

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-16-14

CENTRAL MAINE DRYWALL, INC.,)
)
Plaintiff,)
)
v.)
)
PRO CON, INC., and)
TRAVELERS CASUALTY AND SURETY)
COMPANY OF AMERICA,)
)
Defendants.)
)

**ORDER ON DEFENDANT PRO CON,
INC.’S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Defendant Pro Con, Inc. (“ProCon”) moves for partial summary judgment on Count V of Plaintiff Central Maine Drywall, Inc.’s (“CMD”) complaint. For the reasons discussed below, ProCon’s motion is granted.

I. BACKGROUND

Defendant ProCon was the general contractor for a project to construct a Residence Inn in Bangor, Maine (hereafter, the “Project”). (Def. Supp’g S.M.F. ¶ 1; Pl. Opp. S.M.F. ¶ 1.) On December 4, 2014, ProCon subcontracted CMD to preform certain work on the Project. (*Id.*) ProCon and CMD executed a number of change orders expanding the scope of CMD’s work on the Project. (*Id.* ¶ 2.) CMD finished its work and has received payments totaling \$820,858.07 from ProCon, which constitutes the total amount owed to CMD under the subcontract and change orders. (*Id.* ¶ 3.)

ProCon also subcontracted Porter Building Systems, Inc. (“PBS”) to perform certain work on the Project. (*Id.* ¶ 2.) Shortly after CMD began working on the Project, ProCon asked CMD if it would perform work that had been subcontracted to PBS because PBS was not fulfilling the terms of its subcontract. (Pl. Add’l S.M.F. ¶ 1; Def. Reply S.M.F. ¶ 1.) When PBS

became aware of ProCon's arrangement with CMD, PBS contacted CMD and asked it to perform the work directly for PBS. (*Id.* ¶ 2.) CMD began working on the Project for PBS on December 9, 2014, and continued to do work for PBS until PBS abandoned the Project and filed for Chapter 7 bankruptcy. (*Id.* ¶ 5.)

CMD filed a complaint against ProCon and BanRes, LLC, owner of the Bangor Residence Inn and associated land, on December 18, 2015.¹ CMD's complaint contain claims for breach of contract and violation of the Prompt Payment Statute (Count I), unjust enrichment (Count III), Quantum Meruit (Count IV), and to enforce a mechanic's lien (Count V).²

In its complaint, CMD concedes that it received \$73,265.63 in payments from PBS for the work it performed on the Project for PBS. (Compl. ¶ 28.) CMD alleges that the total amount presently due from PBS to CMD for its work on the Project is only \$15,909.38. (*Id.* ¶ 27.) However, CMD asserts that the PBS Bankruptcy Trustee has demanded that CMD return the \$73,265.63 in payments to the bankruptcy estate as avoidable transfers under the U.S. Bankruptcy Code, 11 U.S.C. §§ 547(b), 550(b). (*Id.* ¶ 28.) Thus, CMD asserts it is entitled to enforce its mechanic's lien for \$89,175.01. (Compl. ¶ 29; Pl. Opp. S.M.F. ¶ 8.)

ProCon moved for partial summary judgment on CMD's mechanic's lien claim on October 19, 2016. ProCon argues that, based on the allegations in complaint, CMD is only owed "at most" \$15,909.38 for its work on the Project. (Def. Mot. Summ. J. 5.) ProCon requests that this court "enter partial summary judgment on Count V of CMD's Complaint in favor of ProCon, holding that the amount in controversy for that claim is limited to \$15,909.38, plus costs..." (*Id.*)

¹ Travelers Casualty and Surety Company of America was substituted for BanRes, LLC as a party defendant on May 6, 2016.

² CMD's complaint does not contain a Count II.

CMD filed an opposition to partial summary judgment on November 26, 2016. CMD conceded that it has received \$73,265.63 from PBS for its work on the Project. (Pl. Opp'n to Def. Mot. Summ. J. 4.) CMD further admitted ProCon's allegation in paragraph 6 of ProCon's Statement of Material Facts, namely that \$15,909.38 was the amount that remained unpaid from work it performed as a subcontractor for PBS. (Pl. Opp. S.M.F. ¶ 6). CMD argues, however, that "if" the Bankruptcy Trustee requires it to return \$73,265.63 in payments from PBS pursuant to § 547(b) of Bankruptcy Code, it would have the same affect as if CMD had not been paid for its work, entitling it to a mechanic's lien for the amount returned to the Bankruptcy estate. (*Id.* at 5.) Thus, CMD argues that it is entitled to a lien that includes the \$73,265.63 in payments claimed by the Bankruptcy Trustee. (*Id.*) ProCon filed a reply on December 2, 2016.

Oral argument was held on January 4, 2017. During oral argument, CMD represented to the court that it had received an offer of compromise from the Bankruptcy Trustee. In addition, on January 18, 2017 CMD advised the Business and Consumer Court that the offer of compromise had been finalized, meaning the Bankruptcy Trustee has agreed to settle all claims regarding the avoidable transfer from PBS in exchange for repayment of \$37,500.00 to bankruptcy estate. CMD reiterated its assertion that it is entitled to enforce a mechanic's lien for both the amount that remains unpaid and for any amounts returned to the PBS bankruptcy estate.

