IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

McDONALD BUILDING COMPANY LLC, Plaintiff,	:	May Term 2016
v.	:	No. 67
WALNUT PARK PLAZA, LLC, Defendant.	:	Commerce Program
	:	Control Nos. 17022971/17022754
	:	2296 EDA 2017

Djerassi, J. **OPINION** **December 20, 2017**

This Opinion addresses plaintiff McDonald Building Company, LLC's ("McDonald") appeal of this court's June 27, 2017 Order denying McDonald's motion for summary judgment and granting defendant Walnut Park Plaza, LLC's ("Walnut Park") motion for summary judgment in this mechanics lien action.. For the reasons discussed below, judgment should, respectfully, be affirmed.

1. Business Organization

Walnut Park owns Walnut Park Plaza apartment complex located at 6232-6250 Walnut Street in Philadelphia, Pa. The apartments house hundreds of low income senior citizens.

At times relevant to issues under review here, Walnut Park was owned by Walnut Housing Associates 2003 Limited Partnership ("the Partnership"), a limited partnership. The Partnership was composed of MCAP Walnut Housing LLC ("MCAP Walnut Housing") which was the general partner, and Boston Financial Investment Management, L.P. ("BFIM") which was the limited partner. General partner MCAP Walnut Housing consisted of a single entity, Municipal Capital Appreciation Partners II ("MCAP II'). MCAP II was also the primary lender to Walnut Park. Individual non-party Richard Corey ("Corey") controlled MCAP II and MCAP

Walnut Housing. Through these arrangements, Corey directed and controlled the affairs of Walnut Park. He also controlled non-party lender Municipal Capital Appreciation Partners IV ("MCAP IV").

Issues ripened in November 2013 when a new Partnership general manager, along with several limited partners filed a lawsuit against Corey and related corporate entities removing them from control of the Partnership.

2. Further Background-New York Action

This lawsuit was filed in New York on November 13, 2013. The Partnership, the new general partner and its supporting limited partners sued Corey, MCAP II and MCAP Walnut Housing LLC, the former general partner, in the Supreme Court of New York. The case is docketed at *Walnut Housing Associates 2003 L.P. et. al. v. MCAP Walnut Housing LLC*, et. al., Index No. 653945/2013 ("New York Action"). Plaintiffs alleged that Corey and his MCAP entities had engaged in self-dealing and gross negligence while controlling the Walnut Park apartment complex. Plaintiffs claimed Corey's companies misused and mismanaged Partnership assets for their own separate profit.

3. Contract between McDonald and Walnut Park and the Corey McDonald Agreement

Plaintiff/appellant McDonald is a commercial/general contractor and construction manager. Paul McDonald is McDonald's founder and president. On July 2, 2011, McDonald entered into a contract with Walnut Park to provide labor and materials for work relating to roof repairs and for work to make eleven (11) apartment units compliant with the American with Disabilities Act. Richard Corey signed the contract on behalf of Walnut Park.

On March 15, 2013, McDonald completed performance under the contract and was owed $1,443,253.00, plus an additional $45,803.00 for change orders. On August 13, 2012, MCAP II

made a partial payment to McDonald in the amount of $387, 553. McDonald demanded the remainder but was informed by Corey that he had to wait until Walnut Park secured more bank financing. Corey suggested, however, that if McDonald wanted, Corey was able to facilitate a loan through MCAP IV and relieve McDonald immediately. Corey's proposal would cover McDonald's outstanding and future receivables relating to its work on the project.[1] On November 12, 2012, McDonald emailed his counsel a draft agreement from Corey stating the following:

> "The attached document is being requested by the Owner of one of our projects. They have not closed on permanent financing. They would like to pay us out of another fund and treat it as a "loan" until they close.

The Corey McDonald Agreement was memorialized in a letter dated November 16, 2012.[2] The letter was prepared by Corey and signed by Corey as manager of MCAP IV. Paul McDonald signed the agreement on behalf of McDonald. The Corey McDonald Agreement provides in relevant part as follows:

> Municipal Capital Appreciation Partners IV, L.P. ("Lender"), a Delaware limited partnership, hereby agrees to loan to McDonald Building Company LLC ("McDonald"), a sum equal to any amounts owed to McDonald by Walnut Park Plaza LLC ("Walnut") for work performed through and including the date hereof pursuant to the contracts and future work performed by McDonald pursuant to the Contracts to the extent Walnut does not pay such amounts in accordance with the Contracts. Any amounts loaned by Lender to McDonald (the "Loans") hereunder shall bear interest at the rate of zero (0%) per annum and such amounts shall be repaid by McDonald on each date that McDonald receives payment from Walnut for such work but only to the extent of such payment by Walnut. At any time that Walnut does not pay McDonald in full performed under the Contracts in accordance with the terms thereof, McDonald will (1) file a mechanics lien (s) against the Project in accordance with and within the time period required by applicable law, (2) proceed to obtain a judgment on such claim (and Lender will

[1] At the time, McDonald was also working on another project on behalf of MCAP IV.

