STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: July 23, 2024)

ELEMENT5, L.P.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. WM-2024-0144**
	:	
BAYBERRY HILL, LLC	:	
F/K/A TURTLE SWAMP, LLC	:	
	:	
Defendant.	:	

DECISION

LICHT, J. Plaintiff Element5, L.P. ("Element5") filed a complaint to enforce its mechanics' lien pursuant to the Rhode Island Mechanics' Lien Statute, G.L. 1956 chapter 28 of title 34, against Defendant Bayberry Hill, LLC f/k/a Turtle Swamp, LLC ("Bayberry"). Bayberry filed a motion seeking to dismiss a portion of Element5's mechanics' lien. Procedurally, the instant motion is framed as a Motion for Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. Element5 objected to Bayberry's motion. For the reasons stated herein, Bayberry's Motion for Summary Judgment is denied.

I

Facts and Travel

Element5 filed a mechanics' lien claim against Bayberry, the owner of property located at 1747 Corn Neck Road, New Shoreham, Rhode Island (the "Property"), due to an alleged lack of payment by Bayberry's general contractor, BLDGWorks, Inc. ("BLDGWorks"). Bayberry filed a petition, pursuant to § 34-28-17.1, requesting this Court to invalidate Element5's mechanics' lien

for $221,859.15 and declare that Element5 has perfected a mechanics' lien only in the amount of $488.25.

By way of background, Element5 is a material supplier and "is in the business of designing, developing, and implementing innovative solutions for mass timber structural systems for modern buildings." Pl.'s Opp'n to Def.'s Pet. to Discharge Lien (Pl.'s Opp'n) Ex. 1 (Chris Latour Aff.), ¶ 3. Bayberry is the project owner of the new residential construction project (the "Project") on the Property. *See* Stipulated Facts ¶ 2.

On or about September 28, 2022, Element5 entered into a subcontract with BLDGWorks, a non-party to this dispute, to provide the Project with custom materials. *See* Stipulated Facts ¶ 3. In particular, Element5 was to provide a "bespoke structural system consisting of glulam columns and glulam beams for the framing, cross-laminated timber (CLT) panels for the floor, roof, interior walls, and exterior walls, and the assemblies and connections for timber to timber and timber to steel (the "System")." Chris Latour Aff. ¶ 5. BLDGWorks and Element5 agreed that Element5 would deliver the materials outlined in the subcontract to a warehouse, Offshore Express, Inc. ("Offshore Express"), located in Peacedale, Rhode Island on July 20, 2023. *See* Stipulated Facts ¶ 4.[1] On July 20, 2023, Element5 timely performed its delivery of materials to Offshore Express; however, the delivery did not include approximately 43.8 pounds of screws manufactured by Rothoblaas USA, Inc. ("Rothoblaas"). *See id*. ¶ 5. On July 25, 2023, Element5 delivered the Rothoblaas screws by FedEx to the Property. *See id*. ¶ 6. Thereafter, starting on August 17, 2023

[1] The stipulated facts submitted by the parties indicate that the dates of delivery occurred in 2024. *See generally* Stipulated Facts. However, the parties' arguments and memoranda correctly reflect that the dates of delivery occurred in 2023. Accordingly, this Court will reflect the accurate year of 2023 throughout its Decision.

through August 30, 2023, the parts originally delivered to Offshore Express were delivered to the Property. *See* Chris Latour Aff. ¶ 8.

In total with change orders, the subcontract price amounted to $474,140. *See* Stipulated Facts ¶ 7. Bayberry paid the full amount of the subcontract price to BLDGWorks and BLDGWorks attempted to pay the full amount to Element5. *See id*. ¶ 8. Yet, $221,859.15 worth of these payments were intercepted by a third-party hacker and were not received by Element5. *See id*. ¶ 9. As such, on February 9, 2024, Element5 mailed its Notice of Intention to do Work or Furnish Materials ("Notice of Intention") to claim a mechanics' lien on the Property for the unpaid amount of $221,859.15. *See id*. ¶ 11. On the same day, the Notice of Intention was filed and recorded in the Records of Land Evidence in the Town of New Shoreham, Rhode Island. *See id*. Subsequently, Element5 recorded its Notice of *Lis Pendens* on March 19, 2024, and filed its Complaint on March 20, 2024. *See id*. ¶¶ 12, 13. On May 30, 2024, this Court held a show cause hearing to determine whether Element5 timely filed its Notice of Intention to perfect its mechanics' lien. Following the hearing, this Court permitted the parties to submit supplemental memoranda to address how the word "furnish" should be interpreted pursuant to § 34-28-4.

