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DEC 19 2022  
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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

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|------------------------|---|-----------------------|
| EVOLVE BUILD, INC.     | : | PHILADELPHIA COUNTY   |
| Plaintiff(s)           | : | COURT OF COMMON PLEAS |
|                        | : |                       |
| vs.                    | : | Case No. 2006M0011    |
|                        | : |                       |
| 754 DARIEN STREET, LLC | : |                       |
| Defendant(s)           | : | COMMERCE PROGRAM      |

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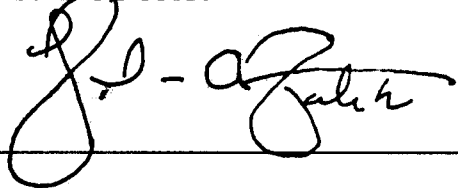
FINDINGS

AND NOW, this 15<sup>th</sup> day of December 2022, upon conclusion of a two day bench trial held before this Court on November 14, 2022 and November 15, 2022, and after review of testimony, Exhibits, and all other relevant fillings of record, it is hereby **ORDERED** and **DECREED** that the Court finds in favor of the Defendant and against Plaintiff as to Plaintiff's Mechanics lien claim.

IT IS FURTHER ORDERED that the Mechanic's Lien is **STRICKEN**, and the \$72,129.20 deposited with the Court on April 26, 2022, shall be released to defendant's counsel, Mark Danek, Esq.

DOCKETED  
DEC 19 2022  
R. POSTELL  
COMMERCE PROGRAM

BY THE COURT:

  
J.

ORDER-Evolve Build, Inc. Vs 754 Darien Street, Llc



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OPINION

1. INTRODUCTION AND PROCEDURAL HISTORY

This matter comes before the Court as an action to enforce a Mechanics' Lien Claim by Plaintiff Evolve Build, Inc. ("Plaintiff") against Defendant 754 Darien Street, LLC ("Defendant"). On June 19, 2020, Plaintiff filed its Mechanic's Lien ("Lien"). Plaintiff claims that as of the date of the filing of the Lien, the total sum that was due and owing was \$72,129.20. Specifically, and as more fully explained below, Plaintiff alleged that Defendant failed to pay various payment applications issued by Plaintiff as they came due. Defendant eventually terminated the Contract with Plaintiff. On September 23, 2020, Defendant filed an Answer to the Complaint denying the enforceability of said agreement. On February 11, 2021, Plaintiff filed Preliminary Objections to Defendant's Answer. On March 2, 2021, Defendant filed an Amended Answer, rendering Plaintiff's Preliminary Objections moot. On March 22, 2021, Plaintiff filed additional Preliminary Objections to Defendant's Amended Complaint, objecting to Defendant's Setoff claims. On April 11, 2021, Defendant filed an Answer to Plaintiff's Preliminary Objections. On May 2, 2021, the Honorable Judge Leon Tucker sustained Plaintiff's Preliminary Objections and ordered Defendant

to file a Second Amended Answer. On May 19, 2021, Defendant complied and filed a Second Amended Answer.

On November 14, 2022, this Court held a two-day bench trial where testimony was heard and the parties entered exhibits into evidence. Upon conclusion of the bench trial, and after due review of the parties' testimony, exhibits, as well as all other relevant filings of record, the Court finds in favor of Defendant and against Plaintiff as to Plaintiff's Mechanic's Lien claim as reasoned below.

## **2. FACTUAL HISTORY**

Plaintiff's representative Michael Sebright was the principal of Evolve Build, Inc. and represented to the Court that he was trained professionally as an architect at Temple University.<sup>1</sup> Mr. Sebright indicated he had practiced at a number of firms throughout the city as both an architect and general contractor.<sup>2</sup> Defendant's Representative, Mounir Badaway, oversaw the construction at the subject property on behalf of Defendant.<sup>3</sup> He represented that his responsibility for the project was to ensure it was properly funded, built correctly, and on time.<sup>4</sup>

In May 2019, the Defendant contracted with Plaintiff for the construction of a single-family home with a fixed price contract in the amount of \$299,000.00 (the "Contract").<sup>5</sup> The subject property is located at 754 S. Darien Street, Philadelphia PA (the "Subject Property"). The Contract laid out a fixed funding schedule from the lender which required work to be done in stages.<sup>6</sup> The Contract specified that failure of Plaintiff to provide supporting documentation of "all invoices,

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<sup>1</sup> See November 14, 2022, Notes of Testimony at 5.