[2] McDonald refers to this agreement as a "loan agreement", however, absent from the agreement is rate of interest, a payment schedule, and an absolute obligation for McDonald to repay MCAP IV. The agreement specifically states, "McDonald's liability for repayment of the Loans shall be limited to and payable out of Walnut's payments to McDonald and McDonald's claims against Walnut." See, Exhibit "H" to McDonald Motion for Summary Judgment cn 17022971. No independent basis for repayment exists.

> reimburse McDonald's legal fees in so doing), and (3) upon Lender's request, McDonald shall assign of record such lien and judgment to Lender. Prior to such assignment of record, McDonald will cooperate with Lender in perfecting a lien upon or security interest in McDonald's rights to payment from Walnut. McDonald's liability for repayment of the Loans shall be limited to and payable out of Walnut's payments to McDonald and McDonald's claims against Walnut.[3]

4. Payments and the Mechanic's Lien

Between November 19, 2012 and June 28, 2013, MCAP IV wired six payments to McDonald in the total amount of $1,101,502.67.[4] McDonald paid all its subcontractors in full for their work on the project. On January 2, 2013, Corey emailed McDonald stating, "we will be wiring a large amount tomorrow" and "will want to see liens before any more." On January 3, 2013, MCAP IV wired to McDonald a payment of $466, 449.22. Thereafter, McDonald and his counsel engaged in numerous conversations concerning the lien demand. In an email dated April 25, 2017, McDonald advised his counsel as follows:

> Just to remind you that this is a weird one. We have actually already been paid every invoice except the last one and retainage via a "loan" from another fund (MCAP IV) of the same Owner. Basically, a different partnership. The Owner is asking us to file the lien to force the partnership entity that owns the building to pay us, at which point we will pay back the loan to MCAP. So the lien will be for the full amount of the contract. I'm hoping this makes sense to you.

The lien was prepared and McDonald forwarded the lien to Corey for review. On April 30, 2013, McDonald emailed Corey the following:

> ...we are finalizing the lien package per your review. I just want to clarify with you that we are filing a lien for the *entire amount* we billed you on WPP-ADA/Roof project. To remind you we received payments from MCAP via two different funds:
>
> Payment #1, 8/13/12, $387,553.33 > this came from MCAP Partners II LP
>
> Payments #2-4 totaling $872, 263.19 > these were wires from MCAP Partners IV LP

[3] Exhibit "H" to McDonald Motion for Summary Judgment cn 17022971.

[4] Exhibit "A"- Stipulation of the Parties- McDonald Motion for Summary Judgment cn 17022971.

Please confirm the amount we should lien. Thanks.

On May 1, 2013, McDonald filed a mechanic's lien on Walnut Park in the Court of Common Pleas of Philadelphia County. On June 17, 2013, McDonald filed an amended mechanic's lien on Walnut Park but deducted the $387,553.33 previously paid by MCAP II.

In December 2013, Corey and his affiliates were replaced by BFIM as general partner in control of Walnut Partner. BFIM contacted McDonald to discuss the amended lien and in July, 2014, BFIM presented McDonald with a payment plan where Walnut Park would make monthly payments to McDonald on the amended lien in the amount of $25,000 per month. On July 23, 2014, McDonald's counsel emailed Joseph Donley, counsel for Corey that "Boston Financial has given Paul McDonald a payment plan to satisfy the lien. We need to discuss with you and Dick Corey since any work-out must be in satisfaction of McDonald's duties under the loan agreement with Dick's company." From August 27, 2014 to March 30, 2014, BFIM made eight payments to McDonald in the amount of $25,000/payment for a total sum of $200,000. After March 30, 2014, BFIM discovered for the first time the existence of the Corey McDonald Agreement thorough discovery in the New York action. As a result, BFIM caused Walnut Park to stop making payments to McDonald on the amended lien. BFIM had concluded that the outstanding obligations to McDonald had already been satisfied.

On April 29, 2015, McDonald filed this complaint against Walnut Park to enforce the amended lien. The parties filed cross motions for summary judgment. On June 27, 2017, this court denied McDonald's motion for summary judgment and granted Walnut Park's motion for summary judgment. This appeal followed.

DISCUSSION

The Mechanic's Lien statute provides in relevant part as follows:

> Every improvement and the estate or title of the owner in the property shall be subject to a lien, to be perfected as herein provided, for the payment of all debts due by the owner to the contractor or by the contractor to any of his subcontractors *for labor or materials* furnished in the erection or construction, or the alteration or repair of the improvement, provided that the amount of the claim ... shall exceed five hundred dollars ($500).[5]

The statutory basis for a mechanic's' lien expressly limits the lien to amounts owed for labor and materials only. The mechanic's lien law is "intended to protect the prepayment labor and materials that a contractor invests in another's property, by allowing the contractor to obtain a lien interest in the property involved."[6] A mechanics' lien is not the basis for recovery of unliquidated damages for breach of contract and is not intended to settle the contractual obligations of the parties.[7]

In the case *sub judice*, plaintiff McDonald may obtain a judgment upon a mechanic's lien against Walnut Park if the following factors are met: (1) McDonald performs erection, construction, alteration, or repair services at the request of Walnut Park; (2) Walnut Park is the owner of the property at which McDonald performed its services; (3) Walnut Park has not paid all debts due to McDonald for those services; and (4) the amount of the claims exceeds $500. Walnut Park concedes that McDonald has satisfied the first, second and fourth factors. The dispute arises as to whether Walnut Park has already paid all of its debts to McDonald for the services provided.