II

Standard of Review

Section 34-28-17.1(a) "grants the owner or contractor a '*prompt* post-deprivation hearing' in the form of an 'expedited show-cause proceeding' to determine whether there is a probability of judgment in favor of the lienor." *Alpha Omega Construction, Inc. v. Proprietors of Swan Point Cemetery*, 962 A.2d 733, 738 (R.I. 2008) (quoting *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 811 (R.I. 2005)). "[A]ny person in interest" may seek a show-cause proceeding if, *inter alia*,

> "a notice or other instrument has not been filed or recorded in accordance with the applicable provisions of § 34-28-1 et seq.; or . . . that for any other reason a claimed lien is invalid by reason or failure to comply with the provisions of § 34-28-1 et seq., then in such event, such person may apply forthwith to the superior court for the county where the land lies for an order to show cause why the lien in question is invalid, or otherwise void, or the basis of the lien is without probability of a judgment rendered in favor of the lienor." Section 34-28-17.1(a).

Section 34-28-17.1(a) thereby gives persons of interest "the opportunity to challenge the claimed lien on a number of grounds, including its substantive invalidity, or for some other procedural defect under the statute." *Gem Plumbing & Heating Co*, 867 A.2d at 812.

The procedure set forth in § 34-28-17.1 is similar to a motion for summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. *See A. Salvati Masonry, Inc. v. Andreozzi*, No. KM20131278, 2014 WL 7232077, *2 (R.I. Super. Dec. 12, 2014). Accordingly, if the moving party can demonstrate through affidavits or other evidentiary material that there are no genuine issues of material fact, then this Court may enter judgment upon the undisputed facts. *See id*. However, if it appears that there are genuine issues of material fact, the case cannot be concluded pretrial. *See id*.

III

Analysis

The Rhode Island Mechanics' Lien Statute allows those who have supplied labor, materials, equipment, or services for the benefit of property to obtain a lien against it. *See* § 34-28-1. To establish a valid mechanics' lien, Element5 must comply with the requirements outlined in § 34-28-4. In sum, § 34-28-4 mandates that any lien filed under §§ 34-28-1, 34-28-2, or 34-28-3 will be void and invalid unless, before or within 200 days after the doing of such work or the furnishing of such materials, the petitioner mails to the owner of record, by prepaid registered or

certified mail, return receipt requested, a Notice of Intention to do Work or Furnish Materials, or Both. *See* § 34-28-4.

The issue before this Court is when did the 200-day window for filing a Notice of Intention commence. Bayberry asserts that the statutory period began when the materials were delivered to Offshore Express on July 20, 2023, whereas Element5 counters by saying the clock started when the materials were delivered to the Property starting on July 25, 2023.[2] *See* Def.'s Mem. in Supp. of Dismissal of Element5, L.P.'s Mechanic's Lien Claim ("Def.'s Mem."), at 6. Notably, this case would have been straightforward if it had arisen prior to 1965, as the Mechanics' Lien Statute provided that the statutory period commenced "after such materials [were] placed upon the land." Section 34-28-5. However, in 1965, the General Assembly reenacted the Mechanics' Lien Statute and, among other things, changed the language from "after such materials [were] placed upon the land" to "the furnishing of such materials." Therefore, the resolution of this issue hinges on the interpretation of the term "furnish" set forth in § 34-28-4.

Bayberry submits that the first shipment of materials delivered by Element5 to Offshore Express on July 20, 2023 were untimely, as they were delivered more than 200 days before Element5's Notice of Intention was mailed and recorded. *See* Def.'s Mem. at 6. To substantiate its argument, Bayberry points to the plain meaning of the term "furnish" and highlights the General Assembly's intentional act of removing the statutory requirement that the materials be "placed upon the land." *See* Def.'s Suppl. Mem. in Supp. of Dismissal of Element5, L.P.'s Mechanic's Lien Claim ("Def.'s Suppl. Mem."), at 2-3.

[2] Bayberry concedes that the Rothoblaas screws that were delivered to the Property by FedEx on July 25, 2023 were furnished within the statutory 200-day window. *See* Def.'s Mem. in Supp. of Dismissal of Element5, L.P.'s Mechanic's Lien Claim ("Def.'s Mem."), at 4. Therefore, the lien at least exists as to the Rothoblaas screws in the amount of $488.25. However, the parties disagree as to the total amount of the mechanics' lien, and the Court will discuss that issue below.

