. at 789. Observing the mechanic's lien statute required the property description to be "sufficiently accurate only for identification[,]" this Court found that "[b]ecause of the character of a railway, traversing as it does in this case the streets and roads of a town and county, the notoriety which is necessarily given such a work of internal improvement, the description in this lien is sufficiently accurate we think for identification." *Id.*

In addition, "the fact that [the] description could have been more precise does not take it out of substantial compliance"[11] with West Virginia Code § 38–2–11. As this Court noted in *Duncan Box*, "the aid of extraneous proof for the purpose of identifying the property"[12] is often required. Here, such extraneous proof would likely be helpful. Knowing precisely where it constructed Caiman's pipeline in Marshall County, L.A. Pipeline was able to list numerous pipeline rights-of-way and surface agreements as part of the property description in its mechanic's lien. The appendix record reflects that L.A. Pipeline's lien was placed of record with the Clerk of the County Commission of Marshall County in Lien Book 8, immediately following Glass Bagging's mechanic's lien. These factors in combination reflect that anyone conducting a title search on property traversed by Caiman's pipeline in Marshall County would find these various rights-of-ways and surface agreements and the mechanic's liens filed against Caiman.

Under the particular facts and circumstances of this case, including Glass Bagging's clear right to its mechanic's lien as the result of L.A. Pipeline's failure to remit payment for the materials it supplied and which were used in the construction

of Caiman's pipeline, as well as the liberal construction to be applied to the manner in which the lien was perfected, we find the property description in Glass Bagging's mechanics' lien was adequate.

C. Timeliness

[3] L.A. Pipeline also asserts that Glass Bagging did not timely assert a claim to enforce its mechanic's lien, as contemplated under West Virginia Code § 38–2–34 (2011 & 2016 Supp.). Glass Bagging responds that under West Virginia Code § 38–2–34, a civil action to enforce a mechanic's lien shall "inure to the benefit of all other persons having a lien under this article on the same property." Because its mechanic's lien was already before the circuit court by virtue of L.A. Pipeline's action seeking to marshal and prioritize all liens filed against Caiman's pipeline, Glass Bagging asserts there was no need for it to file a separate action seeking to enforce its mechanic's lien.

This issue of timeliness is not addressed in the summary judgment order being appealed. This is undoubtedly attributable to the fact that L.A. Pipeline stated in its memorandum in support of its summary judgment motion that "[t]he sole issue" for the circuit court to determine is whether "the legal description of the property subject to the lien is sufficient to satisfy the statutory requirements[.]" Because the timeliness issue was not addressed by the circuit court, we decline to consider it. *See* Syl. Pt. 2, *Duquesne Light Co. v. State Tax Dep't.*, 174 W.Va. 506, 327 S.E.2d 683 (1984) (internal citation omitted) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."). [13]

IV. Conclusion

***7** For the reasons set forth above, the August 26, 2015, summary judgment order of the Circuit Court of Marshall County is affirmed. The case is remanded to the circuit court for further proceedings consistent with this memorandum decision.

Affirmed.

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II

All Citations

Not Reported in S.E. Rptr., 2016 WL 6304570

Footnotes

1 L.A. Pipeline states that it is no longer in business; that it is insolvent; and that there are currently millions of dollars in unsatisfied judgments entered against it.

2 On May 2, 2011, Glass Bagging instituted a civil action against L.A. Pipeline (No. 11–C–70) asserting claims for breach of contract and unjust enrichment. Caiman was also named as a defendant in that action. On March 15, 2012, Glass Bagging filed a second civil action (No. 12–C–47) against L.A. Pipeline titled "Complaint to Determine Creditors' Claim." Although these two civil actions, as well as L.A. Pipeline's action, appear on the circuit court's order granting summary judgment in favor of Glass Bagging, it is unclear whether these actions were ever formally consolidated by the circuit court. *See*, in part, W.Va.R.Civ.P. 42(a) ("When actions involving a common question of law or fact are pending before the court ... it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.").

3 Upon the circuit court accepting payment by way of a check from United Bank made payable to the Clerk of the Circuit Court of Marshall County, the escrow fund in the amount of $165,477.90 was established.

