IN THE

Supreme Court Of Virginia

RECORD NO. 131569

SYNCHRONIZED CONSTRUCTION SERVICES, INC.,

Appellant,

v.

PRAV LODGING, LLC and VIRGINIA COMMUNITY BANK,

Appellees.

OPENING BRIEF OF APPELLANT

Andrew N. Felice (VSB No. 26277)
REES BROOME, PC
1900 Gallows Road, Suite 700
Tysons Corner, Virginia 22182
(703) 790-1911 (Telephone)
(703) 848-2530 (Facsimile)
afelice@reesbroome.com

Counsel for Appellant - Synchronized Construction Services, Inc.

James H. Higginbotham, II (VSB No. 22283)
ATTORNEY AT LAW
P.O. Box P-7000
Lynchburg, Virginia 24505
(434) 455-3180 (Telephone)
(434) 845-0306 (Facsimile)
jhigginbotham@englishconst.com

Counsel for Appellant - Synchronized Construction Services, Inc.

The Appellate Link • 1001 E. Main Street, Richmond, VA 23219 • (804) 698-9471

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

ASSIGNMENT OF ERRORS..... 1

STATEMENT OF THE NATURE OF THE CASE
AND MATERIAL PROCEEDINGS IN THE TRIAL COURT..... 2

STATEMENT OF THE FACTS..... 6

LEGAL ARGUMENT – STANDARD OF REVIEW..... 15

ARGUMENT AND AUTHORITIES..... 16

1. AS A RESULT OF THE CONTRACTS IT ENTERED INTO, PARIS WAS NOT A NECESSARY PARTY TO SYNCHRONIZED'S MECHANIC'S LIEN ENFORCEMENT ACTION AS PARIS DID NOT HAVE A SUFFICIENT PROPERTY INTEREST WHICH COULD BE DIMINISHED OR DEFEATED THROUGH SYNCHRONIZED PROPER EXERCISE OF ITS MECHANIC'S LIEN RIGHTS..... 16

   A. The language of Paris' Contracts effectively precluded Paris from asserting any claim against the Prav Lodging to the funds remaining to be due under the Contracts and hence, any result in Synchronized's mechanic lien action would not defeat or diminish a possessory or expectancy interest that Paris may claim to enjoy relative to this matter..... 15

2. THE CIRCUIT COURT'S CONCLUSION THAT PARIS IS A NECESSARY PARTY BECAUSE IT POSSESSED RIGHTS WHICH WERE SOMEHOW "BOUND UP" WITH THAT OF THE OTHER PARTIES, IMPERMISSIBLY EXPANDS THE DEFINITION OF WHO MAY BE CONSIDERED A NECESSARY PARTY UNDER VIRGINIA LAW..... 25

3. THE RECORD BELOW REFLECTS THAT SYNCHRONIZED HAS SHOWN THAT IT HAS THE ABILITY TO PRESENT ADMISSIBLE EVIDENCE ON THE ISSUE OF THE STATUS OF ACCOUNTS UNDER THE PRAV LODGING-PARIS' CONTRACT AS PART OF ITS MECHANIC'S LIEN ENFORCEMENT ACTION AND THUS THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION..... 34

CONCLUSION..... 36

CERTIFICATE..... 38

ADDENDUM OF VIRGINIA CODE SECTIONS..... 39

TABLE OF AUTHORITIES

Federal Authorities

Columbia Gas Transmission, LLC v. Martin
833 F. Supp. 2d 552 (E.D. Va. 2011)..... 21

In Re: Richardson Builders, Inc.
123 B.R. 736 (Bankr. W.D. Va. 1990)..... 28

State Authorities

Air Power, Inc. v. Thompson
244 Va. 534, 422 S.E. 2d 768 (1992)..... 31

Asch v. Mt. Vernon Yacht Club
251 Va. 89, 465 S.E. 2d 817 (1996)..... 26

Bush Construction Co., Inc. v. Patal, et al.
243 Va. 84, 412 S.E. 2d 703 (1992)..... 30, 31

Galloway Corp. v. S.B. Ballard Const. Co., et al.
250 Va. 493, 464 S.E. 2d 349 (1995)..... 22

LaCava v. Commonwealth
283 Va. 465, 722 S.E. 2d 838 (2012)..... 15

Mendenhall v. Cooper
239 Va. 71, 387 S.E. 2d 468 (1990)..... 24

Mulford v. Walnut Hill Farm Group, LLC
282 Va. 98, 712 S.E. 2d 468 (2011)..... 14

Raney v. Four Thirty Seven Land Company, Inc.
233 Va. 513, 357 S.E. 2d 733 (1987)..... 27, 28

Storm v. Nationwide Mutual Insurance Company
199 Va. 130, 97 S.E. 2d 759 (1957)..... 21

Walt Robbins, Inc. v. Damon Corporation
232 Va. 43, 348 S.E. 2d 223 (1986)..... 29, 30

