

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31942

STEVEN W. RICHARDS,
CORTLAND PROPERTIES, INC.,
NORTHPOINT RESIDENTIAL CONSTRUCTION, INC., and
MID-LAKE PROPERTIES, II, INC.,

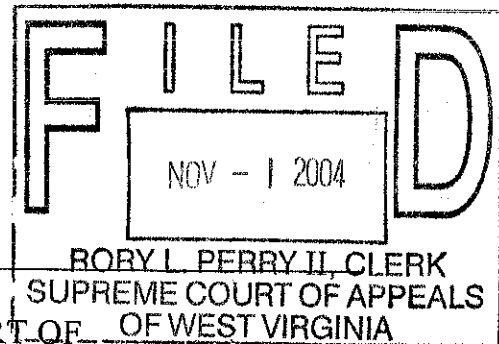
Appellants,

v.

CIVIL ACTION NO. 03-P-14

ROBERT JUNE HARMAN,
dba Harman Equipment Sales,

Appellees.



FROM THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

APPEAL BRIEF
OF APPELLANTS STEVEN W. RICHARDS,
CORTLAND PROPERTIES, INC.,
NORTHPOINT RESIDENTIAL CONSTRUCTION, INC. and
MID-LAKE PROPERTIES, II, INC.

JORY & SMITH, LC
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Counsel for Appellants

October 29, 2004

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**BRIEF ON APPEAL FOR APPELLANTS
STEVEN W. RICHARDS, CORTLAND PROPERTIES, INC.,
NORTHPOINT RESIDENTIAL CONSTRUCTION, INC. and
MID-LAKE PROPERTIES, II, INC.
TO THE WEST VIRGINIA SUPREME COURT OF APPEALS**

Now come Appellants Steven W. Richards, Cortland Properties, Inc., Northpoint Residential Construction, Inc. and Mid-Lake Properties, II, Inc., by and through their counsel, Stephen G. Jory, Jory & Smith, L.C., pursuant to this Court's Order dated September 30, 2004, and file this Brief on Appeal to The West Virginia Supreme Court of Appeals in the above-captioned matter.

I. STATEMENT OF THE KIND OF PROCEEDING AND NATURE OF THE RULINGS OF THE CIRCUIT COURT

On October 22, 2003, Appellee Harman filed a notice of mechanic's lien in the Office of the Clerk of the County Commission of Tucker County, West Virginia, which claimed a lien in the amount of \$221,901.75 against real estate owned by Appellants in the Northpoint Subdivision in Canaan Valley, Tucker County, West Virginia. Exhibit A. That notice of mechanic's lien merged two separate and distinct claims: (a) a claim of \$3,000 for work performed on August 14-17, 2003, to repair a water leak, and (b) a claim for payment of approximately \$219,000, including interest, for work performed in the late 1980s in the construction of infrastructure at Northpoint Subdivision. (Tr. p. 2-4) ¹.

Appellants filed a Petition to Discharge Mechanic's Lien as Civil Action No. 03-P-14, in the Circuit Court of Tucker County, West Virginia, on December 19, 2003,

¹Transcript references are to the transcript of the January 26, 2004, hearing before Honorable Andrew N. Frye, Jr., Judge of the Circuit Court of Tucker County, West Virginia.

alleging that Harman, as a maintenance and repairman, whose services are retained only occasionally, is not a contractor who performed work such as to be included within the definition contained in the mechanic's lien statute, and that Harman had not performed work continuously from the first date of the work. *W. Va. Code* §38-2-16. Specifically, it was asserted that Harman had performed no work within the last five (5) years for or upon any improvements to the lots described in the mechanic's lien.

A hearing was held before the Circuit Court of Tucker County on January 26, 2004. Harman alleged at the hearing that the Northpoint developers had signed promissory notes in 1990 and 1991 promising to pay him for work performed in prior years. (Tr. p. 2-3) No notes were produced upon which the allegation was based. Although one of the developers, Appellant Richards, acknowledged that an uncertain amount had been previously owed to Harman, there remained a significant question as to the amount and the collectibility of that debt. Furthermore, there was a question as to whether the repair work performed in 2003 had any relation to the infrastructure construction performed 15 years earlier; i.e., was it related as to contract, location or nature of improvements?