4 This order was subsequently amended by an order entered *nunc pro tunc* on September 17, 2012, to order the recording of a release of Glass Bagging's Notice of Mechanic's Lien, which was also of record in the office of the Clerk of the County Commission of Marshall County.

5 L.A. Pipeline also challenges the circuit court's ruling that Glass Bagging's now-discharged mechanic's lien "was and should henceforth be considered to be valid" so as to "uphold the principles of equitable resolution and prevent[ ] unjust enrichment[.]"

6 Under West Virginia Code § 38–2–18 (2011), a materialman's mechanic's lien is superior in priority to a contractor's mechanic's lien.

7 L.A. Pipeline notes that its receipt of the escrow fund would be subject to its secured lien creditor, United Bank.

8 Pursuant to the circuit court's order entered March 5, 2012, L.A. Pipeline's claims against Caiman were dismissed, with prejudice, and Caiman's counter-claim and cross-claims were also dismissed, with prejudice.

9 Although L.A. Pipeline states that it provided a metes and bounds description in its own mechanic's lien, what it actually provided was a list of various rights-of-way and surface agreements, which, if located and examined, would presumably include metes and bounds descriptions.

10 West Virginia Code § 38–2–29 provides, in part, that "it shall not be necessary for such lienor to give and record a notice as to each separate building or structure or improvement thereto."

11 *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 684 P.2d 322, 325 (Idaho Ct. App. 1984).

12 *Duncan Box*, 126 W.Va. at 873, 20 S.E.2d at 392.

13 Having found in favor of Glass Bagging on the validity of its statutory mechanic's lien, we need not address whether the circuit court correctly found that Glass Bagging also had an equitable lien.

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Exhibit 2

CONSTRUCTION SUBCONTRACT

Subcontract Number: **2018-01-15**

Subcontractor: Mersino
Address: 10162 East Coldwater Road
Davison, MI 48423
Contact: Marco Mersino
marco@mersino.com
810-658-3472 cell: 386-566-3356

Work Locations: Marshall and Wetzel Counties, WV

Yard Address: 1307 Wheeling Avenue, Glen Dale, WV 26038

This subcontract is effective as of the 16th day of August 2018, by and between **Welded Construction, L.P.**, a Delaware Limited Partnership (CONTRACTOR) and the above-named SUBCONTRACTOR (the "Parties"). The Parties hereby agree that all Work specified below shall be performed by the SUBCONTRACTOR understanding that CONTRACTOR is committed to safety, health and the protection of the environment as core values reflected in all aspects of its operations. SUBCONTRACTOR shall perform all activities in accordance with these principles and all provisions of this Subcontract Agreement that consists of this Subcontract Agreement, the following documents and the attachments, appendices, drawings, specifications, documents and exhibits specified therein and hereby incorporated herein (Subcontract):

Subcontract Form of Agreement

Exhibit "A" – Labor and Equipment Rates – Extra Work
Exhibit "B" – Administrative Forms
Exhibit "C" – Insurance Requirements
Exhibit "D" – Additional Insured
Exhibit "E" – Baseline Schedule
Exhibit "F" – Subcontractor Proposal
Exhibit "G" – General Terms & Conditions
Exhibit "H" – Safety Requirements
Exhibit "I" – Columbia Pipeline Group Environmental Construction Standards – West Virginia; Rev. Feb. 2018
Exhibit "J"– Columbia Pipeline Group Pipeline Construction Standard CS.220.001 (6/21/2016)
Exhibit "K" – Minimum Requirements for Pipeline Construction In Close Proximity To High Voltage A.C. Overhead Electric Power Lines (Procedure No. 70.002.055)
Exhibit "L" – Steep Slope Procedures (Welded and TransCanada)
Exhibit "M" - MXP Spread 1 Construction Stipulations.as of 3-30-18 (Line List)

A. **WORK TO BE PERFORMED (Work):** Except as specified elsewhere in the subcontract, SUBCONTRACTOR shall furnish all project; union labor; materials; tools; supplies; equipment; transportation (other than stipulated in this article); supervision; technical, professional and other services; and shall perform all operations necessary and required to satisfactorily perform the following:

- Subcontractor will provide temporary pumping services for the creek diversion for Fish Creek on the Mountaineer Express Pipe project.