Winn v. Aleda Construction Co., Inc.
227 Va. 304, 315 S.E. 2d 193 (1984)..... 17

Virginia Code

Code §43-13 (1950, As Amended)..... 23

Code §43-22 (1950, As Amended)..... 35

Code §43-70 (1950, As Amended)..... 32

Treatises

30 Am. Jur., Judgments, § 225, p. 957..... 21

ASSIGNMENT OF ERRORS

1. The Circuit Court erred in dismissing Synchronized's mechanic's lien enforcement action where Paris, the construction manager, did not have a recognized possessory or expectancy interest in the lien enforcement action which could be defeated or diminished as the result suit and therefore was not a necessary party to the action. While Paris may have had a contractual claim against the owner of the Project arising out of its Contract, the facts below reveal that Paris never satisfied the express conditions precedents found in its Contract in order to preserve and maintain such claims. Hence, even if Paris had contractual claims, those claims would not be sufficient to mandate a finding that Paris was a necessary party to the lien enforcement action brought by Synchronized. (JA 109-111; 303-305)

2. The Circuit Court applied an incorrect standard in analyzing whether Paris was a necessary party to the lien enforcement action and thus erred in dismissing

Synchronized mechanic's lien enforcement action where the presence of the Paris was not required under Virginia law. (JA 109-111; 303-305)

3. The Circuit Court erred in that Virginia Code §43-22 (1950, As Amended) does not explicitly require a Paris to be included as a party to a mechanic's lien enforcement action or at all times be viable party in a mechanic's lien enforcement action where the facts below showed that Synchronized had the ability to present proof at trial of the balance due under the Prav Lodging-Paris Contract at all relevant times including at the time Synchronized's mechanic's lien was recorded. (JA 109-111; 303-305)

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN IN THE TRIAL COURT

This action arises out of a construction of a hotel project in Orange, Virginia. Appellee Prav Lodging, L.L.C ("Prav Lodging")as Owner, retained Paris Development Group, LLC ("Paris")as the construction manager on the Best Western Inn and Suites construction project (hereinafter the "Project"). Appellant

Synchronized Construction Services, Inc. ("Synchronized") was a subcontractor to Paris on the Project.

On March 11, 2010, Synchronized recorded a Memorandum of Mechanics' Lien ("Mechanic's Lien") against the real property comprising the Project to secure payment of $208,850.80 due Synchronized on account of work performed and materials furnished to the Project. On September 9, 2010, Synchronized commence an action in the Circuit Court of Orange County, Virginia seeking to enforce its mechanic's lien and asserted a breach of contact action against Paris. (JA 1-42)

By order dated August 26, 2011, the Circuit Court granted the motion filed by Prav Lodging and Appellee Virginia Community Bank ("VCB") and allowed the posting of a bond in the amount of $237,906.80 as prescribe by Virginia Code §43-70 (1950, As Amended) in order to release the subject property from Synchronized's Mechanic Lien. (JA 56-57) Subsequently, on or about

October 24, 2011, Prav Lodging filed a motion to dismiss the suit asserting that a number of parties, including Paris, named in the suit were not properly before the court and the matter could not move forward without these “necessary parties.” (JA 58-61, 66-71) Synchronized opposed the motion. (JA 62-65)Following oral argument on Prav Lodging’s motion to dismiss, the Circuit Court granted the motion as to Count II (breach of contract) but denied the motion as to the mechanic’s lien enforcement action (Count I of the Verified Complaint) and the lien enforcement action continued. (JA 72-74)

On or about April 27, 2012, VCB filed, on its own behalf, another motion to dismiss Synchronized’s mechanic’s lien enforcement action asserting essentially the same argument, namely that Paris was a necessary party to the action and the lien enforcement action could not be maintained without Paris being present. (JA 75-87) Synchronized filed a Memorandum in Opposition to VCB’s Motion to Dismiss. (JA 88-102) The

Circuit Court held a hearing on the Motion on December 7, 2012. (JA 310-355) Notwithstanding the March 9. 2012 Order, the Circuit Court, on February 6, 2013, issued a Letter Opinion wherein it ruled in favor of VCB’s motion. (JA 103-108) By order of the Circuit Court dated March 8, 2013, the Circuit Court entered judgment dismissing with prejudice Synchronized's mechanic's lien enforcement action. (JA 109-111) Synchronized duly noted and took objection to the Circuit Court’s March 8, 2013 Order. (JA 109-111)

On March 19, 2013, Synchronized filed a Motion for Reconsideration of Order and Memorandum in support identifying and raising certain issues and arguments as to why the Circuit Court should reconsider the ruling in light of the Circuit Court’s findings and holdings set forth in its February 6, 2013 Letter Opinion. (JA 116-259) Both Prav Lodging and VCB filed oppositions to the Motion for Reconsideration. (JA 265-289) Synchronized filed a Reply Memorandum on or about April 25, 2013. (JA 290-299) On March 20, 2013, the Circuit

Court entered a suspending order to allow it to consider Synchronized's motion for reconsideration. (JA 260-262) On June 6, 2013, the Circuit Court issued a Letter Opinion ruling upon the Motion for Reconsideration. (JA 300-301) On July 8, 2013, the Circuit Court issued a final order denied Synchronized's Motion for Reconsideration of Order and this appeal was taken. (JA 303-305) Synchronized duly noted and took objection to the Circuit Court's July 8, 2013 Order. (JA 303-305)

Synchronized herein appeals the orders of the Circuit Court of Orange County, Virginia dismissing with prejudice its mechanics' lien enforcement action for the reasons stated herein and as mat be presented at the hearing on this appeal. (JA 306-307)