The Circuit Court, without seeing the promissory notes, and without hearing any evidence as to the nature of any work performed during the 15 year period between 1989 and 2003, ruled that the August, 2003, work was a continuation of the infrastructure work completed by Harman in 1988 or 1989. With no evidentiary record as to these matters, the Circuit Court denied the Petition to Discharge and on January 30, 2004, issued a "Final Order." Exhibit B.

On April 13, 2004, Harman filed a civil action pursuant to *W. Va. Code* §38-2-34, in the Circuit Court of Tucker County, West Virginia (Civil Action No. 04-C-16), seeking to perfect the previously-filed mechanic's lien and asserting that the Circuit Court's earlier rulings were *res judicata* as to the amount and enforceability of the lien. That action has been informally stayed pending this appeal. If and when that action is revived, it will be possible, through discovery, for the Appellants and the Court to see the note(s), assuming that any exist; it will be possible to determine whether there was a contract which described the nature of the work that was performed more than 15 years ago; and it will be possible to determine whether the August, 2003, work was truly a continuation of the same "improvements." Furthermore, it will become apparent that collection of the 12 to 14 year old note(s) is barred by applicable statutes of limitations.

Appellants, through counsel, contacted counsel for Appellee Harman to determine if he would consent to a stipulation that the Circuit Court's January 30, 2004, order is not a "Final Order" and, before any appeal was taken, to permit the issues as to the amount and enforceability of the lien to be developed in the litigation which Harman filed to perfect the mechanic's lien. Counsel for Harman refused that request.

Appellants submit that the Circuit Court's issuance of a Final Order was erroneous and premature.

II. STATEMENT OF FACTS

In the late 1980s, Appellants were developing a subdivision known as Northpoint in Canaan Valley, Tucker County, West Virginia. Appellee Harman was retained to construct roadways, water lines and sewerage. After making many payments to Harman, the developers reached a point where they were unable to make further cash payments and a note or notes were executed for the balance due. Appellants did not retain copies of the note(s). Over the years thereafter, Harman occasionally performed additional work at Northpoint when he was called upon to do so, always billing for, and being paid for, the specific work requested. No demand was ever made for payment upon the note(s), nor was a past-due balance carried forward on any of the billing statements submitted by Harman. An example is Harman's billing statement dated October 1, 2003, which is attached hereto as Exhibit C. That statement shows a carry-forward balance of \$10,288.91, payments received in August, 2003, of \$7,000, additional charges for work done in August, 2003, in the amount of \$3,000, and, with tax, a balance due of \$8,056.75. There is no mention of a \$219,000 carry-forward balance for any note(s) payable. If Harman believed that he was then entitled to receive \$219,000, he certainly had not made Appellants aware of that claim.

The work done in August, 2003, upon which the timing of the mechanic's lien is based, was repair work rather than infrastructure construction. Said repair work was billed at \$3,000. Thereafter, Harman seized upon a slow payment of the October invoice to file

a mechanic's lien incorporating an amount allegedly due, but never previously claimed, upon the 12-14 year old note(s).

The work done in August, 2003, consisted of the repair of a water leak adjacent to a lot in Section A of the Northpoint Subdivision which is served by a line from the water tank. (Tr. p. 13) The lots upon which Harman placed a lien, however, are within Section B of the subdivision,² which is served by a separate and distinct water line. In other words, the leak in Section A did not adversely affect the lots in Section B. Thus, the August, 2003, work by Harman did nothing to "improve" the Section B lots upon which the lien was placed.

The mechanic's lien, as filed, is in the amount of \$221,901.75, with interest allegedly accruing at the rate of 1.5% per month. That amount includes both (a) the \$219,000 claim based upon the 1990-1991 notes and (b) the \$3,000 claim for the work that was performed by Harman in August, 2003.