Bayberry's citation to Merriam-Webster Online Dictionary is unavailing. Although the term "furnish" is defined as "to provide with what is needed" or "supply, give," the plain and ordinary meaning of the term fails to fully persuade this Court as it does not provide clear guidance. "The plain meaning approach . . . is not the equivalent of myopic literalism, [consequently] it is entirely proper for [this Court] to look to the sense and meaning fairly deducible from the context." *National Refrigeration, Inc. v. Capital Properties, Inc*., 88 A.3d 1150, 1156 (R.I. 2014) (internal quotation omitted). As evidenced by the parties' memoranda and acknowledged once by the Rhode Island Supreme Court in *Gurney v. Walsham*, 16 R.I. 698, 19 A. 323, 324 (1890), the term "furnish" is ambiguous. Therefore, this Court "must apply the rules of statutory construction and examine the statute in its entirety," interpreting individual sections within the context of the overall statutory scheme to determine the intent and purpose of the Legislature. *Gem Plumbing & Heating Co., Inc.*, 867 A.2d at 811 (internal quotation omitted); *see Peloquin v. Haven Health Center of Greenville, LLC*, 61 A.3d 419, 425 (R.I. 2013).

The Rhode Island Mechanics' Lien Statute is known to be "in derogation of the common law, and, as such" must be strictly construed. *Gem Plumbing & Heating Co., Inc*., 867 A.2d at 803. Nevertheless, our Supreme Court has articulated that "the statute should be construed to carry out its intended purpose to 'afford a liberal remedy to all who have contributed labor or material towards adding to the value of the property to which the lien attaches.'" *Id*. (quoting *Field & Slocomb v. Consolidated Mineral Water Co.*, 25 R.I. 319, 320, 55 A. 757, 758 (1903)). The Mechanics' Lien Statute was designed "to prevent unjust enrichment of one person at the expense of another." *Art Metal Construction Co. v. Knight*, 56 R.I. 228, 185 A. 136, 145 (1936). Acknowledging the critical role of the work performed or materials supplied in relation to the land, the Rhode Island Supreme Court characterizes mechanics' lien proceedings as equitable *in rem*

actions, where "[t]he true respondent, therefore, is the land upon which the lien attaches." *Tilcon Gammino, Inc. v. Commercial Associates*, 570 A.2d 1102, 1107 (R.I. 1990).

The Rhode Island Supreme Court has consistently maintained that "having its roots in various predecessor statutes going back to 1847, [the Mechanics' Lien Statute] has 'never been a model of clarity.'" *Gem Plumbing & Heating Co., Inc*., 867 A.2d at 802 (quoting *Faraone v. Faraone*, 413 A.2d 90, 91 (R.I. 1980)). "'[T]here is and for many years has been great uncertainty among the members of the legal profession in this state, as to the interpretation and application of the statute.'" *Id*. (quoting *Art Metal Construction Co*., 56 R.I. at 235, 185 A. at 139). As so eloquently stated in *Faraone* by Justice Weisberger: "the Legislature set forth in a single sentence of gargantuan length" the hoops a petitioner must jump through to bring a valid mechanics' lien claim. *See Faraone*, 413 A.2d at 91; *see also Gem Plumbing & Heating Co., Inc*., 867 A.2d at 802-03 ("And so, '[d]onning our compass and machete, we venture into the thicket,' and attempt to navigate this difficult statute.") (quoting *McKinney v. State*, 843 A.2d 463, 466 (R.I. 2004)). This Court would go further and state that this statute would never win a Pulitzer Prize for clarity and that even ChatGPT could not draft such a convoluted legal labyrinth. Nevertheless, this Court is charged with determining what the statute requires.

The parties have focused their arguments on § 34-28-4. Yet, they overlook that this gargantuan sentence commences with: "Except as provided in § 34-28-7, any and all liens claimed or that could be claimed under §§ 34-28-1, 34-28-2 or 34-28-3 . . . ." The mechanics' lien in this matter is claimed under § 34-28-1(a). As such, § 34-28-1(a) reads as follows:

> " 34-28-1. Improvements by consent of owner — Contracts barring enforcement of lien against public policy[.]
>
> "(a) Whenever any building, canal, turnpike, railroad, or other improvement shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of the

> owner, the owner being at the time the owner of the land on which the improvement is located, or by the husband of such owner with the consent of his wife, the building, canal, turnpike, railroad, or other improvement, together with the land, is hereby made liable and shall stand subject to liens for all the work done by any person in the construction, erection, alteration, or reparation of such building, canal, turnpike, railroad, or other improvement, and for the materials used in the construction, erection, alteration, or reparation thereof, which have been furnished by any person." Section 34-28-1(a).

This Court has attempted to strike[3] the words that are not relevant to this case or a provider of materials:

> "(a) Whenever any building, or other improvement shall be constructed, at the oral or written request of the owner, *the land, is hereby made liable* and shall stand subject to liens for the *materials used in the construction*, erection, alteration, or reparation thereof, which have been *furnished* by any person." Section 34-28-1(a) (emphasis added).