- MERSINO will supply the contractor a bypass pumping system capable of delivering approximate flows up to 55,000 gpm. Each pump will pull from the river upstream of the temporary dam and open discharge back into the river downstream. Pumps will be set into the river and will be required to discharge up a bank then parallel to the river 250 LF and back down the bank into the river.

- The bypass pumping system will consist of multiple hydraulic submersible pumps to deliver the required flows of 55,000 gpm. This will be accomplished by utilizing 4 – 18" hydraulic submersibles each capable of 9,000 gpm, and 1 – 24" hydraulic submersible capable of 21,000 gpm.
  Mersino has also included pricing to supply and install two temporary Hydro-Dam (8' Tall X50' Long) to dam f lows from in front and behind of the excavation area. Hydro-dam shall be able to bulkhead up to 6' maximum height.

- Mersino will provide an installation crew to fuse the HDPE discharge piping, set and plumb pumps for this pumping system. Additionally, upon completion of the bypass pumping portion of the project Mersino will provide a teardown crew to deconstruct the pumping system so that it may be loaded on trucks for demobilization. Should project delays occur due to weather conditions pumping equipment shall be provided at stand-by rates, however installation/ removal and pump watch rates shall remain the same.

SUBCONTRACTOR will be responsible for the following work:

- Assistance with the development of standard submittals required of the contractor by the engineer for the bypass pumping on the project
- Delivery of the bypass pumping equipment to Welded lay down yard
  Operators required for the installation of the bypass pumping system
- Fusion machine for installation
- Equipment required for the operation of the bypass pumping, including the pumps, power packs, discharge piping, isolation valves, spill containment berms, etc.
- Blocking/ bulkheading of the creek to provide sufficient submergence for the pumps
- 24 Hour pump watch as required
- Preventative maintenance of the pumps for duration of project (checking of levels, oil changes, etc.) – Will be provided if pump watch option is chosen
- Operators required for the breakdown and removal of the bypass pumping system upon completion
- Demobilization of equipment upon completion

CONTRACTOR will be responsible for the following:

- The return of this rental agreement signed by an authorized representative of the Contractor, along with a letter of Commencement' or a copy of the performance bond
- All applicable sales and use taxes
- Delivery of equipment from Welded yard to the site
- All fuel and fueling operations required for the bypass pumping systems
- Loaders, excavators and operators to assist in placement/ removal of pumps to/from the creek and placement/removal of the temporary dam
- Clearing of boulders and other debris from the temporary dam placement area to ensure good seal
- Unrestricted access to the jobsite for installation/ removal purposes
- Any and all permits required
- Assistance in unloading/loading of equipment on trucks
- All site restoration required as a result of the use of the pumping equipment
  Subcontractor shall perform the work in accordance with Columbia Gas Pipeline Construction Specifications CS.220.001 (Effective 6/21/16).
- Subcontractor shall be solely responsible, and shall reimburse Contractor if necessary, for any expenses incurred to relocate or replace any protected property corners, line monuments, survey markers, or government benchmarks that have been damaged or destroyed by Subcontractor, its agents, or employees.
- Subcontractor shall police the ROW to remove and dispose of all construction related trash and debris in a manner acceptable to inspection.
- Subcontractor shall furnish and require all employees to wear and visibly display identification badges at all times while they are on the job and they relate to the project. Photos are not required; however, each worker must be able to provide a photo style identification upon Company request.
- Subcontractor shall provide and maintain a written plan, approved by CONTRACTOR, identifying their DOT Operator Qualification program that meets the requirements of 49 CFR, Part 192,

subpart N. Subcontractor shall use only qualified employees to perform covered tasks and will immediately provide Contractor with documentation of any modifications that are made in their written plan or their employees qualification to perform covered tasks.