Notwithstanding the foregoing, a number of important facts of this case have not been developed sufficiently to permit the preparation of a full statement of facts. For example, Appellants have no record of the 1990-1991 note(s) upon which 99% of the amount of the mechanic's lien claim is based; accordingly, Appellants do not know whether any such note(s) presently exists, nor do they know a stated interest rate or how any such

² Section B was not developed until the mid-1990s, several years after the Section A infrastructure was completed. The notes payable, therefore, could only have related to the lots within Section A.

interest may have been calculated. Also, Appellants have no record of a demand having ever been made by Harman for collection of any notes; therefore, pursuant to *W. Va. Code* §46-3-118, any action to now collect upon said notes is barred by the statute of limitations. Furthermore, Appellants need to engage in discovery to determine whether a written contract existed, whether there was any agreement for the continuation of work on the infrastructure, or whether the August 14-17, 2003 work was merely a service call requested by the developer on an *ad hoc* basis, consistent with several other such calls over the years.

III. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that a mechanic's lien may incorporate a monetary claim which may not otherwise be enforced due to the bar of the statute of limitations.
2. The Circuit Court erred in holding that the work performed in August, 2003, was of the same or similar type as that performed 15 years earlier, and was based upon an ongoing contractual relationship of the parties.
3. The Circuit Court erred in holding that lots in one section of a subdivision could be the subject of a mechanic's lien for repair work to a water line in another section, even though the properties are served by separate water lines.
4. The Circuit Court erred in issuing a "Final Order" when the action to perfect the mechanic's lien had not yet been filed, no discovery had taken place, and there was an insufficient record before the Court upon which a ruling could be based.

IV. STANDARD OF REVIEW

As the issue on appeal is a question of law and an interpretation and application of the mechanic's lien statute, the Court must apply a *de novo* standard of review. See Syl. pt.1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

V. DISCUSSION OF LAW

1. The filing of a mechanic's lien long after a promissory note taken for earlier work has been accepted will not revive a claim premised on the note, which claim would otherwise be barred by the expiration of the applicable period of limitations.

Harman, the lien claimant in this case, is cleverly, but wrongly, attempting to "bootstrap" a claim, premised on unenforceable notes, to his mechanic's lien claim.

(a) Harman waived his lien rights when ninety (90) days³ passed after completion of his work in 1988, and he did not file a mechanic's lien to secure payment of whatever amount remained owed to him. Therefore, his mechanic' lien rights upon that work expired in 1988 or 1989.

(b) As to the collectibility of the promissory notes, had suit been brought in 2003 to enforce the promissory notes given in 1990 or 1991 promissory notes., that claim clearly would have been barred by the 10-year statute of limitations set forth in *W. Va. Code* § 46-3-118. See *Steeley v. Funkhouser*, 153 W. Va. 423, 169 S.E.2d 701, 703 (1969) ("A

³ W. Va. Code §38-2-8, in 1988, provided that a mechanic's lien be filed of record within ninety (90) days after completion of the work. In 2002, the West Virginia Legislature changed the filing deadline to 100 days.

promissory note payable on demand becomes due and payable upon its delivery and the statute of limitations begins to run upon such instrument from the date of its execution", quoting *Lightner v. Lightner*, 146 W. Va. 1024, 124 S.E.2d 355 (1962)); *Duttine v. Savas*, 455 F. Supp. 153, 160 (S.D.W. Va. 1978) ("The statute of limitations commences to run from the date of execution with respect to promissory notes payable on demand, such as those in issue here").

A claim for money owed, the enforcement of which would otherwise be barred by the operation of the statute of limitations, will not be revived unless the debtor's intent to revive the claim is manifested in a writing, signed by the debtor, clearly manifesting the intent to revive the time-barred claim. In ruling upon this same issue, but with respect to an open account, this Court held that

to remove the account from the operation of the five year statute of limitations created and imposed by Section 6, Article 2, Chapter 55, Code, 1931, there must be an express promise to pay or, if there be a mere acknowledgment, it must be unqualified, without condition, importing liability and willingness to pay without reference to a future settlement, and it must be determinate and unequivocal so as to be tantamount to an express promise to pay. . . . An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, importing a willingness and liability to pay; it must be an acknowledgment from which a promise of payment may be implied unconditionally and such as to indicate an actual liability and a willingness to pay.

