

R E A L E S T A T E

Subcontractor Prohibited From Filing Mechanics' Lien

BY ALAN NOCHUMSON

Special to the Legal

If the real estate market slows down, as some experts are predicting, Pennsylvania courts will likely be inundated with an influx of mechanics' lien actions filed by contractors who are left holding the proverbial bag on real estate projects mired in cost overruns and unrealized profits.

In *Wentzel-Applewood Joint Venture v. 801 Market Street Associates*, a subcontractor learned a rather costly lesson when the Superior Court of Pennsylvania recently dismissed its mechanics' lien because the subcontractor failed to issue the requisite notice under Pennsylvania law.

CONSTRUCTION WORK

In *Wentzel-Applewood*, Citizens Bank, occupying several upper-floors in a building located in center city Philadelphia, entered into an agreement with a contractor to convert the floors from their previous use as retail and storage space for the Strawbridge and Clothier department store into an "item processing center" on two of the floors with office space on the third floor. The contractor then retained the services of a subcontractor who provided and installed the drywall, studs, doors, windows, ceilings and millwork required in building the item processing center.

After the subcontractor completed the work, the contractor was paid in full by Citizens Bank. The contractor then filed for bankruptcy protection and did not pay the subcontractor for the work performed. The unpaid portion to the subcontractor was in

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the amount of \$257,286.31. The subcontractor then provided formal written notice of its intent to file a mechanics' lien.

TRIAL COURT DECISION

After the subcontractor filed the mechanics' lien in state court, Citizens Bank and the other named parties filed preliminary objections asserting that the subcontractor failed to give, prior to completion of its work, the required preliminary written notice of its intent to file the lien.

The trial court initially overruled the preliminary objections, but it subsequently granted reconsideration and directed that discovery and depositions take place. Upon review of the evidence produced, the trial court, without further evidentiary proceedings, sustained the preliminary objections, dismissed the mechanics' lien claim and struck the lien. The subcontractor then appealed the decision.

APPELLATE OPINION

The subcontractor first argued that the trial

court erred when it sustained the preliminary objections by reason of the subcontractor's failure to give preliminary notice of its intent to file a lien.

Under Pennsylvania's Mechanic's Lien Law, the type of notice required of a subcontractor in order to properly file a mechanics' lien rests with whether the work performed qualifies as "erection and construction" or "alteration and repair." If the work is deemed "alterations and repairs," a subcontractor must give "the owner, on or before the date of completion of his work, a written preliminary notice of his intention to file a claim if the amount due or to become due is not paid." Additionally, "no claim by a subcontractor, whether for erection or construction or for alterations or repairs, shall be valid unless, at least 30 ... days before the same is filed, he shall have given to the owner a formal written notice of his intention to file a claim."

Since there was no dispute that the subcontractor in *Wentzel-Applewood* failed to give preliminary notice, the validity of the subcontractor's mechanics' lien hinged upon its insistence that the work qualified as "erection and construction."

The Superior Court examined how the Mechanic's Lien Law defined the terms "improvement," "erection and construction," and "alteration and repair."

According to the Mechanic's Lien Law, "improvement" includes any building, struc-

ture or other improvement of whatsoever kind or character erected or constructed on land, together with the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended.

"Erection and construction" is defined as the erection and construction of a new improvement or of a substantial addition to an existing improvement rendering the same fit for a new or distinct use and effecting a material change in the interior or exterior thereof.

"Alteration and repair" means any alteration or repair of an existing improvement which does not constitute erection or construction as defined herein.

The Superior Court pointed out that Pennsylvania courts deem improvement of real estate as "erection and construction" "where the adaptation (1) is substantial enough in its own right to constitute a new structure, or (2) creates a significant change in the use of the existing structure."

The Superior Court in *Wentzel-Applewood* did not believe that the renovations were substantial enough in their own right to constitute a new structure. The Superior Court relied on the subcontractor's principal own deposition testimony. During the deposition, the principal noted, "after those three floors had been 'gutted' by another party, the subcontractor

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'performed drywall, metal studs, acoustical, door frames and hardware, millwork, specialty metal ceilings to create computer rooms, electrical rooms, sprinkler rooms, office space, [and] bathrooms.'" The Superior Court reasoned that the renovations performed by the subcontractor "were alterations of the existing building and, extensive though they were, did not constitute the erection of a 'new improvement' or a 'substantial addition' to the ... building."

Moreover, the Superior Court concluded that the improvements did not significantly change the use of the renovated floors. In doing so, the Superior Court continued its reliance upon the deposition testimony of the subcontractor's own principal. During the deposition, he "established that prior to the alterations, the renovated floors were 'retail, old space' used as storage in the commercial operations of Strawbridge and Clothier, and that after the construction the floors were

used in the commercial operations of Citizens Bank as 'office space' and 'processing area.'"

The Superior Court found that "while the specific activities carried out on the pertinent floors changed, the character of the use of the floors remained the same, namely, a use attendant to the commercial operations of first, Strawbridge and Clothier and subsequently, Citizens Bank."

As a result, the Superior Court ultimately agreed with the trial court's ruling that the renovations performed by the subcontractor did not meet the definition of "erection and construction" but rather "alteration and repair," and the subcontractor was thus obligated under the plain language of Pennsylvania's Mechanic's Lien Law to have provided, prior to completion of its work, a written preliminary notice of its intention to file a mechanics' lien.

The Superior Court also rejected the subcontractor's attempt to overturn the trial court's ruling on procedural grounds. In its appeal, the subcontractor argued that the trial court erred when it sustained the preliminary objections without conducting a hearing.

In Pennsylvania, "[w]hen issues of fact are

raised by preliminary objections, the trial court may receive evidence by depositions or otherwise." The Superior Court concluded that the trial court bent over backwards in this regard by allowing the presentation of evidence through depositions.

The Superior Court specifically pointed out that the depositions "provided full clarification of the determinative issues of ... the extent of the work done by [the subcontractor], and ... the uses of the renovated floors before and after the alterations, thereby, affording an ample evidentiary basis for the rulings of the trial court. Thus, there was no need for the trial court to undertake further evidentiary proceedings."

LESSONS LEARNED

This recent opinion clearly illustrates the importance of following the technical requirements imposed on contractors and subcontractors alike when placing a mechanics' lien on a property. By failing to fulfill these requirements, the subcontractor in *Wentzel-Applewood*, faced with a bankrupt contractor, may now lose its ability to collect from otherwise deep pockets. •

than people in New York to not have guns?"

Peck argued that the gun legislation did not create a new standard by which the judiciary could judge gun lawsuits, but simply ordered the judiciary to dismiss those suits.

"This is Congress saying we are going to supplant the courts," Peck said. "Courts just don't decide cases, they rule on them."

He noted that Congress had limited lawsuits against vaccine makers and had regulated countless other areas of commerce, from small aircraft to sugar beets. It has always regulated the sale of guns, which the judge pointed out are as liked in some parts of the country as they might be disliked in New York City.

"It's done it with respect to industry after

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the U.S. Constitution. When Robert S. Peck of the Center for Constitutional Litigation tried to advance that argument on behalf of