- Company will provide an on-site inspection team. Members of this team will have a stop-work authority, and will be responsible for insuring Contractor/Subcontractor compliance on the project.
- Subcontractor shall comply with all OSHA Standards and all applicable State and Local Laws and Regulations.
- In the event Company/Contractor identifies any property corners or line monuments, or government benchmarks that are to be protected. Subcontractor shall reimburse contractor for any expenses incurred by Contractor in relocating or replacing same which have been damaged or destroyed by Subcontractor, its agents, or employees.
- Care should be taken to avoid spills and other types of pollution while work is being performed in streams and other bodies of water and in their immediate drainage areas.
- Where navigable rivers or other streams under the jurisdiction of any governmental agency are crossed, construction shall conform to any code, specifications or special requirement of such agencies.
- Project requires hard hats in compliance with ANSIZ89.1 type II with side impact protection.
- Subcontractor shall provide daily reports to Contractor by 10 am for the previous day's work.
- Subcontractor shall attend progress meetings as required throughout the term of this agreement.

See attached Exhibit F Subcontractor's proposal dated Friday 13th day of July 2018 for pricing.

The Work is a portion of the goods and services to be provided by CONTRACTOR to Columbia Gas Transmission, LLC (OWNER) for **Spread 1** of the **Mountaineer Express Pipeline Project in Marshall and Wetzel Counties in West Virginia.**

B. **SCHEDULE:** The Work shall be performed in accordance with the dates set forth in the Exhibit "E".

In accordance with Exhibit E- Subcontractor will operate ten (10) hours a day six (6) days a week, any overtime hours worked must be approved by the Contractor's Project Superintendent and Project Manager.

C. **COMPENSATION:** As full consideration for the satisfactory performance by SUBCONTRACTOR of this subcontract, CONTRACTOR shall pay to SUBCONTRACTOR compensation in accordance with the prices set forth in Exhibits "A", "F" and with the payment provisions of this subcontract (Exhibit G).
The estimated value of this subcontract is: **$298,380.00, (Two-hundred, ninety-eight thousand, three hundred, eighty and 00.00**
Payment terms NET 30 days after approved invoice
Retainage – 0%

Exhibit F – Subcontractor Proposal is attached as reference for clarifications and assumptions of the work to be performed.

This subcontract embodies the entire agreement between CONTRACTOR and SUBCONTRACTOR and supersedes all other writings. The parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding not set forth herein.

CONTRACTOR:	SUBCONTRACTOR:
Welded Construction, L.P.	**Mersino Dewatering, Inc.**
Authorized Signature:	Authorized Signature:
Print Name: Mett S. Carroll	Print Name: Gino Mersino
Print Title: Project Manager	Print Title: President

38-3267850

(Federal Tax Payer I.D. Number)

Exhibit 3

Office of Energy Projects

February 2017

FERC/DEIS-0275

DRAFT ENVIRONMENTAL IMPACT STATEMENT

FOR

Columbia Gas Transmission, LLC – Mountaineer XPress Project
Columbia Gulf Transmission, LLC – Gulf XPress Project

Volume I

Docket Nos. CP16-357-000 and CP16-361-000



Federal Energy Regulatory Commission
Office of Energy Projects
888 First Street, NE, Washington, DC 20426

Cooperating Agencies:

U.S. Environmental Protection Agency

U.S. Army Corps of Engineers

West Virginia Division of Natural Resources

West Virginia Department of Environmental Protection

Table 4.3-7
Impaired Waterbodies within the Proposed MXP Workspace

Project Facility/ County a/	Milepost	Stream ID b/	Waterbody Name	Proposed Crossing Method c/	Cause of Impairment d/
MXP-100 Mainline					
Marshall	7.1	smac035	Fish Creek	Dry	Biological
Wetzel	16.9	swzg012c	Rush Run	Dry	Fecal coliform/bacteria
	18.3	swzf014	Little Fishing Creek	Dry	Biological, fecal coliform/bacteria, iron
	24.5	swzg065	Fishing Creek	Dry	Fecal coliform/bacteria, iron
Tyler	34.9	styh001	Indian Creek	Dry	Biological, fecal coliform/bacteria
Doddridge	38.4	sdoi011	McElroy Creek	Dry	Biological, fecal coliform/bacteria, iron
	44.0	sdoc005a	Flint Run	Dry	Fecal coliform/bacteria
	48.7	sdoc020	Buckeye Creek	Dry	Fecal coliform/bacteria
	50.5 e/	sdoh026	Meathouse Fork	Dry	Biological, fecal coliform/bacteria, iron
	51.8	sdog002	Meathouse Fork	Dry	Biological, fecal coliform/bacteria, iron
	54.3	sdog202	Bluestone Creek	Dry	Fecal coliform/bacteria
	56.9	sdoo302	Left Fork Arnold Creek	Open Cut/Wet Trench	Fecal coliform/bacteria
	59.6	sdog014	South Fork Hughes River	Dry	Biological
Ritchie	65.4	srig022	Middle Fork	Dry	Biological
	72.2	sric044	South Fork Hughes River	Dry	Biological
	72.5	sric043	South Fork Hughes River	Dry	Biological
	76.9	sric012	South Fork Hughes River	Dry	Biological
Wirt	87.5	swif053	Straight Creek	Dry	Biological
	94.8	swif001	Little Kanawha River	Dry	Fecal coliform/bacteria, iron
	96.5	swih010	Spring Creek	Dry	Biological, iron
	96.9	swih012	Spring Creek	Dry	Biological, iron
	97.3	swih014	Spring Creek	Dry	Biological, iron
Roane	102.8	sroc030	Left Fork Reedy Creek	Dry	Biological
	108.8 f/	srog021	Buffalo Creek	Open Cut/Wet Trench	Fecal coliform/bacteria
Jackson	113.3 f/	sjaa025b	Little Mill Creek	Dry	Biological, fecal coliform/bacteria, iron
	115.2	sjaa014	Frozencamp Creek	Dry	Biological, fecal coliform/bacteria, iron

Case 19-50274-CSS Doc 30-3 Filed 06/15/20 Page 3 of 5

Table 4.3-7
Impaired Waterbodies within the Proposed MXP Workspace

Project Facility/ County a/	Milepost	Stream ID b/	Waterbody Name	Proposed Crossing Method c/	Cause of Impairment d/
Access Roads Along the MXP-100					
Marshall					
ARMA007	7.0	smac035	Fish Creek	New culvert	Biological
ARMA008.4	11.0	sami035	Bark Camp Run	New culvert	Biological
Wetzel					
ARWZ017	28.8	swzf319	Buffalo Run	Existing culvert	Biological, fecal coliform/bacteria, iron
ARWZ020	30.1	swzf318	Buffalo Run	Existing culvert	Biological, fecal coliform/bacteria, iron
Tyler					
ARTY002.1	34.9	styf402	Indian Creek	New culvert	Biological, fecal coliform/bacteria
Doddridge					
ARDO003	44.0	sdog369	Flint Run	New culvert	Fecal coliform/bacteria
ARDO009.3	54.5	sdoi204	Bluestone Creek	New culvert	Fecal coliform/bacteria
	54.5	sdoi204	Bluestone Creek	New culvert	Fecal coliform/bacteria
ARDO011	56.2	sdoo313	Left Fork/Arnold Creek	Existing culvert	Fecal coliform/bacteria
Ritchie					
ARRI008	74.9	srif303	Lick Run	New culvert	Fecal coliform/bacteria, iron
	74.9	srif303	Lick Run	New culvert	Fecal coliform/bacteria, iron
Wirt					
ARWI019.6	95.2	NHD	Spring Creek	New culvert	Biological, iron
Roane					
ARRO002	102.8	sroc030	Left Fork Reedy Creek	New culvert	Biological
Jackson					
ARJA001	112.1	sjaf307	Buffalo Creek	New culvert	Biological, fecal coliform/bacteria
ARJA007.9	129.3	sjac001	Thirteenmile Creek	Existing culvert	Fecal coliform/bacteria, iron
Putnam					
ARPU007	136.0	spuk377	Spring Valley Branch	Existing culvert	Iron
ARPU008.1	137.4	spuk357	Spring Valley Branch	New culvert	Iron

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Table 4.6-3
High Quality Waters Crossed by the MXP Centerline