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[5] 49 P.S. § 1301(a) (Purdon 2001) (emphasis added).

[6] *Matternas v. Stehman,* 434 Pa.Super. 255, 642 A.2d 1120, 1124 (1994); see also, *Artsmith Development Group, Inc. v. Updegraff,* 868 A.2d 495, 496 (Pa.Super. 2005).

[7] *Wyatt Inc. v. Citizens Bank of Pennsylvania*, 976 A.2d 557, 570 (Pa. Super. 2009).

A review of the record shows that McDonald has actually been paid for all the work it performed for Walnut Park.[8] Indeed, Mr. McDonald testified at deposition as follows:

> Q. And do you know the total amount of the sums that were received in connection with the ten applications?
>
> A. I believe that the total amount received was equal to the total amount invoiced, including the change orders and the retainage...
>
> Q. Does McDonald Building Company consider itself whole in connection with the amounts that have been invoiced in connection with this project?
>
> A. Yes.

In the New York action, McDonald testified consistently at deposition:

> Q. Does McDonald Building Company consider itself whole in connection with the amounts that have been invoiced in connection with this project?
>
> A. Yes.

(McDonald NY Tr. 44:14-44:18)

The reality is plaintiff McDonald, as corporate contractor, has no stake in this action. The company has already been paid in full for the labor and material it expended on the project. Therefore, the basis for the amended mechanic's lien recorded on June 17, 2013, no longer exists.

Indeed, McDonald has paid all its subcontractors in full for their work on the project and the company is whole in connection with the amounts it invoiced for itself.

On review, we conclude McDonald has no action under this lawsuit but, more likely than not, filed this complaint anyway to try to honor terms of the Corey McDonald Agreement.

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[8] McDonald argues that it is an "undisputable fact" that Walnut Park still owes McDonald the full amount of the lien because Walnut Park nor anyone acting on their behalf made any payments to McDonald. This argument contradicts McDonald's testimony where he admits that payment in full was received.

McDonald's obligations to Corey, if any, are not involved in this mechanic's lien case because the amount of the amended mechanic's lien has already been paid to McDonald.

Mechanic's liens are statutory creations designed to protect persons who, before being paid, or fully paid, provide labor and material to improve a piece of property and give lienholders security for their payment independent of contractual remedies.[9] Mechanic's liens arise not from the act of furnishing the labor and materials but rather from debt that is created.[10]
While McDonald and Walnut Park had agreed that Walnut Park was responsible to reimburse McDonald for labor and materials, this debt, protected by a mechanic's lien, is now extinguished. McDonald has no standing to enforce the lien because the contracting party, namely Walnut Park does not owe money to McDonald.

It appears McDonald began the case *sub judice* to help Corey recover money from his own MCAP IV through Walnut Park assets, even though Walnut Park is not a signatory to the Corey McDonald Agreement. Perhaps, McDonald believes it was obligated to file this lawsuit under the terms of its agreement with Corey. Whatever the motive this complaint in a mechanic's action is not the way for MCAP IV to recover money from anyone.[11]

Before he was deposed as Partnership general partner, Corey controlled the way construction payments to McDonald were made by Walnut Park through his own MCAP IV. But problematically, Corey in his agreement with McDonald also sought to cover his MCAP

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[9] *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co.*, 90 A.3d 682 (Pa. 2014).

[10] *Murray v. Zemon,* 402 Pa. 354, 167 A.2d 253 (1960).

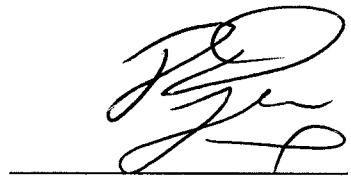
[11] *Wyatt Inc. v. Citizens Bank of Pennsylvania*, 976 A.2d 557, 570 (Pa. Super. 2009).

IV's loans through a mechanic's lien on Walnut Park that has already been satisfied. In short, plaintiff McDonald Building Company LLC has no standing here.[12]

CONCLUSION

For all these reasons, this court's June 27, 2017 Order granting Walnut Park's motion for summary judgment and denying McDonald's motion for summary judgment should, respectfully, be affirmed.

BY THE COURT



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[12] The McDonald Corey Agreement does not require McDonald to repay Corey. There is no interest due and McDonald is not responsible for the legal fees incurred. These terms lead to a plausible inference that the monies were paid by MCAP IV at Corey directions for reasons unrelated to the financing of the Walnut Park work. See McDonald's response to Walnut Park' motion for summary judgment p. 7 , at control no. 17022971: "WPP's allegations relating to Corey's involvement with the Lender's facilitation of the Loan will be resolved in the pending New York Action.").