MECHANICS' LIENS: SELECTED ISSUES FOR REAL ESTATE LAWYERS

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In these difficult economic times, contractors more frequently are not receiving payment for labor and materials furnished for the improvement of real property. Consequently, they may resort to filing a mechanic's lien. It is appropriate, therefore, to remind attorneys who may be called upon to either file or defend a mechanic's lien about some basic mechanic's lien issues. This article is not intended to detail all the issues attendant to mechanic's liens, and any attorney involved with a mechanic's lien case should review the relevant statutes, contained at VIRGINIA CODE §§ 43-1 to 43-23.2, and case law.

First, a mechanic's lien has its foundation in a contract with which the lien must correspond.[1] The use of the materials and labor under the contract gives rise to the right to perfect and enforce a lien. The lien is inchoate until perfected, and it can be lost if it is not enforced within the time and in the manner prescribed by statute.

The statutes relating to the creation and perfection of a mechanic's lien are in derogation of the common law and strictly construed.[2] The very existence of a mechanic's lien, as well as the jurisdiction of the court to enforce it, depends upon the statutes and not upon equitable rules.[3] While this rigid statutory construction occasionally results in a hardship, this is the law of Virginia.[4]

In Virginia, the mechanic's lien statutes and are designed to aid persons whose labor, skill, or materials enhance the value of real property or structures thereon. VIRGINIA CODE § 43-3(A) states that

> [a]ll persons performing labor or furnishing materials of the value of fifty dollars or more, including the reasonable rental or use value of equipment, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold . . . shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof.

CODE section 43-2 contains a nonexclusive list of items constituting (i) structures permanently annexed to the freehold; (ii) materials for the improvement of buildings or structures that are permanently annexed to the freehold; and (iii) certain types of work, including the reasonable rental or use value of equipment, that are deemed to be materials.

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[1] *Rosser v. Cole*, 237 Va. 572, 576, 379 S.E.2d 323, 325 (1989).

[2] *Id.*

[3] *Feuchtenberger v. Williamson, Carroll & Saunders*, 137 Va. 578, 584, 120 S.E. 257, 259 (1923).

[4] *Coleman v. Pearman*, 159 Va. 72, 80, 165 S.E. 371, 373 (1932) ("[a]ll the statutory provisions for mechanics' liens are indispensable, and the omission of any one of them is fatal.")

VIRGINIA CODE § 43-4 requires a mechanic's lien claimant who is a general contractor to *file*, along with the memorandum of lien, a certification that he has mailed a copy of the memorandum of lien to the affected owner's last known address. All persons are deemed to have notice of the lien from the time of recording and indexing of the lien.

MECHANIC'S LIEN AGENT AND BUILDING PERMIT FOR RESIDENTIAL PROPERTY

Under certain circumstances, a lien claimant must give notice of his claim to a mechanic's lien agent ("MLA") as that term is defined in § 43-1. *See* VA. CODE § 43-4.01. The requirement applies only to persons performing labor or furnishing material in connection with the construction of a one- or two-family residential dwelling unit ("Residential Unit"). Therefore, the notice provisions are not applicable to persons performing labor or furnishing material in connection with the construction of buildings used for commercial purposes.

Section 43-4.01(C) of the VIRGINIA CODE provides, in part, that

> no person . . . may claim a lien under this title or file a memorandum or otherwise perfect and enforce a lien under this title with respect to a one or two family residential dwelling unit if such person fails to notify any mechanics' lien agent identified on the building permit . . . within thirty days of the first date that he performs labor or furnishes material to or for the building or structure.

Thus, if the building permit has been issued, posted, and identifies an MLA at the time the lien claimant begins work, he must give notice to the MLA within 30 days from the first date the claimant works on or supplies materials to the job. The statute defines the term "mechanics' lien agent" as a person "(i) designated in writing by the owner of real estate or a person authorized to act on behalf of the owner of such real estate and (ii) who consents to act, as the owner's designee for purposes of receiving notice pursuant to § 43-4.01." VA. CODE § 43-1. Effective July 1, 2010, consent of the MLA does not have to be in writing. There are two possible readings of the requirements of subsection 43-1. One, the statute may require that the MLA be designated either by the owner or by an agent of the owner. Two, the statute may simply state that the MLA can be either (1) a person designated in writing by the owner *or* (2) a person authorized to act for the owner. Under the second reading, designation in writing may not be necessary if the owner can demonstrate by some other means, such as course of dealing, that the MLA is someone authorized to act for her.