<sup>2</sup> *Id.*

<sup>3</sup> See November 14, 2022, Notes of Testimony at 80.

<sup>4</sup> *Id.*

<sup>5</sup> See Exhibit P-1

<sup>6</sup> See Exhibit P-1, at Exhibit A.

receipts, or other documentation substantiating the request for a payment hereunder,” relieved Defendant from any “requested payment until such time as satisfactory documentation is provided.”<sup>7</sup> On May 18, 2019, Plaintiff requested a draw of a \$25,000 deposit to begin construction at the Subject Property.<sup>8</sup> On August 26, 2019, Plaintiff sent to Defendants a request for payment of \$46,191.50 and stated that the amount was due and owing for the Project. On October 2, 2019, Defendant reached out to Plaintiff and requested a construction budget be provided to establish the total price to Defendant. With this background, Plaintiff filed a Mechanics Lien, seeking compensation for the alleged work that was completed as well as its anticipated profits from the project. As further reasoned below, the Court finds in favor of Defendant.

### **3. FINDINGS AND DISCUSSION**

The Court finds that Plaintiff has not met its burden of proof to demonstrate that there was a proper debt due and owing to warrant recovery under the Mechanic’s lien statute.

Before the Court can make a determination as to the law, the Court must ascertain the facts, the true facts. The facts are to be determined by the testimony, supported and substantiated by the evidence including, but not limited to, witnesses and their believability. Believability is based upon the credibility of the witnesses, and credibility is based on the perceived truthfulness and accuracy of the witness. Pa. SSJI (Civ) § 4.20 (2020). A witness may be deemed credible if he or she honestly tried to tell the truth and if the witness was able to recount with reasonable accuracy the matters testified upon, among many other factors. *Id.* No matter how long the witness testifies or how important the testimony is, if the finder of fact believes a witness was deliberately untruthful

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<sup>7</sup> See Exhibit P-1, at pg. 3, Sec. 3.

<sup>8</sup> See Exhibit D-4 8/19/2019 email

in a material and important part of testimony presented, the finder of fact may disregard all part or none of the testimony of that witness. *Donoughe v. Lincoln Elec. Co.*, 936 A.2d 52, 65 (Pa. Super. 2007) (quoting *Martin v. Evans*, 711 A.2d 458, 463 (Pa. 1998)). “The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of the jury.” *Allegheny Energy Supply Co., LLC v. Wolf Run Min. Co.*, 53 A.3d 53, 60 (Pa. Super. 2012). A trial court’s decision on its findings of fact will only be reversed if they are not supported by competent evidence in the record or if its findings are premised on an error of law. *Gamesa Energy USA, LLC v. Ten Penn Ctr. Assocs., L.P.*, 181 A.3d 1188, 1191 (Pa. Super. 2018); *Allegheny Energy Supply Co., LLC v. Wolf Run Min. Co.*, 53 A.3d 53, 60 (Pa. Super. 2012). Accordingly, for the reasons discussed in depth *infra*, the Court finds the Plaintiff was not credible.

Under Pennsylvania law, Mechanics liens are governed by 49 Pa. C.S.A. 1503. It provides that the claim may state:

- (1) the name of the party claimant, and whether he files as contractor or Subcontractor;
- (2) the name and address of the owner or reputed owner;
- (3) the date of completion of the claimant’s work;
- (4) if filed by a Subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;
- (5) if filed by a contractor under a contract or contracts for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor or materials furnished;
- (6) in all other cases than that set forth in clause (5) of this section, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof;
- (7) the amount or sum claimed to be due; and
- (8) such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them.

49 Pa. C.S.A. § 1503.

Further, in order to prove the elements of a mechanics' lien, a Plaintiff must establish 1) A contract for the work done or for the materials furnished in connection with the erection, construction, alteration or repair of an improvement to real property; and 2) A debt due and owing thereunder or as a subcontractor or material supplier to one who has such a contract. See *R. C. Ford Plumbing & Heating, Inc. v. Thomer*, No. 200480322, 2006 Pa. Dist. & Cnty. Dec. LEXIS 276, at \*11 (C.P. Bucks June 13, 2006) *aff'd* *R.C. Ford Plumbing & Heating, Inc. v. Thomer*, 918 A.2d 799 (Pa. Super. 2006)