STATEMENT OF THE FACTS

This action arises out of a construction of a hotel project in Orange, Virginia being built by Prav Lodging, as owner, and Paris as the construction manager. Paris was a corporation organized under the

laws of Wyoming and having its principal place of business located in Monroe, Michigan. (JA 6, 88-102) At all times relevant hereto, Paris did not have a physical presence in and about the Commonwealth of Virginia. (JA 88-102) According to records maintained by the Commonwealth of Virginia State Corporation Commission, Paris' registration to conduct business in Virginia as a foreign corporation was canceled effective November 30, 2010 and its Virginia Registered Agent resigned as of July 21, 2010. (JA 88-102) The records maintained by the Virginia Department of Professional and Occupational Regulation, reflect that Paris' Virginia Class A Contractor's License expired November 30, 2010. (JA 88-102)

In addition, even though discovery had not been completed in the action below and no evidentiary hearings were held in the case, Synchronized submitted and proffered that the corporate status of Paris in the State of Wyoming was listed as "Inactive-Administratively Dissolved (Tax)" effective March 12,

2010 or roughly the same date as the filing of Synchronized's mechanic's lien (and six month prior to the filing of the lien enforcement suit). (JA 102)

On about October 1, 2008, Prav Lodging and Paris entered into a written construction contract ("Contract") for the Project. (JA 134-151)On or about September 1, 2009, Prav Lodging and Paris entered into another contract (the "September 2009 Contract") which, among other things, provided for the payment of subcontractors and suppliers and established that the sum of $1,245,130.30 remained to be paid to Paris on its original Contract for the construction of the Project. (JA 152-154) (Where appropriate herein, the October 1, 2008 Contract and the September 2009 Contract are collectively referred to as the "Contracts")

Under the September 2009 Contract, the law firm of Shakelford, Thomas and Gregg, PLLC (the "Escrow Agent") was tasked by the parties to act as an escrow agent for the distribution of funds disbursed under the September

2009 Contract. (JA 152-154) By its terms, the September 2009 Contract authorized the initial release of $774,310.58 out of the $1,245,130.30 for the payment of certain mechanic's liens filed in the September 2009 timeframe. (JA 118-259) Following the execution of the September 2009 Contract, Paris submitted only two (2) more pay requests to the Escrow Agent on account of work performed on the Project. (JA 121-122) Respectively, those payment requests were known as Draw No. 9 and Draw No. 10. (JA 118-259) Subsequently, the Escrow Agent made certain disbursements to Paris and its subcontractors on account of Draw No. 9. However, no disbursement was made to Paris on account of monies requested by Paris through its Draw No. 10. (JA 118-259)

On about October 31, 2009, Prav Lodging acting through the Escrow Agent and consistent with the September 2009 Contract began issuing payments to Paris and its subcontractors for the work performed and materials furnished to the Project and billed by Paris

in its Draw No. 9. The total billed by Paris for work performed on the Project through Draw No. 9 was $306,133.00. (JA 118-259)

The Escrow Agent maintained records as to the payments it released and made in its capacity pursuant to the September 2009 Contract. (JA 155-156) The Escrow Agent’s Check Register reflects the payments made to Paris and its subcontractors and suppliers for work performed and/or materials supplied to the Project. (JA 155-156)Through the limited discovery conducted to date, it appears that before approving payments of draws, Prav Lodging visually inspected the Project, spoke with entities that inspected the Project and discussed with representatives of VCB the status of the Project. (JA 118-259) Synchronized, therefore believes that there exist witnesses available to testify as to the amount of work performed by Paris and its forces while on the Project, the amount billed by Paris and the total amount paid by Prav Lodging to Paris and its forces for such work.

By deducting the amounts paid by the Escrow Agent pursuant to the terms of the September 2009 Contact from the remaining amount of $1,245,030.30 left on Paris' Contract, there remained a balance as of March 11, 2010, the date of recordation of Synchronized's mechanic's lien, that had not yet disbursed under Paris' Contract which can be computed to be at least:

September 2009 Contract:	$1,245,030.30
Draw Nos. 6, 7 & 8 Payout:	($774,310.59)
Draw No. 9 Payout:	($306,133.00)
Balance left on Paris' Contract:	$173,586.80

(JA 118-259)

As late as March 11, 2010, the record below supports a finding that there remained a positive balance remaining to be paid out on Paris' Contract (and thus capable of supporting Synchronized's mechanic's lien in whole or in part) which Synchronized asserts it will be able to prove through competent witnesses and admissible evidence if this matter is allowed to proceed to trial. (JA 118-259)

Through discovery it was learned that on or about November 25, 2008, VCB retained the Timmons Group from Richmond, Virginia to act as VCB's construction inspector for the Project. (JA 118-259)The Timmons Group conducted eight (8) site inspections of the quality and status of the construction being performed by Paris' forces. (JA 157-190) The purpose of each of the site visits, as expressed in the Timmons Group reports, was to verify the work in place relative to each of Paris' draw request. Timmons Group reviewed each and every draw application submitted by PDG and approved payment of Paris' draw applications based upon site visits and meetings or discussions with representatives of Paris. (JA 118-259)

On February 3, 2010, the Timmons Group issued a written report of their final site visit of January 10, 2010 and review of Paris' Draw No. 10 seeking final payment of $239,757.64. (JA 159-190) In his February 3, 2010 Report, Mr. Hatcher, writing for the Timmons Group stated, among other things:

> All things considered, *we consider the project 99% complete* with the remaining 1% obtainable in a matter of a few days. Since our inspection was performed over two weeks ago, the interior work may be complete by now. However, the status of the work on the exterior likely remains the same as weather has not been conducive to perform outside type work.