If a lien claimant failed to give notice to the MLA and the written requirements of § 43-1 were not complied with until after appointment of the MLA, for example by a subsequently executed writing, the argument may be made that the MLA was not properly designated. Lien claimants may argue that one cannot be a valid MLA until the proper designation has been issued by the owner and the proposed agent consents. Also, failure to give notice within the specified 30 day period shall not bar a person from claiming a lien or from filing a memorandum of lien provided that the lien is limited to labor performed or materials supplied on or after the date a notice is given to the MLA. VA. CODE § 43-4.01(C).

The statute also refers to mailing or physical delivery of the MLA notice, thereby implying that the notice must be in writing. The notice shall contain (i) the name, mailing address, and telephone number of the person sending such notice, (ii) the building permit number on the building permit, (iii) a description of the property as shown on the building permit, and (iv) a statement that the person filing such notice seeks payment for labor performed or material furnished. VA. CODE § 43-4.01(B). A return receipt or other receipt showing delivery of the notice to the addressee or written evidence that such notice was delivered by the postal service or other carrier to but not accepted by the addressee is *prima facie* evidence of receipt. *Id.*

Importantly, an inaccuracy in the notice as to the description of the property does not preclude claiming, perfecting or enforcing a lien if the property can otherwise be reasonably identified from the description. VA. CODE § 43-4.01(B). Note, though, that the statute does not contain similar savings provisions for other errors on the MLA notice.

A building permit must be posted on the property before any labor is performed or material furnished on the property for which the building permit is issued. VA. CODE § 43-4.01(A). Although the CODE imposes this requirement, it specifically provides for the possibility that labor and/or materials will be furnished to the property *before* issuance of the building permit. The statute provides that if labor or materials are provided before the building permit is issued, the notice to the MLA must be provided within 30 days after issuance of the permit. VA. CODE § 43-4.01(C). If, at the time of issuance, the building permit contains the name, mailing address, and telephone number of the mechanic's lien agent as defined in § 43-1, any person entitled to claim a lien under this title may notify the mechanic's lien agent that he seeks payment for labor performed or material furnished by registered or certified mail or by physical delivery. VA. CODE § 43-4.01(B). What if the permit does not contain one of the required elements? Is it therefore void entirely or can the argument be made that substantial compliance is sufficient, for instance if only the telephone number of the agent is missing?

Additionally, the building permit must be "conspicuously and continuously posted on the property for which the permit is issued until all work is completed on the property." VA. CODE § 43-4.01(A). An issue raised by this portion of the statute is what constitutes "conspicuous" posting of the building permit. Must the permit be posted in the front and center of the dwelling or will posting elsewhere (*e.g.*, on a tree near the front) on the property be sufficient? If the permit is posted in an inconspicuous place but the lien claimant sees it, is the failure to conspicuously post fatal? Another question the statute raises is what happens when the permit originally is conspicuously posted, but something happens to it before construction is completed. For example, the permit may blow off the tree on which it is posted. It may become so faded by the sun that it is unreadable. Someone may rip the permit down from its posted location.

Finally, the statute requires "continuous" posting of the permit. If the permit is posted, then removed for some reason, and then posted again, are all mechanic's lien claimants subsequently performing work absolved from the requirement to give notice, only those who began work while the permit was not posted, or only those who began and finished work prior to re-posting?

Another issue arises if the building permit is posted at the time the lien claimant begins work, and the posted building permit does not identify an MLA. As the result of a 2010 amendment, the statute now requires the lien claimant to check with the authorities to determine whether the building permit has been amended or an MLA has been appointed. This same duty applies if no building permit is posted. VA. CODE § 43-4.01(C). VIRGINIA CODE § 43-4.01(C) provides that "the issuing authority shall maintain the mechanic's lien agent information in the same manner and in the same location in which it maintains its record of building permits issued."