Parties to a contract can expressly or impliedly waive its provisions. *Black Top Paving Co., Inc. v. Dep't of Transp.*, 466 A.2d 774, 776 (Pa. Cmwlth. 1983). "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 610 A.2d 499, 501 (Pa. Super. 1992). "Waiver may be established by a party's express declaration [—i.e., an express waiver—] or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary"—i.e., an implied waiver. *Id.* "An implied waiver exists when there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived." *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1223 (Pa. Super. 1989). See also *Ernest Bock & Sons, Inc. v. City of Philadelphia*, 239 A.3d 1144 (Pa. Cmwlth. 2020), appeal denied, 249 A.3d 255 (Pa. 2021)

When considering a mechanics lien, the plaintiff must show a debt in order to establish a right to recovery. *Noar v. Gill*, 4 A. 552, 555 (Pa. 1886). Further, "unless the facts set forth in the claim are admitted by the plea or otherwise, the Plaintiff must prove them." *Id.*

In the present matter, the Court finds that Plaintiff has failed to establish that it is owed a debt as required by Pennsylvania jurisprudence.<sup>9</sup> As part of its duties under the construction contract in this case, Plaintiff was required to provide supporting documentation including “all invoices, receipts, or other documentation substantiating the request for a payment hereunder[.]”<sup>10</sup> Failure to do so under the terms of the contract relieved Defendant from any “requested payment until such time as satisfactory documentation is provided.”<sup>11</sup> Plaintiff was also required submit lien waiver forms at the time of its requests for payment.<sup>12</sup> The testimony from parties however, demonstrates that Plaintiff did not submit certain supporting documentation which it was required to supply under the terms of the contract and that did not comply with the above indicated contractual terms.

Specifically, Plaintiff admitted it did not submit any lien waiver forms at the time of any of its requests for payment.<sup>13</sup> The record also shows that Defendant in this case made several payments to Plaintiff for its services for which it never received any supplemental documentation as required by the terms of the contract. Specifically, the record demonstrates that on September 27, 2019, a \$15,000.00 dollar payment was made to Plaintiff for which there is absence of evidence of any supplemental documentation.<sup>14</sup> Testimony further shows that around August 26, 2019, Defendant made a \$1500.00 payment to Plaintiff for which there is an absence of any evidence of

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<sup>9</sup> *Noar v. Gill*, 4 A. 552, 555 (Pa. 1886).

<sup>10</sup> See Exhibit P-1, at pg. 3, Sec. 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at pg. 2. Section 3.

<sup>13</sup> **Q:** My question to you is did you secure any lien waiver forms from any of the material suppliers for the project at 754 Darien?

**A:** Throughout the project it was my contractors, in-house, so there were no lien waivers required. It was my employees. I did not claim any lien waivers. But I also know there's no liens on this property other than my lien. And there was never a lien waiver attached to our contract. I was never given that option by the defendant. See Notes of Testimony at 34.

<sup>14</sup> See Defendant's Exhibit 15; see also Notes of Testimony 101.

the required supplemental documents substantiating this payment.<sup>15</sup> Furthermore, the testimony also indicates that on October 30, 2019, another payment was made to Plaintiff in the amount of \$10,000.00 for which there is again no evidence of the required substantiating supplemental documentation or lien waivers.<sup>16</sup>

Though Plaintiff attempts to claim Defendant waived its rights to supplemental documentation and lien waivers under the terms of the contract by accepting payment requests and granting payments in absence of such required documentation, the record does not support this contention.<sup>17</sup> Specifically, during trial when questioned, Defendant's representative affirmatively denied this assertion.<sup>18</sup> Additionally, Plaintiff in this case also indicated that he signed and understood the contractual agreement as well as its terms.<sup>19</sup> He also explicitly testified that he never understood this requirement for supplemental documentation to be waived.<sup>20</sup> Accordingly, based on evidence and testimony produced both at trial and in the existing record, Plaintiff did not meet

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<sup>15</sup> See Notes of Testimony at 102-104.

<sup>16</sup> *Id.*

<sup>17</sup> "The evidence shows that each of those terms were either waived or amended by the course of conduct. They were a series of payment applications submitted that were at least partially paid upon without submission of any of those documents."

See Notes of Testimony at 76-77.

<sup>18</sup> Q: When you made this payment, did you ever convey to Evolve that 754 Darien was waiving the contract rights to documents including the request for payment?

A: No.

Q: Did you ever convey to Evolve that by making this payment, 754 Darien was waiving its contract right to lien waivers?

A: No.

See Notes of Testimony at 101, 83.

<sup>19</sup> See Notes of Testimony at 33.

<sup>20</sup> Q: Are you aware at the time that 754 Darien waived the requirement that you needed to supply the paperwork for the request for payment?