It would seem that for "the land [to be] made liable" and "for the materials [to be] used in the construction," "a delivery of the materials to the building site, representing the most unequivocal appropriation of material for use in the particular project, short of actual use, satisfies that requirement." Agthe, Dale, *Delivery of Material to Building Site as Sustaining Mechanics' Lien*, 32 A.L.R.4th 1130, n.8 (Originally published in 1984); *see* § 34-28-1(a). Logically, for materials to enhance the property's value and be used in construction, the materials must be placed on the property or project site for the land to materially benefit. Although Element5 and

[3] The following shows what was actually eliminated: "(a) Whenever any building, ~~canal, turnpike, railroad,~~ or other improvement shall be constructed, ~~erected, altered, or repaired by oral or written contract with or~~ at the oral or written request of the owner, ~~the owner being at the time the owner of the land on which the improvement is located, or by the husband of such owner with the consent of his wife, the building, canal, turnpike, railroad, or other improvement, together with~~ the land, is hereby made liable and shall stand subject to liens ~~for all the work done by any person in the construction, erection, alteration, or reparation of such building, canal, turnpike, railroad, or other improvement, and~~ for the materials used in the construction, erection, alteration, or reparation thereof, which have been furnished by any person." G.L. § 34-28-1(a).

BLDGWorks agreed that the materials would be shipped to the offsite warehouse, such delivery does not materially benefit the land. As previously stated, the Mechanics' Lien Statute was intended to prevent unjust enrichment. *See Art Metal Construction Co.*, 56 R.I. 228, 185 A. 136. If materials used to improve property are not paid for, it would be unjust for the landowner to benefit from those materials, leaving the material supplier at a loss. But, until the materials are delivered to the property, the landowner and the land have no benefit.

While Bayberry correctly notes that the General Assembly amended the Mechanics' Lien Statute to remove the phrase "placed upon the land," the legislative intent behind this change remains unclear due to the absence of legislative history. Without this context, it is difficult to ascertain whether the removal was intended to alter the fundamental requirement that materials must have a direct connection and materially benefit the property. Yet, holding that a mechanics' lien for materials arises at, or relates back to, the time of furnishing materials onto the property or project site serves crucial policy objectives. Such a holding ensures that mechanics' lien rights are triggered only when materials are used to directly improve the property's value. *See Gurney,* 16 R.I. 698, 19 A. at 324 ("the word [furnish], taken in connection with its context, must receive the more limited interpretation; that is to say, that, for the lien to attach for the benefit of the material-man, the materials must not only have been used in 'the construction, erection, or reparation,' but must also have been furnished by him to be used so"). Moreover, such a holding prevents premature enforcement actions based solely on materials being delivered to an offsite warehouse. This decision accords itself with the judiciary striking a fair balance between the strict construction of the statute on the one hand and the carrying out of its legislative purpose of affording a liberal remedy to all who have contributed materials toward adding to the value of the property on the other. *Frank N. Gustafson & Sons, Inc. v. Walek*, 599 A.2d 730, 733 (R.I. 1991).

This Court believes that the legislative intent underlying the prescribed statute was to link the 200-day retrospective statutory period with the delivery of materials to the property or project site, as this signifies the moment when the materials become integral to the construction or improvement of the land for the benefit of the property. Counting backwards 200 days from Element5's Notice of Intention recorded on February 9, 2024, it becomes apparent that the critical date is July 24, 2023. Therefore, any materials delivered to the Property on or after July 24, 2023 fall within the statutory 200-day retrospective statutory period. This includes not only the Rothoblaas screws delivered on July 25, 2023, but also all subsequent materials furnished from the offsite warehouse to the Property between August 17 and 30, 2023.

Notably, this Court is cognizant that, under these facts, the application of statutory construction may end in a harsh result. As Justice Weisberger wrote in *Faraone*, to prevent the ill of unjust enrichment, the Mechanics' Lien Statute creates a different dilemma by "placing the burden of expense upon one of two individuals who are generally blameless." *Faraone*, 413 A.2d at 92. Nonetheless, this Court must interpret the term "furnish" in a manner consistent with the statute's overarching purpose and equitable principles, ensuring that materials provided are indeed for the benefit of the property to which the lien attaches. As such, any materials delivered to the Property on July 24, 2023 and thereafter are within the permissible 200-day statutory period; thus, Element5 has met its burden to show cause that it has a valid mechanics' lien for the total amount of $221,859.15.

IV

Conclusion

For the reasons stated herein, this Court **DENIES** Bayberry's Petition to Discharge Element5's Mechanics' Lien. Counsel shall confer and submit an appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Element5, L.P. v. Bayberry Hill, LLC f/k/a Turtle Swamp, LLC**
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COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**July 23, 2024**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Katharine Kohm, Esq.**
For Defendant:	**Peter F. Skwirz, Esq.** **Matthew J. Landry, Esq.**