Last, there are three exceptions to the requirement to send notice to the MLA:

1. No person is required to comply with the notice requirements as to any mechanic's lien which is recorded prior to issuance of a building permit. VA. CODE § 43-4.01(C).

2. No person is required to comply with the notice requirement when the building permit does not designate an MLA. *Id.*

3. Persons claiming a lien under § 43-3(B) are exempt from these requirements. *Id.*

ALLOCATION ISSUES UNDER VIRGINIA CODE § 43-3(A): JOINT OR BLANKET MECHANIC'S LIEN

Since a claimant is generally entitled to a lien for work done or materials furnished in the improvement of real property but on only so much as is necessary for its convenient use and enjoyment, difficult issues arise where there is more than one lot, building, or contract involved. Without question, the polestar for the claimant's attorney is to "allocate" whenever there is some rational basis to support it and to file separate memoranda of liens when allocating.

A joint or blanket memorandum of mechanic's lien is a lien against two or more buildings or structures on separate parcels of land and which fails to allocate the specific amount or value of the labor or materials furnished by the claimant to each specific building or structure. A memorandum of mechanic's lien should contain a statement of the amount claimed for work done and materials furnished for improvement of the identical lot upon which the lien is claimed and a description of that very property. VA. CODE § 43-4.

In Virginia, a memorandum of mechanic's lien, asserting a single joint or blanket lien against several separate and distinct lots or parcels of land without apportionment to each lot, is valid only under the following circumstances:

1. There is a single contract between the owner and the mechanic's lien claimant for the claimant to supply all of the labor or materials for all of the buildings or structures on the various lots for a single, unapportioned, lump sum price;[5]

2. The claimant is unable to specify the amount of labor or materials supplied to each separate lot;[6] and

3. There are no other outstanding liens on the property subject to the lien; that is, only the rights of the owner and the mechanic's lien claimant are involved, and not the rights of other third-party lienholders (*e.g.*, noteholders and trustees under a deed of trust, other mechanics' lien claimants).[7]

All three of these requirements must be met for a memorandum asserting a joint lien to be valid.

In *United Masonry, Inc. v. Jefferson Mews, Inc.*,[8] the plaintiff filed a single joint and blanket mechanic's lien for work done under two separate contracts: one contract for the construction of common elements that would benefit the entire 264-unit project and the other contract for work done on the initial 132 units. The Court narrowed the issue to whether the blanket mechanics' lien was invalid "for failure to apportion the value of the work performed between the individual condominium units and the common element facilities."[9] The lien in *Jefferson Mews* failed to allocate the amounts due under each separate contract for the separate structures and sought to encumber the entire 264-unit project for the work done on only 132 units. The Supreme Court of Virginia ruled that the joint lien memorandum failed to substantially comply with § 43-3 of the Virginia Code and was therefore invalid.[10] The primary focus of

[5] *Sergeant v. Denby*, 87 Va. 206, 208, 12 S.E. 402, 402 (1890).

[6] *Weaver v. Harland Corp.*, 176 Va. 224, 233, 10 S.E.2d 547, 550 (1940).

[7] *Sergeant*, 87 Va. at 208, 12 S.E. at 402; *see also United Masonry v. Jefferson Mews, Inc.*, 218 Va. 360, 237 S.E.2d 171 (1977).

[8] 218 Va. at 366, 237 S.E.2d at 175.

[9] *Id*. at 371, 237 S.E.2d at 178.

[10] *Id*. at 378, 237 S.E.2d at 182.

the Court in invalidating the single joint lien was the existence of two separate and distinct contracts and the failure of the claimant to allocate the amounts claimed in accordance with the separate contracts.[11]

ALLOCATION ISSUES UNDER VIRGINIA CODE § 43-3(A): OVERINCLUSIVE LIENS

If a mechanic's lien claimant attempts to assert one lien against several parcels of land, where the mechanic did not work or add value to all parcels against which the lien is sought, the entire lien is rendered invalid.[12]