County a/	Waterbody Name	MP	Flow Type	Crossing Method
MXP-100				
Marshall	Fish Creek	7.1	Perennial	Dry-ditch
Wetzel	Little Fishing Creek	18.3	Perennial	Dry-ditch
	Fishing Creek	24.5	Perennial	Dry-ditch
Tyler	Indian Creek	34.9	Perennial	Dry-ditch
Doddridge	McElroy Creek	34.4	Perennial	Dry-ditch
	Flint Run	44.0	Perennial	Dry-ditch
	Buckeye Creek	48.7	Perennial	Dry-ditch
	Meathouse Fork b/	50.5	Perennial	Dry-ditch
	Meathouse Fork b/	51.8	Perennial	Dry-ditch
	Bluestone Creek	54.3	Perennial	NA c/
	South Fork Hughes River	59.6	Perennial	Dry-ditch
Ritchie	South Fork Hughes River	67.3	Perennial	Dry-ditch
	Slab Creek	71.4	Perennial	Dry-ditch
	South Fork Hughes River	72.2	Perennial	Dry-ditch
	South Fork Hughes River	72.5	Perennial	Dry-ditch
	South Fork Hughes River	76.9	Perennial	Dry-ditch
	Leatherbark Creek	78.9	Perennial	Dry-ditch
Wirt	Straight Creek	87.5	Perennial	Dry-ditch
	Little Kanawha River	94.8	Perennial	Dry-ditch
	Spring Creek	96.5	Perennial	Dry-ditch
	Spring Creek	96.9	Perennial	Dry-ditch
	Spring Creek	97.3	Perennial	Dry-ditch
Roane	Middle Fork Reedy Creek	104.5	Perennial	Dry-ditch
Jackson	Little Mill Creek	113.3	Perennial	Dry-ditch
	Elk Fork	118.6	Perennial	Dry-ditch
	Tug Fork	121.8	Perennial	Dry-ditch
	Thirteenmile Creek	129.3	Intermittent	Open-cut/wet trench
Putnam	Eighteenmile Creek	138.4	Perennial	Dry-ditch
	Eighteenmile Creek	138.9	Perennial	Dry-ditch
	Eighteenmile Creek	140.0	Perennial	Dry-ditch
	Kanawha River	147.0	Perennial	HDD
	Five and Twenty Mile Creek	152.4	Intermittent	Open-cut/wet trench
Cabell	Mud River	163.4	Perennial	Dry-ditch
MXP-200				
Doddridge	Meathouse Fork	1.1	Perennial	Dry-ditch
	Toms Fork	3.7	Perennial	Dry-ditch
	Meathouse Fork	5.9	Perennial	Dry-ditch
	Meathouse Fork - Back Channel	5.8	Ephemeral	Open-cut/wet trench

a No HQWs are within the Sherwood Compressor Station or within the SM80 Line or SM80 Loop Line Replacement workspaces.

b Meathouse Fork would be crossed by the MXP-100 pipeline inbound into Sherwood Compressor and Regulator Station, MXP-100 outbound from the station, and MXP-200 outbound from the station. All three crossings would be installed concurrently and are therefore counted as 1 crossing.

c Waterbody is within the construction workspace but not crossed by the pipeline centerline.

Exhibit 4

2020 WL 598321
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Appeals of West Virginia.

Naomi June HUTCHINSON,
Plaintiff Below, Petitioner,
v.
Shirley L. GILLES, Defendant Below, Respondent

No. 18-0644
|
FILED February 7, 2020

(Nicholas County 16-C-69)

MEMORANDUM DECISION

***1** Petitioner Naomi June Hutchinson, by counsel Thomas K. Fast, appeals the Circuit Court of Nicholas County's June 15, 2018, order granting, in part, her motion for summary judgment. Respondent Shirley L. Gilles made no appearance before the Court. On appeal, petitioner argues that the circuit court erred in failing to order specific performance of the terms of a contract between the parties and, instead, ordering respondent to repay the loan amount specified in the contract, in addition to costs and interest.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In May of 2016, petitioner filed a complaint against respondent for breach of contract. According to the complaint, the parties entered into a contract in April of 2015 whereby petitioner would loan respondent $1,365.02 in order for respondent to redeem certain parcels of land that had been sold at a tax auction. Per the contract, if respondent did not repay the loan by June 30, 2015, she would deed the subject property to petitioner by July 15, 2015. It is undisputed that respondent did not repay the loan in the timeframe provided. However, respondent filed an answer to petitioner's complaint in which she asserted as an affirmative defense that petitioner rejected a payment of $1,365.02 on or about August 22, 2015, because petitioner "preferred to be paid by certified check rather than cash." Thereafter, petitioner moved for summary judgment, and respondent did not file a response. The circuit court, however, instructed petitioner to "submit a memorandum in regard to what, if any, effect an offer of payment made after a contractual deadline has on these proceedings."