II. STANDARD OF REVIEW

Either party may move for summary judgment on all or part of a claim. M.R. Civ. P. 56 (a)-(b). Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821. A fact is material if it can affect the outcome of the case. *Dyer*, 2008 ME 106, ¶

14, 951 A.2d 821 (internal citation and quotation marks omitted). A genuine issue of material fact exists if the fact finder must choose between competing versions of the truth. *Id.* When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.* Summary judgment is also an appropriate device for winnowing issues and deciding questions of law. *Magno v. Town of Freeport*, 486 A.2d 137, 141 (Me. 1985); *see* 3 Harvey, *Maine Civil Practice* § 56:1 at 218-19 (3d ed. 2011).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. M.R. Civ. P. 56(e); *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 26, 133 A.3d 1021. If the motion is properly supported, the burden then shifts to the non-moving party to respond with specific facts establishing a prima facie case for each element of the claim challenged by the moving party. M.R. Civ. P. 56(e); *Chartier v. Farm Family Life Ins. Co.*, 2015 ME 29, ¶ 6, 113 A.3d 234. If the non-moving party fails to present sufficient evidence of the challenged elements, then the moving is entitled to a summary judgment. *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 21, 969 A.2d 897. Both the motion and the opposition must be supported by statements of material facts. M.R. Civ. P. 56(h)(1)-(2). Each statement of material fact must be supported by citation to record evidence. M.R. Civ. P. 56(h)(4). The record evidence must be “of a quality that could be admissible at trial.” *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d 653. The court may disregard any assertions of fact not properly supported. M.R. Civ. P. 56(h)(4).

III. ANALYSIS

Maine’s mechanic’s lien statute provides that whoever performs or furnishes labor, materials, or equipment used in erecting, altering, moving, or repairing a house building, or appurtenance, or any wharf, pier, or any building thereon, under a contract with or by consent of

the owner, “has a lien thereon and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs.” 10 M.R.S. § 3251. In order to maintain a lien, a claimant must, within 90 days of ceasing labor or furnishing materials or services, record with the office of the registry of deeds in the county in which the building is situated a true statement of the amount due to the claimant, with all just credits given, and a description of the property intended to be covered by the lien sufficiently accurate to identify the property and the names of the owners, if known. *Id.* § 3253(1)(A). The claimant must also provide a copy of the statement filed with the office of the registry of deeds to the owners by ordinary mail. *Id.* § 3253(1)(B). Any inaccuracy in the statement of the amount due to the claimant will not invalidate the lien, unless it appears that claimant has willfully claimed more than is due. *Id.* § 3254.

To enforce a lien, the claimant must bring a civil action against the debtor, the owner of the property, and all other parties with an interest in the property in the county where the property is located within 120 days after ceasing laboring or furnishing materials or services. *Id.* § 3255(1). Title 10, Section 3258 provides, in relevant part:

The court shall determine the amount for which each lienor has a lien upon the property by jury trial, if either party so requests in complaint or answer; otherwise in such manner as the court shall direct. Such determination shall be conclusive as to the fact and amount of the lien, subject to appeal as in other actions.

Id. § 3258. Thus, the actual amount due to the claimant for which he has a lien is a question of fact for trial. However, the statute also states that this determination can also be made “in such manner as the court shall direct” which could include in the Court’s view resolution of part or all of the claim through a summary judgment process. *Platz Assocs. v. Finley*, 2009 ME 55.

CMD admits that it has received complete payment for the work it did on the Project for ProCon, that it received \$73,265.63 in payments from PBS for the work it did on the Project for

PBS, and that it is presently claiming that it is owed only \$15,909.38 for its work for PBS on the Project. (Pl. Opp. S.M.F. ¶¶ 3, 5-6.) CMD's only argument that it may claim a mechanic's lien for more than \$15,909.38 is its assertion that the Bankruptcy Trustee has demanded that it return all or part of the \$73,265.63 in payments from PBS as an avoidable transfer under § 547(b) of U.S. Bankruptcy Code. (Pl. Opp'n to Def. Mot. Summ. J. 4-5.) However, there is no evidence in the record that CMD has actually returned any of the \$73,265.63 in payments to Bankruptcy Trustee. A mechanic's lien is intended to secure only the amount owed for the furnishing of labor, materials, and services. 10 M.R.S. § 3251. Because CMD has received and retained \$73,265.63 in payments from PBS for its work on the Project, CMD is not entitled to enforce a mechanic's lien for the amount those payments. *See* 10 M.R.S. § 3251.

The parties have raised a genuine question of law in this case about whether a claimant can enforce a mechanic's lien for amounts that were paid but later avoided and returned a Bankruptcy estate. However, because no payments from PBS have been returned to the Bankruptcy Trustee, that question is a theoretical one that the court need not decide at this time.

IV. CONCLUSION

Based on the foregoing, Defendant Pro Con, Inc.'s motion for partial summary judgment on Count V of Plaintiff Central Maine Drywall, Inc.'s complaint is **GRANTED**. Partial Summary Judgment is granted to ProCon based on amounts paid to the Plaintiff, as admitted by the Plaintiff in its filings. Therefore, as to count V of its Complaint, the Mechanic's Lien claim is limited to \$15,909.38, plus costs allowable by law.

Pursuant to Maine Rule Civil Procedure 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