In *Woodington Electric*, the mechanic's lien claimant only performed labor or furnished materials on two of the nine parcels included in the property description attached to the memorandum of mechanic's lien that was sought to be enforced. On appeal, the Supreme Court held that the lien was overinclusive and thus invalid.[13] VIRGINIA CODE § 43-15 states that "[n]o inaccuracy . . . in the description of the property to be covered by the lien shall invalidate the lien. . . ." However, the property to be covered by the lien is the property on which the mechanic has worked and none other.[14] If the mechanic worked on parcel A but imposed a lien on parcels A, B and C, the Supreme Court of Virginia does not consider that an inaccuracy in describing Parcel A.[15]

The Supreme Court of Virginia also addressed the overinclusive lien question in *Rosser v. Cole*.[16] Rosser, the owner of a 450-acre tract of land, subdivided it into seventy-seven lots that were served by a network of subdivision streets. Rosser then entered into a contract with Cole for general clearing and grading in connection with the construction of the roads. Cole later filed a memorandum of mechanic's lien against the entire 450-acre tract, although he had done no work on any of the seventy-seven lots themselves, but had worked only the roads.[17] Rosser challenged the validity of the lien under § 43-17.1 of the VIRGINIA CODE. The trial court held that the lien was valid.[18] The Supreme Court reversed, holding that the lien was invalid "[b]ecause the contractor's memorandum of mechanic's lien failed to correspond to his contract, failed to describe the land and improvements upon which his lien rights existed, and purported to cover property to which his lien rights did not extend."[19]

ALLOCATION ISSUES UNDER VIRGINIA CODE § 43-3(B)

VIRGINIA CODE § 43-3(B) provides that any person providing labor or materials for site development improvements or for streets, stormwater facilities, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or condominium units has the right to claim a lien on each individual lot in the development for that fractional part of the total cost of such labor or materials as is obtained by using "one" as the numerator and the number of lots as the denominator and in the case of a condominium on each individual unit in an amount computed by

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[11] *See Sergeant*, 87 Va. at 209, 12 S.E. at 403 ("[I]t is not so much the location of the premises as the contract between the parties that determines whether the lien must be joint or several").

[12] *Woodington Elec. v. Lincoln Sav. & Loan Ass'n*, 238 Va. 623, 634, 385 S.E.2d 872, 878 (1989).

[13] *Id.* at 634, 385 S.E.2d at 878.

[14] *Id.* at 633, 385 S.E.2d at 877.

[15] *Id.*

[16] 237 Va. 572, 379 S.E.2d 323.

[17] *Id.* at 573-74, 379 S.E.2d at 324.

[18] *Id.* at 574, 379 S.E.2d at 324.

[19] *Id.* at 578, 379 S.E.2d at 327.

reference to the liability of that unit for common expenses and pertaining to that condominium. "Site development improvements" means improvements which were provided for the development, such as project site grading, rather than for an individual lot. VA. CODE § 43-3(B).

In order for the mechanic's lien to be valid under these circumstances, the lien claimant must file a disclosure statement *prior to* the sale of the lot or condominium unit against which the lien is sought. The disclosure statement should be filed before the prospective claimant commences work. If any lots are conveyed prior to the filing of the disclosure statement, the claimant loses his lien rights for a fractional amount of the claim in proportion to the number of lots conveyed. [20] Failure to include the correct number of lots in a lien, or failure to properly allocate the amount of the lien among the applicable lots, invalidates the lien.[21]

A claimant who provides "off-lot" improvements may also file a mechanic's lien under VIRGINIA CODE § 43-3(A). Section 43-3(A) provides that a person performing labor for the improvements of a building or structure has a lien upon "such building or structure." In contrast, under VIRGINIA CODE § 43-3(B), a mechanic who constructs a subdivision street does not have a lien upon "such building or structure"—the street—but is given a lien on the adjacent lots benefited by the street based on a statutory fractional allocation formula. A mechanic's lien claimant cannot use the statutory fractional allocation formula set forth in VIRGINIA CODE § 43-3(B) to allocate amounts claimed for work governed solely by VIRGINIA CODE § 43-3(A). There is no statutory allocation formula which allocates amounts claimed in a mechanic's lien filed pursuant to VIRGINIA CODE § 43-3(A). It is the duty of the claimant to "carve out" and allocate these amounts by determining the actual amount incorporated into each individual lot or parcel.[22]