(Emphasis Added). (JA 159-190) The Timmons Group report for Draw No. 10 concluded with the finding that “the amount requested of $239,757.64 appears to be commensurate with the recent work completed” and that an amount of $10,000.00 should be retained to ensure completion of the remaining work. (JA 159-160) Any work remaining on the Project as of February 2010 was, as noted in the Timmons Group report, relatively insignificant.

On March 11, 2009, Synchronized recorded its mechanic's lien against the real property comprising the property to secure the balance due and owing under its Subcontractor of $208,850.80. (JA 38-41)

Therefore, roughly one month prior to the recordation of Synchronized’s mechanic’ lien, VCB’s own

construction expert had identified that $239,757.64 less $10,000.00 was due and owing to Paris for work performed on the Project. Prav Lodging never made payment directly to Paris for the balance due under Paris' Draw #10 and did not disburse the $239,757.64 identified by the Timmons Group in their February 3, 2010 Report. (JA 118-133)Had this matter been allowed to proceed to trial Synchronized expected to call as both a fact and expert witness a representative from the Timmons Group to testify as to the services he performed on the Project and reports authored by the Timmons Group during the course of his work on the Project which lasted until February 2010.

Discovery in the case below was not completed. As such, Synchronized was pre-empted from discovering additional facts and evidence which may be used to support the claims asserted. By its reviewed and approved Project billings, it as of January 1, 2010 there remained very little work remaining under Paris' Contract and balance due or which may be due Paris

under the Contract and the September 2009 Contract were readily ascertainable to the parties.

LEGAL ARGUMENT

STANDARD OF REVIEW

As this matter was decided below on a motion to dismiss based upon the Circuit Court's ruling that Paris was a necessary party to Synchronized's mechanic' lien enforcement action, the question presented on appeal is one of law. Accordingly, a de novo standard of review applies to this matter. *Mulford v. Walnut Hill Farm Group, LLC*, 282 Va. 98, 111, 712 S.E. 2d 468, 476 (2011). See also, *LaCava v. Commonwealth*, 283 Va. 465, 469-470, 722 S.E. 2d 838, 840 (2012).

ARGUMENT AND AUTHORITIES

1. AS A RESULT OF THE CONTRACTS IT ENTERED INTO, PARIS WAS NOT A NECESSARY PARTY TO SYNCHRONIZED'S MECHANIC'S LIEN ENFORCEMENT ACTION AS PARIS DID NOT HAVE A SUFFICIENT PROPERTY INTEREST WHICH COULD BE DIMINISHED OR DEFEATED THROUGH SYNCHRONIZED PROPER EXERCISE OF ITS MECHANIC'S LIEN RIGHTS.

A. The language of Paris' Contracts effectively precluded Paris from asserting any claim against the Prav Lodging to the funds remaining to be due under the Contracts and hence, any result in Synchronized's mechanic lien action would not defeat or diminish a possessory or expectancy interest that Paris may claim to enjoy relative to this matter.

The basis of payment due Paris under its Contract with Prav Lodging was predicated on the reimbursement of the cost of the performance of its scope of work plus the payment of a stated fee. (JA 134-151) Article 6 of the Contract established the costs of the work which the parties have agreed will be considered to be "reimbursable" costs and those costs incurred by Paris which will be considered "non-reimbursable." (JA 142-145) Pursuant to Article 6.1.3, with regard to subcontractor costs for which Paris would be seeking reimbursement, the Contract provides:

> Payments made by the Contractor [Paris] to Subcontractor in accordance with the requirements of the subcontracts.

(JA 143)

This Court has long held when interpreting contracts the words used by the parties are given their usual, ordinary and popular meaning. *Winn v. Aleda Construction Co., Inc.,* 227 Va. 304, 307, 315 S.E. 2d 193, 194-195 (1984). The use of the past tense in the phrase “payments made” in Article 6.1.3 of Paris’ Contract denotes that subcontractor costs only become reimbursable to Paris (and hence a contractual right to be paid) under the Contract when (and only if) Paris has *already made payment* to its subcontractors.

No evidence was presented to the Circuit Court below which would support a finding that by virtue of payments made to its subcontractors or to Synchronized, Paris had a contractual right under Article 6.1.3 to assert a claim either: (a) for the amount claimed by Synchronized in its Mechanic’s Lien; (b) for any

further payment due under the terms of its Contract or the September 2009 Contract.

In fact, the record below suggested just the opposite. By virtue of the September 2009 Contract, Paris essentially and effectively relinquished the contractual duty to pay its subcontractors and suppliers on the Project. The record below reflects that as a result of the September 2009 Contract, all further payments to subcontractors or suppliers of Paris for work performed and materials furnished on the Project were to be made as direct payments from the Owner to the subcontractors/suppliers through the Escrow Agent.

Coupled with the express cost reimbursable terms found in the Contract, following the execution of the September 2009 Contract, Paris was effectively treated as simply another contractor on the Project who could collect for the work and services it itself performed and was no longer contractually entitled to collect

from Prav Lodging payment for the work and services of all of the subcontractors and suppliers on the Project.