Preston County Coke Co. v. Preston County Light & Power Co., 146 W. Va. 231, 119 S.E.2d 420, 430 (1961) (citations omitted).

Here, of course, there has been no such manifestation of an intent by the Appellants

to revive the obligations represented by notes executed during the early 1990s, the enforcement of which clearly is barred by the applicable period of limitations. To the contrary, Harman can point to no undertaking on the part of the Appellants to pay the stale claims represented by the unenforceable notes. *See Weirton Ice & Coal Co., Div. of Starvaggi Indus., Inc. v. Weirton Shopping Plaza, Inc.*, 175 W. Va. 473, 334 S.E.2d 611, 614 (1985) ("It is important to note that our statute [*W. Va. Code* § 55-2-8] does not require any special language to revive a stale promissory note. The only condition expressly imposed by the statute is the requirement that the new promise or acknowledgment *shall be in writing and signed by the debtor or his agent*" (emphasis added). Merely doing additional work for which additional compensation is sought is far from being the clear and unmistakable statement of debtor's intent which would be necessary to revive the obligations represented by the stale notes. Also, there was no demand for payment ever asserted by Harman until October 22, 2003. That being the case, Harman's claim for collection of an unenforceable debt cannot be validly asserted in his 2003 mechanic's lien claim. A mechanic's lien claim cannot encompass an unenforceable debt.

2. Harman's lien cannot properly include the initial work where there was no continuity or identity in the work and more than ten years has elapsed since completion of initial work.

Even if this Court determines that no waiver of Harman's lien rights occurred, the lien is ineffective insofar as it incorporates claims for work performed more than ten years prior to the August, 2003, repair work which was performed pursuant to a separate and distinct

contract. Under West Virginia law, a mechanic's lien attaches and dates from the time the first work is done or the first materials are furnished under the contract giving rise to it. *Carolina Lumber Co. v. Cunningham*, 156 W. Va. 272, 192 S.E.2d 722 (1972); *Thorn v. Barringer*, 73 W. Va. 618, 81 S.E. 846 (1914); *Cushwa v. Improvement, Loan & Building Ass'n*, 45 W.Va. 490, 32 S.E. 259 (1898). Harman's right to file a Mechanic's lien ended 90 days after the last work was performed. *West Virginia Code* §38-2-8 (prior to the 2002 statutory change). The question presented here, therefore, is whether the August, 2003, repair work giving rise to Harman's mechanic's lien is merely an extension of the original contract for infrastructure work or a separate contract to repair the leak in the Section A water system. Stated otherwise, was Harman's sporadic work performed pursuant to a single contract or multiple contracts?

"In order for liens to be effective from the commencement of the construction or improvement, the improvement so commenced must be the same improvement for which the liens are claimed. It is not enough that some improvement was previously commenced on a part of the same premises for the same owners [W]here work on a building was interrupted for too long a period, it has been held that the mechanics' liens accrue to the claimants only from the recommencement of the work on the building." 53 Am. Jur. 2d *Mechanics' Liens* § 254; see also Annotation, *What Constitutes "Commencement of Building or Improvement" for Purposes of Determining Accrual of Mechanic's Lien?* 1 A.L.R.3d 822 ("It generally has been recognized that it is necessary that the work on the building be continuous from start to finish in order for mechanics' liens to accrue to all the claimants

from the time the work on the building was commenced. Accordingly, where the work on the building was interrupted for too long a period, it has been held that the mechanics' liens accrue to the claimants only from the recommencement of the work on the building.")

