

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

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

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December 13, 2004

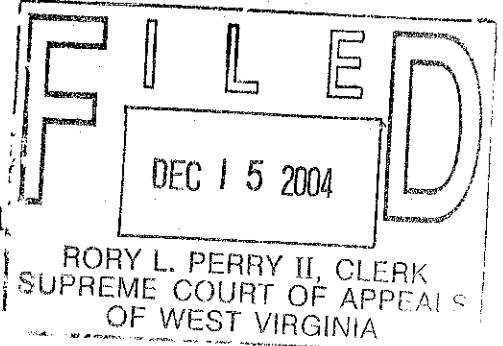


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**REPLY BRIEF OF APPELLANTS STEVEN W. RICHARDS,
CORTLAND PROPERTIES, INC., NORTHPOINT RESIDENTIAL
CONSTRUCTION, INC., AND MID-LAKE PROPERTIES, II, INC.**

Appellants Steven W. Richards, Cortland Properties, Inc., Northpoint Residential Construction, Inc., and Mid-Lake Properties, II, Inc., respectfully submit this reply to the brief of Appellee Robert June Harman, dba Harman Equipment Sales ("Harman"). For the reasons set forth herein, this Honorable Court should reject the arguments made by Harman and should reverse the January 30, 2004, Final Order of the Circuit Court of Tucker County, West Virginia.

I. REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee Harman states that his Notice of Mechanic's Lien was timely filed on October 22, 2003, for work that was completed on August 17, 2003. That statement only tells a small portion of the story. Actually, the mechanic's lien was timely filed only for a \$3,000 balance due for work that he had completed on August 17, 2003. The rest of the money which Harman included in the mechanic's lien, more than \$219,000, was related to work that had been completed more than 14 years earlier. The October 22, 2003, mechanic's lien was not timely filed as to that amount.

It is interesting, and quite revealing, to note that Harman totally ignores the basis of the claim for \$219,000 in his Statement of Facts. Harman does not tell the Court when he performed the work upon which the \$219,000 claim is based. He does not tell the Court that he accepted notes in lieu of cash payment for that work. He does not tell the Court when the note or notes were signed. He does not tell the Court whether those notes actually exist. He does not tell the Court what the interest rate was on the notes or how it was calculated to derive the amount of \$219,000. He does not tell the Court that for more than 10 years after the notes were allegedly signed, he made no

attempt to collect upon the notes. He does not even address the statute of limitations issue. Harman cannot address these matters because there is absolutely no justification for the inclusion of the unenforceable 14 year old debt in a current mechanic's lien.

The lack of the foregoing information was pointed out in Appellant's Statement of Facts. Harman's failure to respond with factual support for the \$219,000 claim can only mean that the claim is totally fictitious.

II. DISCUSSION

1. **There was no continuing contract over a 14 year period which would entitle Harman to include an unenforceable claim in a newly filed mechanic's lien.**

Harman asserts that there was a continuing contract for sporadic repair work which he has performed since 1988. Appellants do not deny that over the years, Harman has occasionally been called and asked to do repair and upkeep work within the Northpoint Subdivision. However, no continuing contract existed and no tacit understanding existed; in fact, other contractors were also called to perform work from time to time. There was no one continuing infrastructure or building project at Northpoint upon which Harman was working during any portion of the years between 1988 and 2003. Thus, the statute upon which Harman relies, West Virginia Code, §38-2-16, is not applicable to this case.

Furthermore, Harman has offered no evidence to support his assertion regarding the existence of a continuing contract. He has produced no contract. He has produced no work logs to indicate the dates upon which he performed work or the type of work he performed within the subdivision. Thus, this Court cannot discern whether Harman worked in the Northpoint Subdivision for two days or twenty days in any particular year. Likewise, the Court cannot discern whether

Harman worked on a property owner's hot tub or if he filled potholes in the subdivision roads when he may have worked in the subdivision during any particular year. Thus, the Court cannot determine that Harman worked under "one contract" as contemplated by §38-2-16. Absent such a finding, it is impossible to conclude that the statutorily unenforceable \$219,000 claim may be included in the 2003 mechanic's lien.

The falsity of Harman's argument is exposed by the fact that even though he asserts that there was a continuing contract for the sporadic upkeep work which he performed over the years, the \$219,000 claim was not shown as a carry-forward balance due on his statement for the August, 2003 work. He knew that the 12 to 14 year old notes were unenforceable. It was only a lawyer's contrivance to attempt to bootstrap the stale claim onto a timely claim and hold Appellant's land hostage for the payment of the stale claim.

