

## Mechanic's lien unenforceable due to statutory noncompliance

Isn't based on contract referred to in filing docs

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Homeowners were entitled to summary discharge of a mechanic's lien filed by a contractor that could not produce the original contract referenced in its filing but later produced a nearly identical contract for a different amount, a Superior Court judge has decided.



NATHAN COLE

The original agreement referenced in the notice of contract that the plaintiff, Atlas Contracting, filed to perfect the lien was for \$240,294. Defendants Catherine and Youssef Saleh denied ever signing a written contract for their home renovation. Atlas initially produced an unsigned version of the contract, and the Salehs moved to summarily discharge the lien for noncompliance with the mechanic's lien statute, G.L.c. 254, §2.

On the hearing date, however, Atlas presented a signed, written contract for \$227,294, which Atlas claimed its staff had recently located and which it was not aware of when it filed for the lien. The Salehs denied the signature was theirs.

Atlas, in turn, argued that summary discharge was an inappropriate means to resolve the case because the existence of a written, signed contract was in dispute.

But Judge Christopher K. Barry-Smith disagreed.

"Atlas can maintain its lien only if the court permits a loose reading of Section 2, which allows a different contract to be substituted after the fact for a defective contract identified in the Notice," Barry-Smith wrote, granting the defendants' summary discharge motion. "Such a loose reading does not conform to the text of Section 2 and does not satisfy the requirement of strict compliance with the mechanic's lien statute."

The seven-page decision is *Atlas Contracting, Inc. v. Saleh, et al.*, Lawyers Weekly No. 12-022-18. The full text of the ruling can be ordered here.

### Strict compliance

The Salehs' attorney, J. Nathan Cole of Boston, said the decision emphasizes for practitioners that they must strictly comply with G.L.c. 254, §2, in order to enforce a mechanic's lien.

"Even where you have two written contracts that are nearly identical, the statute requires a contractor to lien the job based on the specific contract for the project, and the information in the notice of contract must be accurate," he said.

Plaintiff's counsel Aaron H. Hutchins of Northborough, who Atlas engaged just prior to the summary discharge hearing and who was not involved in the lien

filing, pointed out that both the unsigned and signed contracts were virtually identical and that the additional \$13,000 in the version referenced in the notice of contract represented a site supervision fee the Salehs wanted omitted from the permit application in order to reduce their permit fee.

"This was not an apples and oranges scenario," Hutchins said. "Atlas sought the lien based on the actual contractual terms agreed to by the Salehs and the actual work performed by Atlas. My client obviously would have preferred that the court allow not a different contract, but a nearly identical and executed one, to be substituted after the fact. I do not read the statutory language to be so strict as to preclude such a scenario."

But Boston lawyer Hugh J. Gorman III, author of the mechanic's lien chapter in the Massachusetts Practice Series Construction Law treatise, said the judge was correct in his finding.

"To the extent that a party that's trying to enforce a lien fails to follow literally the letter of the law, that renders a lien invalid," Gorman said. "This decision re-confirms the proposition that when you put together lien documents, you need to make sure you've got all your information in hand and that you include the right information relative to the date of the contract and the particular contract you're using to enforce the lien."

Gorman also said that, under the statute, summary discharge is appropriate only when it is clear from the four corners of the lien that there is a defect, such as untimely or improper recording.

"If the original issue of a signed contract that nobody could locate was the only issue, the court couldn't have granted summary discharge, because that was a disputed fact that couldn't be determined based on the operative lien documents," he said. "But when the contractor came back to court and said, 'Oh, I found the contract,' and the one he found was apparently a different version, the judge could now look at the lien documents and determine that the lien was defective because it was not based on the operative contract the parties cited and relied upon in those lien documents."

Jonathan P. Sauer, a construction lawyer in East Walpole, also agreed with the result.

"Mechanic's liens are strictly construed ... as compared with payment bond claims, which are liberally construed," he said. "There is an uneasy, inherent contradiction and disconnect between 'a man's or woman's home is his or her castle' and, at the same time, allowing material suppliers, subcontractors and general contractors to come in to try to take that castle away. The somewhat imperfect resolution of that inherent contradiction is strict construction."

However, Boston construction attorney Joseph A. Barra said the mechanic's lien statute does provide for flexibility when it comes to defining the contract at issue. That is because the Legislature amended the statute in 1996, broadening the definition of "written contract" to include any written, enforceable contract, Barra said.

"Given these circumstances, I believe that the court had the authority to apply the \$227,294 contract to Atlas' notice but elected not to exercise its discretion," he

### Atlas Contracting, Inc. v. Saleh, et al.

**THE ISSUE** Were homeowners entitled to summary discharge of a mechanic's lien filed by a contractor that could not produce the original written contract referenced in the lien but later produced a nearly identical written contract for a slightly lower amount?

**DECISION** Yes (Middlesex Superior Court)

**LAWYERS** Aaron H. Hutchins of Northborough (plaintiff)  
J. Nathan Cole of Kenney & Sams, Boston (defense)

said, adding that the strategic decision of Atlas' attorney to supplement the record with that contract was the right decision, as counsel was obligated to disclose that finding to the court.

### Contract dispute

The parties became embroiled in a dispute over payment for home renovation work Atlas performed on the Salehs' Arlington home between November 2016 and June 2017.

Atlas claimed the parties had a contract for \$240,294 but that the Salehs approved another \$115,484 in modifications and additions. The contractor also acknowledged that the Salehs paid Atlas \$234,145. The Salehs denied agreeing to any modifications and contended that the renovation

the project, but neither Youssef nor Catherine ever signed it.

Ozcan, however, testified in an affidavit that Youssef did sign the contract, for \$240,294, but explained he could produce only an unsigned version because he had submitted the original to the town when applying for a building permit and the town had destroyed it per municipal policy.

At their hearing this month, Atlas submitted a new affidavit in which Ozcan testified that he actually did have a signed contract, newly discovered by office staff, that he was not aware of back in March. The contract, presented to the court, was for \$227,294. According to Atlas, Youssef had signed the contract in December 2016 — a fact that Youssef disputed.



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— Hugh J. Gorman III, Boston

was supposed to stay within the agreed-upon \$240,000 budget.

In August 2017, Atlas filed a notice of contract with the Middlesex Registry of Deeds to secure a mechanic's lien. The notice identified an original contract for \$240,294, along with approved add-ons for another \$115,484, with an unpaid balance of \$121,634.

Three months later, Atlas filed suit in Superior Court, alleging breach of contract and seeking enforcement of the mechanic's lien.

The Salehs filed counterclaims alleging breach of contract and Chapter 93A violations and, in March 2018, moved for summary discharge of the mechanic's lien.

In their motion, they relied on Atlas' inability to produce a signed, written contract and testified that they had entered only an oral contract. According to the Salehs, Atlas manager Ohan Ozcan handed Youssef Saleh a contract backdated to December 2016 months after starting work on

Meanwhile, Atlas argued that given the dispute over the existence of a signed contract, summary discharge was inappropriate.

### Actual contract

Barry-Smith said the case raises the question of whether a contractor can secure a lien by showing any unpaid written contract or whether the statute requires that the notice of contract identify and be based upon the actual written contract.

He found the latter.

"Section 2, by reference to 'a written contract' and 'said contract,' reflects that the Notice of Contract cannot rely upon a general contractual obligation, it must be based upon a specific written contract," the judge said. "Moreover, to enjoy the protections afforded by the mechanic's lien statute, a contractor must strictly comply with the statutory requirements."

Because Atlas failed to comply with those terms, Barry-Smith concluded that the lien should be summarily discharged.