Since Paris' Contract was a cost reimbursable contract, after October 1, 2009 Paris effectively no longer had any residual contract right to demand and collect payment from the Prav Lodging for *all* of the work performed by *all* of the subcontractors on the Project (assuming it had already incurred such costs). The loss of this right is consistent with the record below which showed that after September 2009, the Escrow Agent, not Paris, issued direct disbursements and payments (in exchange for lien releases provided to the Escrow Agent)to various contractors, subcontractors and suppliers who performed work and furnished materials to the Project. (JA 155-156)

The underlying transactions in this case below, therefore, support the argument that after September 2009 Paris had no actionable contract right, under the Contract, to seek and/or demand payment from Prav Lodging for the work performed by all of its

subcontractor forces or had any right or claim against Prav Lodging for payment of the amounts included by Synchronized in its Mechanic's Lien. Having *not* paid Synchronized (or any other subcontractor or tradesmen) the amounts sought by Synchronized in its Mechanic's Lien's, *Paris had not incurred any costs which would support a right to paid by Prav Lodging pursuant to Article 6.1.3 of the Contract.* (JA 143)

The cost reimbursable nature of the original Contract coupled with the terms of the September 2009 Contract resulted in a fundamental shift in the parties' contractual rights and dealings. Moving forward from September 2009 to the conclusion of the Project, Prav Lodging was no longer contractually required to make direct payments to Paris to reimburse Paris for all of the costs and expenses already sustained by Paris in performance of the work under the Contract. Rather as a safeguard to Prav Lodging, the September 2009 Contract allowed Prav Lodging to control and be responsible for the disbursement of payments for

work performed on the Project (including that of Paris and its subcontractors and suppliers). By its terms, the September 2009 Contract effectively limited (or eliminated) Paris ability to assert claims for payment resulting from the work that its subcontract forces completed on the Project.[1]

---

[1] Even if Paris had some contractual claim for payment under its Contract, if this issue was viewed from a *res judicata* or collateral estoppel perspective, Paris and Synchronized may be viewed as being in privity any subsequent contact action hypothetically brought by Paris against Prav Lodging involving issues necessarily litigated in this case, would be barred by a plea of *res judicata* by the results obtained by Synchronized in this action as privity exists. *Storm v. Nationwide Mutual Insurance Company*, 199 Va. 130, 134, 97 S.E. 2d 759, 761-762 (1957) (In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. *Citing*, 30 Am. Jur., Judgments, § 225, p. 957.) *See also*, *Columbia Gas Transmission, LLC v. Martin,* 833 F. Supp. 2d 552, 558-559 (E.D. Va. 2011)("Virginia courts typically find privity when the parties share a contractual relationship, owe some kind of legal duty to each other, or have another legal relationship such a co-ownership.") Synchronized, in addition to being in contractual privity with Paris, has a legal interest through the application of the mechanic's lien statute with proving the balance due under Paris' Contract as of the date of the recordation of its mechanic's lien. Synchronized has essentially the same identity of legal interest in proving such an element as would Paris if it was a viable entity pursuing such a claim against

In addition, under Article 7.2.1 of the Contract there are at least three express condition precedents to Paris' right to the final payment due under the Contract: (i) completing the work under the Contract; (ii) the submission of a final application of payment and final accounting of the cost of the work and a review of the same by the owner's accountants; and (iii) the issuance of a Certificate of Payment by Architect. Paris would have had to satisfy all of the foregoing conditions precedent to enjoy the right to assert a claim for final payment under the Contract. (JA 147) This Court has held that express conditions precedents in construction contracts to be enforceable as written. *Galloway Corp. v. S.B. Ballard Const. Co., et al.,* 250 Va. 493, 501, 464 S.E. 2d 349 (1995)

Prav Lodging for monies due under its Contract. Virginia law, therefore, would afford Prav Lodging with protection against subsequent claims being brought by Paris and would not be offended if Synchronized is afforded the opportunity to prove its mechanic's lien action.

(unambiguous conditional payment terms in contracts are enforceable).

To the extent that the Circuit Court's ruling below is predicated on Paris having some contractual claim over monies due and payable under the Contract, the record does not include any evidence to support such a finding. As Paris' claim would be contractual in nature, in order to have such a claim, there must be some credible evidence in the record that reflects that Paris retained some contractual claim for payment by virtue of having satisfied the conditions included in its Contract. The record contains no evidence to support such a claim or notion.

In addition, pursuant to Virginia Code §43-13 (1950, As Amended) any funds paid to the general contractor must be used to pay subcontractors or other persons performing labor or furnishing materials to the project. Even if Paris could have overcame its contractual hurdles and could have asserted a claim for monies due under the Contract, Paris would have been

required to pay over those funds to Synchronized and the other subcontractors who had recorded mechanic's liens against the Project in 2010 (Synchronized is the only remaining subcontractor who had a mechanic's lien enforcement suit remaining pending) before it could use those funds as its own. By virtue of the Virginia lien law Synchronized has a higher priority claim (assuming *arguendo* that Paris even has a claim).

This Court has defined a "necessary party" in the context of a mechanic's lien action as a party who could claim a "possessory or expectancy interest" which is likely to be "defeated or diminished" by the mechanic's lien action. *Mendenhall v. Cooper,* 239 Va. 71, 75, 387 S.E. 2d 468, 470 (1990).