For a mechanic's lien to relate back to the commencement of work, the work must be performed without material abandonment; the issue is primarily one of notice, and a project will be considered abandoned when a reasonable observer would be on notice that persons who performed work on the site apparently did not intend to continue it to completion. *Nu-Trend Elec., Inc. v. Deseret Federal Sav. & Loan Ass'n, Inc.*, 786 P.2d 1369 (Utah Ct. App. 1990). In *May v Mode*, 142 Mo. App. 656, 123 S.W. 523 (1909), the court held that the mechanic's lien of the contractor, who finished the building after work on it had ceased for a long period of time, dated from the recommencement of the work and not from the time the work on the building was originally commenced. In the instant case, the original work was completed and it is only a repair which has brought the contractor back to the site. As there was no continuing contract for any additional work to be completed, any contractor could have been hired for the recent repair work, and there is no basis for application of the relation-back doctrine.

In *Fryman v. McGhee*, 108 Ohio App. 501, 163 N.E.2d 63 (1958), it was held that liens for work done on a sizeable project cannot relate back to the beginning of earlier work done as an improvement on part of the same premises and for the same owner. In *Fryman*, there was nothing in such earlier work to suggest a plan for work subsequently done by the

lien claimants on other parts of the premises. Moreover, an inspection of the premises prior to the time of the work done by such lien claimants would not have revealed a larger project for improvement of such premises, and there was no evidence that such project was even conceived when the earlier work was begun. Similarly, in the instant case, it could not have been contemplated that a water line repair 15 years hence would be a continuation of the original construction.

The importance of this issue cannot be overstated. If during the 15-year period when there was only sporadic maintenance and repair work being performed at the Northpoint Subdivision by Harman, as opposed to any continuing construction, no notice, actual or constructive, would be available to a title examiner which would put him on the alert as to a potential mechanic's lien claim relating to back to the 1988 commencement of construction. The Circuit Court's ruling which extends the time within which a contractor can file a mechanic's lien from 90 days to 15 years, could jeopardize the certainty and reliability of all title examinations performed for Northpoint Subdivision properties since 1988.

It is not uncommon in commercial real estate transactions for the Seller to be required to sign a mechanic's lien disclaimer containing language similar to the following:

No person, firm or corporation, except those listed below, if any, has within one hundred (100) days last past begun, continued or completed the performance of any work or labor, on, or the furnishing of any material, machinery or other equipment or supplies for use in, either with or without a contract or subcontract, and either to or for the owner directly or to or for any contractor or subcontractors, or contracted or subcontracted for, the erection, construction, alteration, removal or repair of any building or other structure or other improvement on said property.

Such language would protect a potential buyer from finding that a mechanic's lien is filed after he has acquired the property. If, however, this Court should permit mechanic's liens to be filed, claiming entitlement to payment for 15 year old unenforceable debts after several occurrences of non-continuous work, then West Virginia will be a title abstractor's nightmare and title insurance may be impossible to obtain. In any situation where there is an unpaid debt, new work could be performed and, immediately thereafter, a mechanic's lien could be filed incorporating the old unenforceable debt. The filing of the mechanic's lien in this case was nothing more than a ploy to revive an unenforceable debt by wrongfully encumbering real estate.

3. A mechanic's lien does not normally attach to property that was not improved by the work.

A mechanic's lien ordinarily extends no farther than the boundaries of the lot or tract on which the improvement stands, although the owner may own the lots adjacent thereto. 53 Am. Jur. 2d, *supra*, § 260; *Suburban Improvement Co. v. Scott Lumber Co.*, 59 F.2d 711, 716 (4th Cir. 1932) (applying West Virginia law and holding that "where a residential development is divided into lots, as is the case here, and a building is erected or repaired on one of these lots, the right to a lien under this statute, in the absence of special circumstances not here material, extends no further than the boundaries of the lot whereon the building stands, although the owner may own other realty adjacent thereto. . . . The object of the law

is to give to those who have enhanced the value of the building the security of a lien thereon, not to give a lien upon property not benefitted.") (citation omitted)

Harman's mechanic's lien was filed on lots in Section B that are not even served by the Section A water line that Harman repaired. Therefore, as a matter of law, the liens are invalid.

4. The Circuit Court's refusal to discharge the mechanic's lien prior to the same being perfected pursuant to *W.Va. Code* §38-2-34 should not constitute a final and appealable order.