2. Harman's bootstrap theory to revive unenforceable claims in a mechanic's lien would destroy the certainty of title examinations in subdivisions throughout the state.

In his response to this issue, Harman reveals that he does not understand the importance of the limited time period for the filing of mechanic's liens. A title examiner must be able to rely upon the fact that after 90 days (now, 100 days) have passed from the date that the last materials were delivered to the work site and from the date that the last work was performed on a project, then, absent the filing of a mechanic's lien, no mechanic's lien may thereafter be asserted.

Harman's argument, taken to its logical conclusion, would result in title examination chaos. If Harman's stale claim can be revived by bootstrapping it onto a current claim, then Harman, in October of 2003, could have obtained a mechanic's lien against every property in the Northpoint subdivision, regardless of who presently owns that property. This is because of the relation-back

doctrine which provides that a mechanic's lien relates back to the date upon which work was first performed. Since Harman performed the infrastructure work before any of the lots were sold, his October, 2003, lien could have included over 60 lots, most of which are owned, and developed into vacation homes, by people from throughout the middle-Atlantic states. Many lawyers have, over the years, rendered opinions that those property owners have marketable title, free and clear of any liens. If this Court accepts Harman's argument, then all those title opinions will be rendered worthless. Gratuitously, Harman suggests that there is no problem because he limited his lien to 10 lots presently owned by Appellants. However, if Harman is hired next month to repair the fence around the trash bin and sends a bill for \$200, he can immediately run to the courthouse with a mechanic's lien for \$219,200 and place a lien upon every lot in the subdivision.

Clearly, there is a reason for the limited period within which mechanic's liens must be filed. If that time has passed and there is no apparent on-going work being performed, then a title examiner must be able to conclude that no mechanic's lien is thereafter going to encumber the title to that property. If that certainty is removed by action of this Court, then a lawyer will only be able to render title opinions for unimproved property. For improved property, the title examiner would be able to render an opinion only after first obtaining a written waiver or certificate of payment from every general contractor and subcontractor who worked on the improvements or supplied materials for the improvements, no matter how many years ago the improvements were constructed. Yet Harman's stated position is that "purchasers have an obligation to make certain that all of the work performed by a contractor on a lot and in the common areas of the subdivision have been paid to avoid [the situation where a mechanic's lien could be filed even after the deadline for filing a lien has passed]." (Appellee's Brief, p. 13) That statement is absurd.

Harman seeks to have the traditional system of title examinations completely turned upside down.

3. Harman's mechanic's lien improperly includes real estate unaffected by any work performed in August of 2003.

Harman performed no work in August of 2003 upon any of the 10 lots which are encumbered by the lien, nor did he work on any structure which affected those lots. Thus, the entirety of the October, 2003, mechanic's lien is invalid.

4. The Circuit Court erroneously entered a final order as to matters upon which no facts were adduced.

The commentary set forth in the Statement of Facts portion of this Reply Brief highlights the factual deficiencies of this case and also highlights Harman's refusal to provide even the most basic factual information in support of his claim. Why won't he state the dates when he allegedly performed work for the Appellants and the exact nature of that work? Why won't he produce a copy of the notes?

Quite simply, without the foregoing information, how could any order entered by a Court in Harman's favor be final. If a Court could determine that the 12 - 14 year old notes are somehow enforceable, how can the amount be determined without seeing the notes? There is nothing about Harman's arguments that make sense.

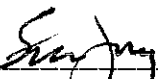
III. CONCLUSION

Appellants assert that the October 22, 2003, Notice of Mechanic's lien filed by Harman is invalid in its entirety. First, the claim for \$219,000 is an attempt to unlawfully revive unenforceable payment obligations, and the claim is untimely as to that amount. Secondly, the claim

for \$3,000 is invalid because the 10 lots specifically encumbered by the Mechanic's Lien were neither improved nor affected by the work performed by Harman in August of 2003.

WHEREFORE, the Final Order of the Circuit Court of Tucker County, West Virginia, must be reversed and the October 22, 2003, Notice of Mechanic's Lien must be discharged.

Respectfully Submitted,



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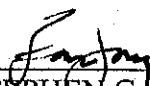
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CERTIFICATE OF SERVICE

As counsel for Appellants, I do hereby certify that I duly served two true copies of the attached *Reply 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:

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Dated at Elkins, West Virginia, this 13th day of December, 2004.



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