If a subdivision road builder or utility contractor fails to apportion the lien or fails to file the disclosure statement as required by VIRGINIA CODE § 43-3(B), the claimant "is limited to the traditional lien rights conferred by § 43-3(A) . . . [which] grants him no lien rights beyond the confines of the road or streets on which he worked."[23] In *Rosser v. Cole*, an owner contended that the contractor's mechanic's lien was invalid because the contractor sought a "blanket lien for the total value of his services upon the entire property"[24] since he failed "to apportion the amount claimed [in his memorandum] among the individual lots as required by Code § 43-3(b)."[25] The Court held that the contractor's lien was an invalid "extraterritorial lien" because the claimant purported to "cover" property to which his lien rights did not extend.[26]

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[20] *Roundtree, L.L.C. v. RAM Dev. Corp.*, 45 Va. Cir. 458 (Fairfax County 1998).

[21] *United Virginia Mortg. Corp. v. Haines Paving Co.*, 221 Va. 1047, 277 S.E.2d 187 (1981); *PIC Constr. Co. v. First Union Nat'l Bank of N.C.*, 218 Va. 915, 241 S.E.2d 804 (1978); *Weaver v. Harland Corp.*, 176 Va. 224, 10 S.E.2d 547 (1940); *Belle View Condominiums v. Drytech, Inc.*, 65 Va. Cir. 169 (Fairfax County 2004); *Superior Iron Works, Inc. v. Boguess*, 1994 Va. Cir. LEXIS 920 (Loudoun County 1994); *Ben Gravett Enters. v. Parcon Constr., Inc.*, 31 Va. Cir. 385 (Loudoun County 1993).

[22] *Addington-Beaman Lumber Co. v. Lincoln Sav. & Loan Ass'n*, 241 Va. 436, 440, 403 S.E.2d 688 (1991).

[23] *Rosser*, 237 Va. at 578, 379 S.E.2d at 326-27.

[24] *Id.* at 575, 379 S.E.2d at 325.

[25] *Id.* at 573, 379 S.E.2d at 324.

[26] *Id.* at 578, 379 S.E.2d at 326-27.

THE MEMORANDUM OF MECHANIC'S LIEN

A memorandum of mechanic's lien shall be sufficient for purposes of § 43-4 if it "substantially" follows the suggested statutory form for general contractors, subcontractors or sub-subcontractors, as the case may be. The statutory forms are located at VIRGINIA CODE §§ 43-5, 43-8 and 43-10. The forms were amended in 2007. Using one of the suggested forms as it existed prior to the 2007 amendment, utilizing the incorrect form, or failing to provide all information listed on the form may result in the memorandum failing to "substantially" comply with the statute and an unperfected and invalid lien.

MECHANIC'S LIEN WAIVERS

In Virginia, the right to file or enforce a mechanic's lien may be waived in whole or in part at any time by any person entitled to the lien. VA. CODE § 43-3(C). A lien waiver must be express, or, if it is to be implied, it must be established by clear and convincing evidence.[27] A contractor or materialman may waive its right to a mechanic's lien by executing a mechanic's lien waiver. In order to be enforceable, the lien waiver must be supported by consideration.[28] For example, payments received by a contractor in exchange for a waiver of lien rights, coupled with an inducement to a lender to continue construction advances, may constitute sufficient consideration for a contractor's lien waiver.[29] Sufficient consideration exists if the promisee is induced by the waiver to do something that he is not legally bound to do or refrains from doing anything that he has a legal right to do, or if the promisee acts in reliance upon the waiver to his detriment.[30] A lien waiver limited to the amounts actually paid will not constitute a waiver of a contractor's right to additional sums that were due as of the date of the prior payment.