Subsequent to the filing of the mechanic's lien, Appellants moved to discharge the lien for the legal reasons set forth in the three foregoing arguments. As no civil action had yet been filed to perfect the lien, there had been no factual discovery. Thus, the parties and the Circuit Court had little information about the work that was performed in the 1980s, *vis-a-vis* the work that was done in August, 2003, or, in fact, any work that may have been done between those dates. Harman did not produce any promissory notes upon which his claim is based. Harman has not been challenged as to his apparent compounding of interest. Harman has not demonstrated how \$219,000 of his claim survives the bar of the statute of limitations. Other facts were not available to the parties or the Court at the January 26, 2004, hearing.

Now, Harman has filed a civil action to perfect his mechanic's lien (Tucker County Civil Action No. 04-C-16). That civil action is the proper forum for a thorough development of the facts relating to the bogus mechanic's lien. Discovery has been

requested by Appellants but has not yet been answered by Harman. That action has been informally stayed pending this appeal. Eventually, there should be some certainty regarding the existence of the notes and the dates upon which they were executed. Other factual issues may also be resolved if this case is remanded for further hearings.

The issuance of a "Final Order" by the Circuit Court was premature.


VI. REQUEST FOR RELIEF

Appellants Steven W. Richards, Cortland Properties, Inc., Northpoint Residential Construction, Inc. and Mid-Lake Properties, II, Inc., respectfully request that this Court (1) reverse the Circuit Court's Final Order sustaining the propriety of Appellee's Mechanic's Lien; (2) instruct the Circuit Court to discharge that portion of the Mechanic's Lien relating to the promissory notes given for work performed by Appellee in the 1980s, for the reasons that (a) applicable statutes of limitations have rendered the collectibility of the notes unenforceable, and (b) the 1980s work lacks continuity of contract, location, and nature of the work with the current debt giving rise to the filing of the lien; or (3) in the alternative, remand this case, with instructions to the Circuit Court for consolidation with Civil Action No. 04-C-16 for further development and trial.

VI. REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that this Court grant oral argument.

Respectfully Submitted,



Stephen G. Jory
W. Va. State Bar ID # 1937
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P.O. Box 1909
Elkins, WV 26241
Telephone: 304-636-3553

Counsel for Appellants
Steven W. Richards,
Cortland Properties, Inc.,
Northpoint Residential Construction, Inc.
and Mid-Lake Properties, II, Inc.

NOTICE OF MECHANIC'S LIEN ON REAL PROPERTY

To: Stephen W. Richards
Raymond E. Church
Cortland Properties, Inc.
Northpoint Residential Construction
HC 70 Box 4AA
Davis, West Virginia 26260

And to: Pat A. Nichols, Esquire
Successor Trustee
P.O. Box 201
Parsons, West Virginia 26287

You will please take notice that the undersigned Harman Equipment Sales has furnished labor and delivered materials to Stephen W. Richards, Raymond E. Church and North Point Residential Construction for use in the erection, maintenance and construction of roads, water supply and excavation work on the entire real estate project on the following real estate situate in Dry Fork District, Tucker County, West Virginia described as follows:

Those certain lots or parcels of real estate designated as Lot Nos. 123, 125, 127, 131, 133, 135, 139, 141, 142, and 143 of Northpoint Woods-Section B, situate about 5 miles south of Davis West Virginia and lying on the western bounds of W.V. State Route 32, Dry Fork District, Tucker County, West Virginia.

The foregoing are also depicted on that certain plat prepared by James T. Carr, PS#920, of record in the in the Office of the Clerk of the County Commission of Tucker County, West Virginia in Plat Cabinet 2, Slide 215, to which said plat reference is made for a more particular description of said real estate being conveyed. Tax Map 310, Parcel 2, Dry Fork District.

Being some of the same real estate conveyed to the above debtors herein by Schoolhouse Limited Liability Company, a West Virginia Limited Liability Company, by deed dated July 1, 1996, said deed to be placed of record in the aforesaid Clerk's office immediately prior to the recordation of the Deed of Trust for the benefit of the Belington Bank.