Ultimately, the circuit court granted summary judgment for petitioner, but refused to require respondent to deed the subject property to petitioner. Instead, the circuit court found that the contract at issue "contains an unenforceable penalty" due to the fact that petitioner's damages are certain, yet the contract required respondent to deed petitioner approximately $50,000 worth of land due to her failure to repay the loan amount—a penalty that "is more than [thirty-five] times the value of the actual damages" to petitioner. Because the parties agreed that a loan was made and never paid back, the circuit court found there was no remaining question of material fact and entered an order directing that respondent pay petitioner damages in the amount of $1,365.02, plus court costs and post-judgment interest at a rate of four-and-a-half percent. It is from this order that petitioner appeals.

***2** "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Further, in regard to contracts, we note that petitioner is correct that, generally, this Court has found that

> "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syllabus Point 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962).

Syl. Pt. 1, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005). Indeed, "[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Id.* at 35, 217 S.E.2d at 682, syl. pt. 3. However, petitioner fails to acknowledge that "[f]orfeitures are not favored by equity. They are heavy and harsh and will not be declared or enforced unless justice clearly demands it." *Hill v. Vencill*,

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90 W. Va. 136, 144, 111 S.E. 478, 481 (1922) (citations omitted); *see also* syl. pt. 8, *Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 737 S.E.2d 640 (2012) ("Equity will not enforce a forfeiture.") (citations omitted). As this Court has explained, "[t]he term 'forfeiture' is defined ... as '[t]he loss of a right, a privilege, or property because of a crime, *breach of obligation*, or neglect of duty.' " *Id.* at 328, 737 S.E.2d at 662 (quoting Black's Law Dictionary 661 (7th ed. 1999)) (emphasis added). Additionally, "[p]rovisions of a contract, effecting a forfeiture or exacting a penalty, are strictly construed against the party for whose benefit they were incorporated in the instrument." *Wellington*, 217 W. Va. at 41, 614 S.E.2d at 688 (citation omitted). With these principles in mind, we turn to the specifics of the matter on appeal.

Here, petitioner contends that she is entitled to the subject property because of respondent's breach of her contractual obligation and demands the equitable remedy of specific performance. We find, however, that not only does equity not support respondent's forfeiture of the property, but that petitioner's interpretation of the contract mischaracterizes the plain terms contained therein. The explicit language of the contract clearly and unambiguously provided that petitioner would loan respondent $1,365.02 and respondent would be required to repay that loan by June 30, 2015. The fact that the contract also contained an additional clause penalizing respondent for a breach of these terms in the form of the deeding of the subject property to petitioner does not transform this loan agreement into a contract for property, as petitioner argues on appeal. In her brief, petitioner urges this court to apply the following law as determinative of the matter:

> Where a contract respecting real property is, in its nature and circumstances, unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it. And generally courts of equity will decree a specific performance when the contract is in writing and is certain and is fair in all its parts, and is for an adequate consideration and is capable of being performed, but not otherwise.

***3** Syl. Pt. 3, *Abbott v. L'Hommedieu*, 10 W. Va. 677 (1877). While *Abbott* concerns a contract for the sale of real property, petitioner fails to recognize that the contract at issue here is simply for a loan between the parties. In ruling on petitioner's motion for summary judgment, the circuit court identified the clause regarding the transfer of property in the event of a breach and correctly ruled that "it contains an unenforceable penalty." We agree.