In the present case, the only interest that Paris could have in this action would presumably relate to a contractual claim it may have for final payment allegedly due under the Contract and the September 2009 Contract. However, based upon the record developed below there is no evidence that Paris has (or had at

the time in question)such a claim and/or has fulfilled the express conditions of its own Contract which would entitle it to make a claim for any further payment of funds due under the Contracts.

The facts of this case (as developed as they are reflected in the record below) defeats any assertion that Paris holds a “possessory or expectancy interest” which is likely to be “defeated or diminished” by allowing Synchronizer’s mechanic’s lien action to proceed. As such, the Circuit Court erred in finding that Paris was a necessary party and its dismissal of Synchronized’s mechanic’s lien enforcement action.

2. THE CIRCUIT COURT’S CONCLUSION THAT PARIS IS A NECESSARY PARTY BECAUSE IT POSSESSED RIGHTS WHICH WERE SOMEHOW “BOUND UP” WITH THAT OF THE OTHER PARTIES, IMPERMISSIBLY EXPANDS THE DEFINITION OF WHO MAY BE CONSIDERED A NECESSARY PARTY UNDER VIRGINIA LAW.

In its discussion of this Court's definition of the term “necessary parties,” the Circuit Court’s February 6, 2013 Letter Opinion opines that this Court has repeatedly stressed that the term should be defined

broadly by trial judges. (JA 103-108) However, none of the cases, relied upon by the Circuit Court could be viewed as requiring or directing trial courts to apply an expansive definition to who or should be deemed a necessary party to a civil action under Virginia law.

In *Asch v. Mt.Vernon Yacht Club*, 251 Va. 89, 465 S.E. 2d 817 (1996) a case cited by the Circuit Court in its February 6, 2013 Letter Opinion, this Court held that the Mt. Vernon Yacht Club, an Virginia corporation, was a necessary party in an action brought by members of the yacht club seeking injunctive relief and a declaration that they are members of the club under the club's bylaws. This Court in *Asch* held that the yacht club was a necessary party in an action involving the application and adjudication of the membership requirements of its own bylaws. Logically, the yacht club in *Asch*, as with any similar situated corporate organization would have a legal interest in the interpretation and application of its own bylaws in a suit brought by its members. This Court's decision in

Asch cannot be viewed as expanding the definition of necessary parties under Virginia law or providing support for a finding that Paris was a necessary party to Synchronizer’s mechanic’s lien enforcement action.

This Court's ruling in *Raney v. Four Thirty Seven Land Company, Inc.,* 233 Va. 513, 357 S.E. 2d 733 (1987) also cited by the Circuit Court does not sanction an expansive definition of "necessary parties" under Virginia law. In *Raney*, this Court found that the developer, Four Thirty Seven Land Company, Inc., was not a necessary party to a prior action to establish boundary lines over a parcel of property because "Four Thirty Seven, had neither actual enjoyment, nor possession, nor expectancy of [that]interest" which was adjudicated in a prior action. *Id.* at 520. In reaching its decision, this Court applied what can only be viewed as Virginia's traditional definition as to what constitutes factors control a determination as to who is a “necessary party.”

This Court’s decision in *Raney* is instructional and useful in this action as this Court held that the developer's "exaggerated claims could not alter its actual position and transmute it into a necessary party" and noting that one who asserts an unfound claim to an interest in property does not become entitled to be made a party to all legal proceedings involving the property. *Id.* at 520. This Court in *Raney* did not enlarge the definition of a necessary party but rather reaffirmed that a necessary party was one who had an actual possessory or expectancy interest which is likely to be defeated or diminished by the plaintiff's particular action. As in *Raney*, any unfounded claims that Paris may have arising out of its Contract do not create entitlement to be included as a necessary party to Synchronized's lien enforcement action. [2]

---

[2] Although not cited by the Circuit Court in either of its Letter Opinions issued below, the case *In Re: Richardson Builders, Inc.* 123 B.R. 736, 740 (Bankr. W.D. Va. 1990) is inapplicable to the facts of this case. The decision in *Richardson Builders* does not identify the type of contract entered into by the owner and general contractor. The very nature of the Prav

In the context of a mechanic's lien enforcement action, this Court has not relaxed or broadened the definition of who may be properly viewed as necessary parties to a lien enforcement action. In mechanic's lien enforcement actions, this Court has consistently held that parties who hold identifiable *property interests* such as trustees on an antecedent deed of trust are necessary parties to such actions because of their property interest in the real property are capable of being defeated or diminished by the plaintiff's mechanic's lien claim. *Walt Robbins, Inc.*

Lodging-Paris' Contract being a cost-reimbursable contract versus a lump sum or fixed price contract essentially precludes the "risk" of the owner incurring inconsistent obligations which the *Richardson Builders* Court cited as rationale for its decision. The general contractor in the *Richardson Builders* case appears, from the decision, to have maintained its claims against the owner. The record below does not establish that Paris' had maintained claims against Prav Lodging under either the Contract or the September 2009 Contract. The apparent rationale of the Bankruptcy Court for its ruling in *Richardson Builders*, therefore, is not present in this action. It can also be noted that since Richardson was a debtor, the Bankruptcy Court naturally asserted jurisdiction over any claims that the debtor-contractor had against a project owner.

v. Damon Corporation, 232 Va. 43, 46, 348 S.E. 2d 223 (1986) Similarly, this Court has held that the beneficiary on a deed of trust recorded against the subject after the general contractor’s mechanic’s lien was recorded but before the enforcement suit was filed was a necessary party to a lien enforcement suit. *Bush Construction Co., Inc. v. Patal, et al.,* 243 Va. 84, 412 S.E. 2d 703 (1992).