You are further notified that the undersigned has not been paid the sum of Two Hundred Twenty One Thousand, Nine Hundred and One Dollars and 75 Cents (\$221,901.75), including interest at the rate of 1.5 percent per month through the payment date, together with collection of Attorney Fees and Expenses accrued in conjunction with the filing of this Lien, and that Harman Equipment Sales claims a lien upon your interest in the said property to secure the payment of the said sum. The date the last materials, equipment and labor were provided was the 15th day of August, 2003.

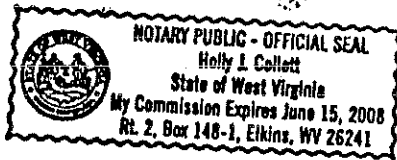


STATE OF WEST VIRGINIA;
COUNTY OF RANDOLPH:

Robert June Harman, being first duly sworn, upon his oath says that the statements in the foregoing notice of lien contained are true, as he verily believes.

Robert Harman
ROBERT HARMAN, PRESIDENT
HARMAN EQUIPMENT SALES

Taken, subscribed and sworn to before me this 21ST day of October, 2003.



Holly J. Collett
NOTARY PUBLIC

My commission expires June 15, 2008.

STATE OF WEST VIRGINIA,
Tucker County Clerk's Office:

Be it remembered that on this 22nd day of Oct., 2003
the foregoing Mechanics Lien, with the certificate
thereto, was this day presented in said office and admitted to record.

Teste Linda Cole by OPR, Clerk

PREPARED BY:

DAVID A. SIMS, ESQUIRE
LAW OFFICES OF DAVID A. SIMS
P.O. Box 2659
Elkins, West Virginia 26241
304-636-8000

IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

STEVEN W. RICHARDS,
CORTLAND PROPERTIES, INC.,
a West Virginia Corporation,
NORTHPOINT RESIDENTIAL CONSTRUCTION, INC.,
a West Virginia Corporation, and
MID-LAKE PROPERTIES, II, INC.,
a Maryland Corporation,
Petitioners,

v.

Civil Action No. 03-P-14
Judge Andrew N. Frye, Jr.

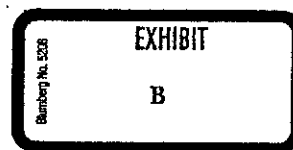
ROBERT JUNE HARMAN,
dba HARMAN EQUIPMENT SALES,
Respondent.

FINAL ORDER

On the 26th day of January 2004, this matter came on before this Court, the Honorable Andrew N. Frye, Jr. presiding, on the Petitioner's *Petition to Discharge Mechanics' Lien* and the Respondent's *Motion to Dismiss*. The Petitioner's were present, in person, and by their counsel, Stephen Jory, and the Respondent was present, in person, and by his counsel, David A. Sims.

Upon hearing arguments of counsel in this matter, this Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. That the Respondent, Robert June Harman – dba Harman Equipment Sales, did perform backhoe work, water system upgrade, and/or other services for the Petitioners to improve 10 lots of real estate in Northpoint Subdivision, Canaan Valley, Dry Fork District, Tucker County, West Virginia.
2. That the Petitioners failed to pay the Respondent, in full, for the improvements the Respondent made at Northpoint Subdivision.