On appeal, petitioner argues that the circuit court's finding in this regard is erroneous [1] because it failed to recognize that "but for the graces of the [petitioner] in loaning the [respondent] the money in the first place, the [respondent] would have forever lost her property to the hands of the tax lien purchaser." As such, petitioner asserts that requiring respondent to deed her the property results in a situation in which respondent "would be no worse off than she would have been had she lost her property" at auction. Based on this reasoning, petitioner argues that "[i]t matters not what the assessed value of the property is" because "[i]t is not a penalty when the breaching party is no worse off than she would have been without the agreement." This is not an accurate summation of the equitable principles at issue here, however, and we find that petitioner's argument is without merit. In short, petitioner seeks the specific performance of an unenforceable penalty clause that would result in her obtaining property valued at over thirty-five times her actual damages. Such forfeiture here is unenforceable, especially in light of the fact that respondent sought to satisfy her responsibility under the contract by reimbursing the money owed, albeit approximately seven weeks beyond the timeframe specified by the parties.

As noted above, the circuit court directed petitioner to file an additional memorandum regarding respondent's tender of the money due under the contract. While petitioner's memorandum concluded that this attempt had no effect on the outcome of the proceedings, we disagree. In that memorandum, petitioner argued that, although the contract did not explicitly state that time was of the essence, "the intention of the parties could not be more clear." Citing the language that she was "to be paid in full ... by June 30, 2015," petitioner concluded that the parties obviously agreed that time was of the essence. We note, however, that "[i]f the parties would make time of the essence, they should so stipulate in the contract." Syl. Pt. 1, in part, *Malone v. Schaffer*, 178 W. Va. 637, 363 S.E.2d 523 (1987). Further,

> ***4** "[i]f the parties also provide that time is of the essence, in those or equivalent words, they effectively agree that a breach of that promise is material or, in other words, that timely performance is in effect an express condition precedent to the promisee's duty to render the counterperformance under the contract."

Waddy v. Riggleman, 216 W. Va. 250, 265, 606 S.E.2d 222, 237 (2004) (quoting 15 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 46:3, at 399-400 (4th ed. 2004)). The record is clear that the parties did not include language in their contract that time was of the essence, or any equivalent language. Further, while it is true that "[i]n determining whether time is of the essence of a contract the intention of the parties is the paramount consideration and such intention may be manifested either by the language of the contract or by the actions of the parties," we disagree with petitioner's assertion that the parties' intention was clear. Syl. Pt. 2, *Creasy v. Tincher*, 154 W. Va. 18, 173 S.E.2d 332 (1970). On the contrary, petitioner has failed to show how performance within the timeframe set forth in the contract was in any way material, beyond her assertion that it gave rise to her right to have the property at issue deeded to her. Accordingly, the circuit court was correct in finding that there was no remaining question of material fact, given that petitioner's damages were evident from the terms of the agreement. *See* Syl. Pt. 1, *Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of W. Va.*, 200 W. Va. 685, 490 S.E.2d 772 (1997) ("A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.") (citation omitted). As such, under the limited facts of this specific case, we find no error in the circuit court's ruling below.

For the foregoing reasons, we affirm.

Affirmed.

CONCURRED IN BY:

Chief Justice Tim Armstead

Justice Elizabeth D. Walker

Justice Evan H. Jenkins

Justice John A. Hutchison

DISQUALIFIED:

Justice Margaret L. Workman

All Citations

Not Reported in S.E. Rptr., 2020 WL 598321

Footnotes

1 Specifically, petitioner argues that "[t]he [c]ircuit [c]ourt erred in imputing a theory of law, liquidated damages, that was neither contained in the written agreement, nor sought in the complaint." While it is true that the circuit court based its decision on the theory of liquidated damages, we note that " '[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.' " *Old Republic Ins. Co. v. O'Neal*, 237 W. Va. 512, 525, 788 S.E.2d 40, 53 (2016) (citations omitted). Accordingly, given the Court's analysis as set forth above, it is unnecessary to resolve the question of whether the circuit court's application of the theory of liquidated damages was appropriate and we decline to do so.

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CERTIFICATE OF SERVICE

I, Gregory J. Flasser, hereby certify that on this 15th day of June 2020, I caused copies of **Reply Brief to Earth Pipeline Services and Columbia Gas Transmission LCC's Objections to Mersino Dewatering's Motion to Intervene** to be served on the parties listed via email and/or first class mail.

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