In *Bush Construction*, this Court held that the adjudication of the mechanic's lien would impact the proceeds available to the beneficiary from a judicial sale and since the beneficiary's lien was inferior to that of the lien claimant, the beneficiary's property interest could be defeated by the enforcement of the mechanic's lien. The beneficiary, therefore, was a necessary party to the lien enforcement action. *Id.* at 88. In explaining its decision, this Court stated that the necessary party determination *“must be based upon an analysis of the nature of the particular interest involved and the rights appurtenant to that interest in*

light of the relief requested." (Emphasis added) *Id.* at 87. Therefore, not only must a party have a "particular interest" in the form of a property interest, that interest must be involved in nature of the relief sought by the plaintiff in the action to the extent that such interest could be defeated or diminished.

This Court in *Air Power, Inc. v. Thompson*, 244 Va. 534, 422 S.E. 2d 768 (1992) further defined what types of property interests require that a party being deemed a necessary party. In *Air Power,* this Court ruled that a beneficiary under an unrecorded land trust held a personal property interest but retained no interest, legal or equitable, in the property itself. *Air Power, Inc.* 244 Va. at 537. This Court held that the beneficiary may be a proper party to the mechanic's lien enforcement suit; however, it was not a necessary party because the beneficiary lacked an interest in the subject property. *Id.* at 538.

In the present case, Paris has no interest, legal or equitable, in the property comprising the Project or

the bond posted pursuant to Virginia Code §43-70. Further, due to the nature of the cost reimbursable Contract that it entered into and the subsequent execution of the September 2009 Contract, Paris had no contractual right to obtain the funds that were included in the amount of Sychronized’s Mechanic’s Lien. The ultimate remedy sought by Synchronized and as proscribe by the Virginia mechanic’s lien law will not impact or affect a legitimate property interest that Paris enjoyed or currently enjoys. This Court has consistently held that parties who have a “possessory or expectancy interest” which is likely to be “defeated or diminished” by mechanic’s lien action are necessary parties while those that do not have such an interest are not.

While one could observe, like the Circuit Court did below, that Paris has some interests that "are bound up" with the adjudication of Synchronized’s mechanic's lien. The “interest” that Paris may have in connection with the lien litigation below is not an interest,

legal or equitable, in the real property which this Court in *Air Power* observed must be present in order to require that the party be included in a lien enforcement action as a necessary party. Further, as set forth above, Paris' cannot be viewed as having a "possessory or expectancy interest" in either payment due for Synchronized's work performed on the Project after September 2009 or the proceeds from the lien enforcement action which Synchronized may be entitled to as Paris is not entitled to receive such payments under the terms of its Contract.

Accordingly the Circuit Court erred in not applying the proper standard of law in its determination of whether Paris was necessary party to Synchronized's lien enforcement action. As a result of this error, this Court must reverse the Circuit Court's March 8, 2013 Order and the July 8, 2013 Final Order entered below.

3. THE RECORD BELOW REFLECTS THAT SYNCHRONIZED HAS SHOWN THAT IT HAS THE ABILITY TO PRESENT ADMISSIBLE EVIDENCE ON THE ISSUE OF THE STATUS OF ACCOUNTS UNDER THE PRAV LODGING-PARIS' CONTRACT AS PART OF ITS MECHANIC'S LIEN ENFORCEMENT ACTION AND THUS THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION.

The Virginia Code and the caselaw interpreting the adjudication of mechanic's liens in Virginia prescribe no rigid means or express requirements by which a mechanic's lien claimant must go about proving each and every element of its mechanic's lien enforcement case. As with any civil action or claim, there may be one or more methods by which a party can establish the elements of its case at trial. In this present action, the record below reflects that Synchronized has proffered and submitted documents and information to the Circuit Court during the course of the case and in response to motions which reveals that Synchronized has the ability and resources available to it to carry its burden of proof at trial on each and every element of its case. (JA 118-133)

The mechanic's lien law does not expressly require that the general contractor be a party to a lien enforcement suit filed by a subcontractor. See, Virginia Code §43-22 (1950, As Amended). While it may be preferable to have the general contractor present and fully engaged in the case and present evidence through such a party, there is no express statutory requirement that a subcontractor must have the general contractor in the courtroom or in the case in order to be able to prove the elements of its mechanic’s lien enforcement case. The equitable nature of the lien law would suggest that if a subcontractor can establish through competent evidence all of the elements required, including the balance due on the general contractor’s contract with the owner, it should be allowed to present such proof at the trial of its case.

Prav Lodging is not prejudiced by allowing the lien enforcement action to proceed as any payments made to Synchronized out of the bond to satisfy its mechanic’s lien claim would effectively become a set-off that Prav

Lodging may have to any claim for payment that Paris could pursue (assuming Paris even had any contractual right to further payment). There is, therefore, no threat of double liability to Prav Lodging should the decision of the Circuit Court be reversed. Merely because the Circuit Court has concluded that at Paris' interests are "bound up" in the determination of Synchronized's mechanic's lien is not enough to warrant the dismissal of the lien action and denying Synchronized the enjoyment (and full protection) of its statutory lien rights.