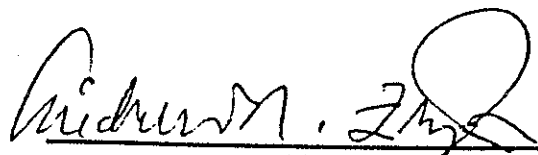
3. That based upon the work performed at Northpoint Subdivision, the Respondent has a valid Mechanics' Lien under the provisions of W.Va. Code 38-2-*et seq.*
4. That the Respondent did perfect his lien by filing a duly verified Notice of Mechanics' Lien with the Office of the Clerk of the Tucker County Commission within the statutorily prescribed perfection period.
5. That the Mechanics' Lien perfected by the Respondent does cover all work performed by the Respondent at Northpoint Subdivision inasmuch as the work performed was all of the same or similar type and was based on an ongoing contractual relationship of the parties.
6. That the work performed by the Respondent did increase the value of the subdivision and was performed for the purpose of supplying water to the homes situate in Northpoint Subdivision. All work performed on the water system at Northpoint Subdivision was for the express purpose and benefit of the homes and structures in Northpoint Subdivision even though, at times, some work progressed over unimproved lots.
7. That "[t]he purpose of the mechanics' liens statute is to protect any person who increases the value of another person's real property by furnishing labor or materials." Carolina Lumber Co. v. Cunningham, 156 W.Va. 272, 192 S.E.2d 722 (1972).
8. That the Mechanics' Lien was sufficient as to identification of the property owner, Petitioner Mid-Lake Properties, II, Inc., inasmuch as "upon considering the entire lien, it can be ascertained with reasonable certainty who the owner is, it [the mechanics, lien] will be sufficient." U.S. Blowpipe Co. v. Spencer, 61 W.Va. 191, 56 S.E. 345 (1907).

9. That the Mechanics' Lien was sufficient as to the description of the structure inasmuch as the water system serviced all identified lots in the Mechanics' Lien filed. "A notice of mechanics' lien sufficiently describes the structures upon which the lien is predicated, as contemplated by W.Va. Code §38-2-8, when it contains a detailed description of the realty, a conclusory description of the structures, and the improvements effected by the contractor under W.Va. Code 38-2-1, are appurtenant to all structures upon the realty." Syl. Pt. 3, Earp v. Vanderpool, 160 W.Va. 113, 232 S.E.2d 513 (1976).

ACCORDINGLY it is hereby ORDERED:

1. The Petitioner's *Petition to Discharge Mechanics' Lien* is REFUSED.
2. The Circuit Clerk shall provide a copy of this Order to all counsel of record.
3. This is a FINAL ORDER of the Tucker County Circuit Court.
4. The Circuit Clerk shall remove this matter from the docket and place it among the actions ended.

ENTERED this 30th day of January 2004.



JUDGE

HARMAN EQUIPMENT SALES

P.O. BOX 141 HARMAN, WV. 26270
1-304-227-4121 fax: 1-304-227-4268

<<< STATEMENT

TO: Northpoint Residential Const.
HC. 70 Box 4 AA
Davis WV. 26260

DATE	CUST NO.	TERMS
10-1-03		Net due at time of services

DATE/QTY	DESCRIPTION	PER UNIT
	Previous Bal.	10,288.91
	Payment Rcd. 8-14-03	(5,000.00)
	Payment Rcd. 8-26-03	(2,000.00)
	1.5% Per Month Interest From 12-1-02-----8-14-03	1,311.80
8-14-03-----		
8-17-03	3Men & Backhoe locating & Rcpairing Water leak .	\$2,500.00
	Level Hand rake, seed & Mulch Ratliff Yard Twice	250.00 \$500.00
Please make checks payable to:		SUBTOTAL \$7,600.71
HARMAN EQUIPMENT SALES		6.00 \$456.04
P.O. BOX 141		PAYMENTS
HARMAN, WV 26270		
		AMOUNT DUE \$8,056.75

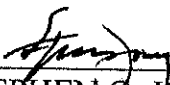
EXHIBIT
C

CERTIFICATE OF SERVICE

As counsel for Appellants, I do hereby certify that I duly served two true copies of the attached *Appeal Brief of Appellants Steven W. Richards, Cortland Properties, Inc., Northpoint Residential Construction, Inc. and Mid-Lake Properties, II, Inc.*, upon counsel of record for Appellee by depositing two true copies of same in the United States Mail with sufficient postage attached thereto, addressed to said counsel as follows:

David A. Sims, Esquire
P. O. Box 2659
Elkins, WV 26241

Dated at Elkins, West Virginia, this 29th day of October, 2004.



STEPHEN G. JORY
Jory & Smith, L.C.
P. O. Box 1909
Elkins, WV 26241