A subcontractor or sub-subcontractor may not be deprived of his independent lien unless he expressly waives his lien rights, or by clear implication, agrees to be bound by the general contractor's waiver of his lien rights.[31]

A general contractor may by contract expressly waive his right to file a mechanic's lien even before work begins; such a waiver may later be binding upon him even if he is not paid.[32] For example, the failure of a landowner to pay under a construction contract does not render unenforceable a waiver of mechanic's liens contained in that contract.[33]

Lien waivers that are clear and unambiguous cannot be altered by parol evidence. Virginia courts have consistently rejected the introduction of any parol evidence to contradict the plain, clear, and unambiguous terms of the mechanic's lien waiver.[34] The seminal case on this issue is *Walker & Laberge.* In that case, the contractor executed a mechanic's lien waiver but then filed a mechanic's lien, claiming that, among other things, the mechanic's lien waiver had been procured by fraud. The trial court rejected the contractor's argument and enforced the lien waiver without giving the contractor an opportunity to proffer parol evidence about the execution of the lien waiver. The Supreme Court of Virginia affirmed

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[27] *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 367 S.E.2d 512 (1988).

[28] *United Masonry v. Riggs Nat'l Bank*, 233 Va. 476, 483, 357 S.E.2d, 509, 513-14 (1987).

[29] *Id.* at 484, 357 S.E.2d at 514.

[30] *Walker & Laberge Co. v. First Nat'l Bank of Boston*, 206 Va. 683, 146 S.E.2d 239 (1966).

[31] *Id*.

[32] *VNB Mortg. Corp. v. Lone Star Indus.*, 215 Va. 366, 373, 209 S.E.2d 909, 914 (1974).

[33] *Loudoun Paving v. Fort Beauregard Dev. Corp*., 30 Va. Cir. 177 (Loudoun County 1993).

[34] *Riggs Nat'l,* 233 Va. at 481, 357 S.E.2d at 513-14; *Breckinridge Ltd. P'ship v. Regent Constr. Corp.*, 37 Va. Cir. 431 (Loudoun County 1995); *Loudoun Paving,* 30 Va. Cir. at 178.

the trial court's decision, ruling that the mechanic's lien waiver was clear and unambiguous on its face. The Court reasoned that

> [h]ere, the language of the waiver is clear, simple, unambiguous and free of uncertainty. Its purpose is stated on its face. It recites that it was executed in consideration of cash received. . . . It contains no "if," "unless," or "except," nor any similar word. It was a present agreement, effective at the time made, and its obvious purpose was not to leave the rights of the parties as they would have been had the waiver not been made. No oral evidence is required to explain its meaning or purpose.[35]

Contractors must be careful when performing work on a large project under a master contract that they do not waive their right to file mechanic's liens for work performed under individual invoices. One circuit court has ruled that the unconditional waiver of the right to file mechanic's liens contained in a "base agreement" precluded a contractor's right to file a mechanic's lien based on the owners failure to pay under the terms of a separate individual work order, even where the "base agreement" stated that all work performed on individual lots could only be done after individual work orders were issued. The Court found that the "base agreement" and the work orders must be read together to determine the full agreement between the parties, and, accordingly, the mechanic's lien waiver contained in the "base agreement" remained effective even after the work order was issued.[36]

THE 90-DAY RULE/THE 150-DAY RULE/THE 6-MONTH RULE

Many mechanic's liens are invalidated for failure of the contractor to comply with one or more of three statutory time limits.

1. The 90-Day Rule

"A general contractor, or any other lien claimant under §§ 43-7 and 43-9, in order to perfect the lien given by § 43-3, provided such lien has not been barred by § 43-4.01 C, shall file a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performs labor or furnishes material, and in no event later than 90 days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated." VA. CODE § 43-4. For example, if a contractor finishes work on July 8th, it would have ninety days from the end of July to file a mechanic's lien. But if the building was completed or work terminated prior to July 31st, the contractor would have to file its memorandum of lien within 90 days from the date work was completed or terminated. The filing deadline is dependent upon each contractor's own activity, and a contractor is not permitted to rely upon the work performed by others to extend the filing time.[37]

2. The 150-Day Rule

Section 43-4 of the VIRGINIA CODE provides, in relevant part, that

> [t]he lien claimant may file any number of memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or material furnished to the job preceding the filing of such memorandum. However, any memorandum may include sums withheld as retainages with respect to labor performed or materials furnished at any time before it is filed, but not to exceed ten percent of the total contract price, . . .