A: I never understood it to be waived.

See Notes of Testimony at 34.



the stringent legal standard necessary to demonstrate either express or implied waiver of this condition.<sup>21</sup>

Perhaps most importantly, the record also reveals inconsistencies as to the amount Plaintiff was claiming it was owed for its services. Upon review of the docket, Plaintiff's Mechanic's Lien filing reflects it was owed \$72,129.20.<sup>22</sup> However, at trial Plaintiff admitted to miscalculations as to amounts it was owed under the terms of the contract.<sup>23</sup> Specifically, during trial, Plaintiff indicated it was due \$44,600 for his work and \$32,000.00 for lost profits representing a total due of \$76,600.00 rather than the \$72,129.20 it indicated in its Mechanics Lien filing.<sup>24</sup> Additionally, Plaintiff also admitted to failing to properly amend its Mechanic's lien claim to represent the accurate amounts owed.<sup>25</sup> Lastly, despite Plaintiff's claims that it was due payment under the contract, credible testimony and evidence presented by Defendant suggests Plaintiff may have been substantially overpaid for the work it performed and Defendant believed that there were

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<sup>21</sup> "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 610 A.2d 499, 501 (Pa. Super. 1992). ("Waiver may be established by a party's express declaration [—i.e., an express waiver—] or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary").

<sup>22</sup> See Plaintiff's June 20, 2022 Mechanic's Lien Filing.

<sup>23</sup> A: This is the invoice we just discussed a while back, both in my testimony and cross-examination. The document there is a slight error given that the final page of that document did not carry through the change orders that needed to be paid for.

Notes of Testimony at 62.

Q: If we can go to P-18, which is the change orders. So, P-18 looks like the first page, Change Order 1, Plaintiff's 216, this amount says \$4,790. How do you explain the difference between the change order versus the amount contained on the payment application?

A: I didn't bill enough. I made a mistake in that calculation.

Notes of Testimony at 64.

<sup>24</sup> "[T]he cause of action of a plaintiff seeking to enforce a mechanic's lien cannot rise higher than the original debt which it secures, just as a mortgage is not collectible unless there is a valid debt which it secures." *Halowich v. Amminiti*, 154 A.2d 406, 408 (Pa. Super. 1959); see also Notes of Testimony 66.

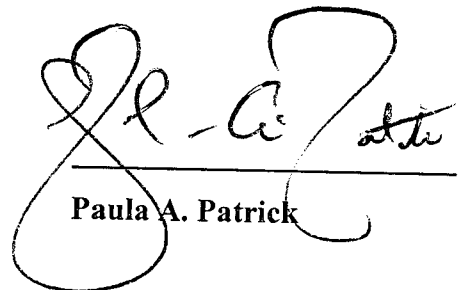
<sup>25</sup> *Id.*

significant deficiencies in regards to certain work aspects of this work.<sup>26</sup> As such, given these discrepancies by Plaintiff as to the amount it was actually due, as well as its earlier indicated admissions it failed to submit required supplemental documentation to receive payment, this Court did not find the Plaintiff's claims to be credible.<sup>27</sup> Accordingly, Plaintiff failed to show that there was a viable debt due and owing, and therefore could not establish a clear right to recovery.<sup>28</sup> Furthermore, the Court finds the Plaintiff was not credible. Hence, the Court finds in favor of Defendant and against Plaintiff.

**SO ORDERED.**

DATED: 12/15/22

**BY THE COURT:**

  
Paula A. Patrick

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<sup>26</sup> During trial and in documentary evidence Defendant asserted that as of November 6, 2019, Plaintiff had been overpaid for the work it had performed on the Darien Street Project. *See* Notes of Testimony at 86, 97-98; *see also* Defendant's Trial Exhibit D-5; Plaintiff's Trial Exhibit P-9.

<sup>27</sup> "No matter how long the witness testifies or how important the testimony is, if the finder of fact believes a witness was deliberately untruthful in a material and important part of testimony presented, the finder of fact may disregard all part or none of the testimony of that witness." *Donoughe v. Lincoln Elec. Co.*, 936 A.2d 52, 65 (Pa. Super. 2007) (quoting *Martin v. Evans*, 711 A.2d 458, 463 (Pa. 1998)).

<sup>28</sup> *Noar v. Gill*, 4 A. 552, 555 (Pa. 1886); *see also Halowich v. Amminiti*, 154 A.2d 406, 408 (Pa. Super. 1959) ("If there is no valid debt of that sort created, the lien cannot be enforced[.]").