CONCLUSION

The Circuit Court erroneously concluded that under the facts of the case that Paris was a necessary party to the underlying mechanic’s lien enforcement action thereby depriving Synchronized the opportunity to proceed to trial.

Accordingly Synchronized respectfully asks that this Honorable Court reverse the decision below and vacate the March 8, 2013 Order and the July 8, 2013

Final Order and order that Synchronized Mechanic's Lien be reinstated and that Prav Lodging and VCB file a bond with the Circuit Court pursuant to Virginia Code §43-70 (1950, As Amended) and remand the case to the Circuit Court for further proceedings consistent with the holding of this Court and a trial on the merits.

Respectfully Submitted,

SYNCHRONIZED CONSTRUCTION
SERVICES, INC.

By counsel

Andrew N. Felice

(VSB# 26277)
Rees Broome, PC
1900 Gallows Road, Suite 700
Tysons Corner, VA 22182
(703) 790-1911 (Telephone)
(703) 848-2530 (Fax)
afelice@reesbroome.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Rules 5:26(e) and 5:32(3)(ii) of the Supreme Court of Virginia have been complied with and pursuant to the Rule, fifteen (15) tangible copies of this Opening Brief of Appellant, and one electronic copy (via CD-ROM) have been hand delivered and filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy(via CD-ROM)have been mailed postage prepaid to the counsel listed below and ten (10)tangible copies and ten (10) electronic copies (via CD-ROM) of the Joint Appendix have been hand delivered and filed with the Clerk of the Supreme Court, and one(1)tangible copy and one (1) electronic copy of the Joint Appendix have been mailed postage prepaid to:

Prav Lodging, LLC
C/o Sean D. Gregg, Esquire
111 E. Main Street
Orange, VA 22960
Counsel for Appellant Prav Lodging, LLC

Virginia Community Bank
C/o Paul S. Bliley, Esquire
W. Alexander Burnett, Esquire
WILLIAMS MULLEN
P.O. Box 1320
Richmond, VA 23218-1320
Counsel for Appellant Virginia Community Bank

I also certify compliance with the word count in this brief contains 5670 words, exclusive of those parts that by rule do not count toward the word limit.

Andrew N. Felice

ADDENDUM OF VIRGINIA CODE SECTIONS

§ 43-13. Funds paid to general contractor or subcontractor must be used to pay persons performing labor or furnishing material.

Any contractor or subcontractor or any officer, director or employee of such contractor or subcontractor who shall, with intent to defraud, retain or use the funds, or any part thereof, paid by the owner or his agent, the contractor or lender to such contractor or by the owner or his agent, the contractor or lender to a subcontractor under any contract for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, for any other purpose than to pay persons performing labor upon or furnishing material for such construction, repair, removal or improvement, shall be guilty of larceny in appropriating such funds for any other use while any amount for which the contractor or subcontractor may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons who have not been fully paid any amount due them.

The use by any such contractor or subcontractor or any officer, director or employee of such contractor or subcontractor of any moneys paid under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be prima facie evidence of intent to defraud.

(1932, p. 483; Michie Code 1942, § 6429b; 1968, c. 568; 1980, c. 390; 1982, c. 391; 1992, c. 713; 1998, c. 754.)

---

https://leg1.state.va.us/cgibin/legp504.exe?000+cod+43-13

§ 43-22. How liens enforced.

The liens created and perfected under this chapter may be enforced in a court of equity by a bill filed in the county or city wherein the building, structure, or railroad, or some part thereof is situated, or wherein the owner, or if there be more than one, any of them, resides. The plaintiff shall file with his bill an itemized statement of his account, showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, the balance due, and the time from which interest is claimed thereon, the correctness of which account shall be verified by the affidavit of himself, or his agent. When suit is brought for the enforcement of any such lien against the property bound thereby, all parties entitled to such liens upon the property or any portion thereof may file petitions in such suit asking for the enforcement of their respective liens to have the same effect as if an independent suit were brought by each claimant.

(Code 1919, § 6437; 1920, p. 485.)

---

§ 43-70. Release of mechanic's lien upon payment into court or filing of bond after suit brought.

In any suit brought under the provisions of § 43-22, the owner of the building and premises to which the lien, or liens, sought to be enforced shall have attached, the general contractor for such building or other parties in interest may, after five days' notice to the lienor, or lienors, apply to the court in which such suit shall be pending, or to the judge thereof in vacation, for permission to pay into court an amount of money sufficient to discharge such lien, or liens, and the costs of the suit or for permission to file a bond in the penalty of double the amount of such lien, or liens, and costs, with surety to be approved by the court, or judge, conditioned for the payment of such judgment adjudicating the lien or liens to be valid and determining the amount for which the same would have been enforceable against the real estate as may be rendered by the court upon the hearing of the case on its merits, which permission shall be granted by the court, or judge, in either such case, unless good cause be shown against the same by some party in interest.

Upon the payment of such money into court, or upon the filing of such bond, as the case may be, after the court has granted permission for the same to be done, the property affected thereby shall stand released from such lien, or liens, and the money so paid in, or the bond so filed, as the case may be, shall be subject to the final judgment of the court upon the hearing of the case on its merits.

(1936, p. 492; Michie Code 1942, § 6437a; 1962, c. 166; 1976, c. 388; 1992, c. 532.)