[35] *Walker & Laberge*, 206 Va. at 692, 146 S.E.2d at 245-46.

[36] *First Am. Bank of Va. v. J.S.C. Concrete Constr., Inc.*, 259 Va. 60, 523 S.E.2d 496 (2000).

[37] *Riggs Nat'l,* 233 Va. at 479, 357 S.E.2d at 511.

In *Carolina Builders Corp. v. Cenit Equity Co.*,[38] the Court invalidated a mechanics' lien in its entirety because it included sums for materials furnished outside the 150-day window. The Court considered two issues: 1) whether the "look back period" was determined by the last day that the labor or materials were supplied to the property, or whether the last date actually included in the mechanic's lien for labor or materials is the operative date; and 2) whether compliance with the 150-day period is a prerequisite to perfection and violation of the 150-day rule renders the entire mechanic's lien unenforceable or whether the lien claimant can abandon its claim for the amounts outside the 150-day period and enforce its lien on the remaining amounts within the 150-day period.

The following facts were stipulated in the trial court: 1) lien filed on 7/29/96; 2) lien included sums for period 12/6/95 through 4/16/96; 3) last day materials supplied to property was 5/23/96; 4) 150 days prior to 5/23/96 was 12/25/95; and 5) lien included sums prior to 12/25/95 (12/6/95-12/15/95).

The Court held:

> 1. VA. CODE § 43-4 is clear and unambiguous and plainly states that the memorandum of mechanic's lien *shall not* include sums for materials furnished more than 150 days prior to the last day that material was furnished to the job preceding the filing of the memorandum. Therefore, the operative date was 5/23/96 and the memorandum of lien included amounts outside the 150-day period.[39]
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> 2. VA. CODE § 43-4 is a lien perfection statute which is strictly construed, and compliance with the 150-day Rule is a prerequisite to perfecting a lien, violation of which renders the lien wholly invalid and unenforceable. Therefore, Carolina Builders' mechanic's lien was invalid and unenforceable in its entirety.[40]

Recently, the Supreme Court of Virginia clarified, in *Smith Mountain Bldg. Supply, LLC v. Windstar Props*, that failure to comply with the 150-day Rule invalidates a mechanic's lien.[41] Even before *Smith Mountain*, however, the circuit courts that had addressed this issue routinely held that violation of the 150-day Rule invalidated a lien.[42]

In *Smith Mountain*, a supplier filed two mechanic's liens and included $52,072.33 for materials furnished to the general contractor more than 150 days prior to the last day materials were supplied preceding the filing of its lien.[43] Windstar, the property owner, filed a motion for summary judgment,

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[38] 257 Va. 405, 512 S.E.2d 550 (1999).

[39] *Id.* at 409-10, 512 S.E.2d at 552.

[40] *Id.* at 410, 512 S.E.2d at 552.

[41] 277 Va. 387, 672 S.E.2d 845 (2009).

[42] *See Webb. v. Green*, Ch. No. 03-478 (Chesterfield County Apr. 14, 2004); *Westburg Constr., Inc. v. Zuckerman*, 43 Va. Cir. 38 (Fairfax County 1997); *Johnson v. Tadlock*, 39 Va. Cir. 436 (Fairfax County 1996); *see also BP Realty v. Urban Eng'g & Assocs., Inc.,* 79 Va. Cir. 176, 178 (Fairfax County 2009) ("Although § 43-15 includes language that 'no inaccuracy in the memorandum filed' will invalidate the lien, it is not literally true. . . . Inclusion of amounts owed for work performed during a brief period a few days before the start of § 43-4's 150 day limitation period [] invalidates the ***entire*** lien.") (emphasis added); *Parish v. Chowdhury*, 59 Va. Cir. 239, 242 (Winchester 2002) (commenting that *Carolina Builders* "illustrates the rigor with which the Supreme Court applies its doctrine of strict construction of the statutes governing the perfection of mechanics' liens."); *Davenport Insulation Harrisonburg Inc. v. Aliff*, 50 Va. Cir. 314 (Rockingham County 1999) (referring to the Supreme Court's decision in *Carolina Builders* as a "mandate" and noting that failure to comply with the requirements of § 43-4 precludes amendment and invalidates the lien).

[43] 277 Va. at 389, 672 S.E.2d at 845.

asserting that Smith Mountain, the supplier, violated the 150-day Rule contained in § 43-4. The trial court granted Windstar's motion, concluding that Smith Mountain's violation of the 150-day Rule made the liens wholly invalid and unenforceable.[44]

Windstar argued for continued strict construction of the mechanic's lien statutes, and relied upon *Carolina Builders*.[45] Conversely, Smith Mountain contended that substantial compliance with the statutes was the applicable standard, and that it should have been allowed to present evidence that the inclusion of sums outside the 150 day period was an "inaccuracy" under CODE § 43-15. Smith Mountain cited *Reliable Constructors, Inc. v. CFJ Properties*,[46] in which the Court held that the lien claimant was entitled to introduce evidence that an administrative fine was an inaccuracy under § 43-15 which did not invalidate the entire lien claim and also remanded the case to the circuit court.[47] Following remand, additional 150-day Rule violations were found during discovery. The claimant then nonsuited and did not refile the matter.

On appeal, the Supreme Court affirmed the trial court's judgment invalidating the liens.[48] The Court stated that the supplier "violated one of the prerequisites required by CODE § 43-4 in order to perfect its mechanic's liens. CODE § 43-15 has no application. We hold, therefore, that ***the inclusion in the memoranda of charges for materials supplied outside the 150-day limitation period*** in CODE § 43-4 ***rendered*** Smith Mountain's ***mechanic's liens invalid and unenforceable*** and that the trial court did not err in so ruling."[49]

In reconciling *Carolina Builders* and *Reliable Constructors*, the Court emphasized the nature of the disputed sums in each case. The fine at issue in *Reliable Constructors* was "clearly not a sum due for labor performed or materials furnished. . . . The inclusion of a fine in a memorandum is akin to claiming a larger sum than the lien claimant's proof would support, rather than a violation of a ***statutory prerequisite*** to perfect a mechanic's lien."[50] Thus, according to the Supreme Court of Virginia, *Reliable Constructors* represents a corollary rather than exception to the 150-day Rule. Namely, inclusion of non-lienable charges in a lien, *i.e.*, charges for items ***other than*** labor or materials, does not violate the 150-day Rule.

3. The 6-Month Rule

A suit to enforce a mechanic's lien must be filed within six months from the filing of the memorandum of lien, or within sixty days from the time the building or structure is completed or the work is otherwise terminated, whichever occurs last. VA. CODE § 43-17. Where a statute makes a time limitation the essence of the right as well as a constriction upon the remedy, the right expires upon the expiration of the limitation; and the expiration of the right is an absolute defense which can be asserted either by demurrer or by plea of the statute of limitations.[51] The mechanic's lien itself is not self-

[44] *Id.* at 389-90, 672 S.E.2d at 846.

[45] *Id.* at 389, 672 S.E.2d at 845.

[46] 263 Va. 279, 559 S.E.2d 681 (2002).

[47] 277 Va. at 389, 672 S.E.2d at 845.

[48] *Id.* at 390, 672 S.E.2d at 846.

[49] *Id.* at 392, 672 S.E.2d at 847 (emphasis added).

[50] *Id.* at 391, 672 S.E.2d at 847 (emphasis added).

[51] *Neff v. Garrard*, 216 Va. 496, 219 S.E.2d 878 (1975).

enforcing and is extinguished unless the lienholder files a bill in equity within six months and then obtains a decree against the debtor's property.[52]

CONCLUSION

As mentioned at the outset of this article, there are a myriad of issues that exist regarding perfecting, enforcing and defending mechanic's liens. The purpose of this article was to address only some of the more common issues. To properly handle a mechanic's lien case, an attorney should be familiar with all the relevant statutes and the cases interpreting them, or consult with a colleague who possesses such familiarity.

[52] *W.T. Jones & Co. v. Foodco Realty, Inc.*, 318 F.2d 881 (4th Cir. 1963).