IN THE

Supreme Court of Virginia

RECORD NO. 131569

SYNCHRONIZED CONSTRUCTION SERVICES, INC.,
Appellant,

v.

PRAV LODGING, LLC, *et al.*,
Appellees.

BRIEF OF APPELLEES VIRGINIA COMMUNITY BANK AND PAUL S. BLILEY, JR., TRUSTEE

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INTRODUCTION

The Appellant, Synchronized Construction Services, Inc. ("Synchronized" or "Appellant") filed suit to enforce its mechanic's lien and named the general contractor, Paris Development Group, LLC ("Paris"), as a defendant but failed to serve Paris within one year and Paris was dismissed from the case. (J.A. 72-73.) Appellee Virginia Community Bank ("VCB") then moved to dismiss the case because Paris was a necessary party, without which the trial court could not proceed. (J.A. 75-87.) Applying this Court's definition of a necessary party, the trial court correctly concluded that Paris was a necessary party because it was materially interested either legally or beneficially in the subject matter or event of the suit and the interests of Paris in the subject matter of the suit and the relief sought were directly 'bound up' with that of the other parties. (J.A. 107.)

Based on the issues and defenses raised in the case, the trial court determined that to adjudicate the validity of Synchronized's lien, Synchronized was required to establish the following, all of which the Paris had an interest in:

(1) The amount owed from the owner to the general contractor;

(2) The amount owed from the general contractor to the subcontractor; and

(3) The contractual and financial arrangements between the owner and general contractor and between the general contractor and the subcontractor.

(J.A. 106-07.)

In this appeal, Synchronized contends Paris had no interest in the bond and therefore was not a necessary party. Paris's argument fails for two reasons. First, Paris did have an interest in the bond because if the bond was paid to Synchronized there would not be any funds remaining to pay the remainder of Paris's fee, reimbursable costs, or its retainage. Second, Synchronized incorrectly limits the subject matter of this lawsuit to the bond itself. The trial court correctly ruled that "the bond only speaks to the remedy in the case, and is only a part of the entire subject matter." (J.A. 105.) The subject matter of the case also included the three issues above, and Paris was materially interested in the outcome of those issues.

This Opening Brief rebuts each of the arguments made by Synchronized in its Opening Brief and explains through argument and Virginia authority why Paris was a necessary party. First, Section I of this Brief responds to Section 1(A) of Synchronized's Brief, discussing why the language in the prime contract did not preclude claims by Paris and explaining why Paris had an interest in the funds comprising the bond. Section II of this Brief responds to Section 2 of Synchronized's Brief and

discusses the definition of a necessary party under settled Virginia law and why Paris fits squarely within that definition. Finally, Section III of this Brief responds to Section 3 of Synchronized's Brief and explains why Synchronized cannot and should not be permitted to represent the interests of Paris in its absence from the case. For the following reasons, the decision of the trial court should be affirmed.

STATEMENT OF THE CASE

Synchronized filed a complaint (the "Complaint") in the Circuit Court for Orange County seeking to enforce a mechanic's lien against certain real property on which a Best Western Hotel was constructed (the "Property"). The Complaint named Prav Lodging, LLC (the "Owner") as the owner of the Property, VCB and Paul S. Bliley, Jr. (the "Trustee") because of their deed of trust on the Property, Paris as the general contractor, and other defendants who had filed mechanic's liens against the Property.

Count I of the Complaint sought enforcement of Synchronized's mechanic's lien against all defendants, asked that the Property be sold to satisfy the lien, and requested judgment against the Owner and Paris for any deficiency from the sale of the Property. (J.A. at 9-11.) Count II of the Complaint asserted a cause of action for breach of contract against Paris. (J.A. 11-12 at ¶¶ 31-35.) In defense of the Complaint, VCB and the

Trustee asserted that the Owner had paid Paris in full and therefore asserted a payment defense to Synchronized's mechanic's lien pursuant to Section 43-7 of the Code of Virginia. (J.A. 225-28.) VCB and the Trustee also asserted that Synchronized was not entitled to enforce its mechanic's lien because neither the Owner nor Paris owed any money to Synchronized. (Id.)

After commencement of the lawsuit, Synchronized failed to effectuate service of process on Paris within one year as required by the Virginia Rules and the trial court dismissed Paris with prejudice in an Order entered March 9, 2012. (J.A. 72-73.) Subsequently, on April 25, 2012, VCB filed a Motion to Dismiss on the grounds that Paris, as the general contractor, was a necessary party to the mechanic's lien suit. (J.A. 75-87.) On February 6, 2013, the trial court issued a letter opinion granting VCB's Motion to Dismiss (the "Feb. 6 Letter Opinion"). (J.A. 103-08.)

A. The Feb. 6 Letter Opinion

In the Feb. 6 Letter Opinion, the trial court explained that in order to decide whether the general contractor was a necessary party, the court must (1) "identify the entire subject matter of the case"; (2) "examine how the Supreme Court of Virginia has defined a necessary party"; and (3)

"decide whether the general contractor meets the definition of a necessary party in this particular case." (J.A. 105.)

The subject matter of the suit included "several financial questions *that directly involve the general contractor.*" (J.A. 106.) (emphasis added.) In particular, the court identified three issues that must be decided in Synchronized's suit involving financial questions that impact Paris:

> (4) The amount owed from the owner to the general contractor;
>
> (5) The amount owed from the general contractor to the subcontractor; and
>
> (6) The contractual and financial arrangements between the owner and general contractor and between the general contractor and the subcontractor. (Id.)

First, "whether any such proven amount can be charged to the bond can only be computed after the court determines what, if anything, the owner owes to the general contractor." (J.A. 107.) As to the second issue, the court explained that "the lien that the plaintiff seeks to enforce against the bond must be based on proof of a claim for money that the subcontractor has against the general contractor." (Id.) After examining these elements of the lawsuit and considering the Supreme Court's definition of a necessary party, the court correctly concluded that Paris, the general contractor, was a necessary party because:

> [T]he general contractor here is 'materially interested either legally or beneficially in the subject matter or event of the suit' and the interests of the general contractor in the subject matter of this suit and the relief sought are directly 'bound up' with what the other parties. (Id.)

B. The Trial Court Denied the Motion for Reconsideration.

After the Court issued the Feb. 6 Letter Opinion, Synchronized filed a Motion for Reconsideration which was briefed by the parties and denied on its merits by the trial court in a letter opinion (the "June 6 Letter Opinion") and a corresponding Final Order entered on June 8, 2013 (the "Final Order"). (J.A. 300-05.) In its June 6 Letter Opinion, the court explained that to decide the merits of the suit it "must examine the financial obligations between the owner and the general contractor and those between the general contractor and the subcontractor." (J.A. 300.) Many of these issues—such as what payments were made, when they were made, and what they were made for—were contested. (J.A. 301.) Applying Virginia's common law definition of a necessary party as set forth in numerous decisions by this Court, the trial court once again concluded that the general contractor was necessary to the subject matter of Synchronized's suit. (Id.)

The court further rejected the argument that Paris would not be prejudiced, and noted that even without prejudice, the dispositive issue of a

necessary party is whether the party is "materially interested either legally or beneficially in the subject matter of the suit and its interests are bound up with those of the other parties." (Id.) Because Paris was "materially interested" and "bound up" in the subject matter of the mechanic's lien suit, specifically the financial and contractual obligations to be adjudicated in the lien enforcement suit, Synchronized was required to give Paris notice and the opportunity to be heard so that Paris could decide for itself whether to participate. (Id.) Because the trial court properly concluded that Paris was a necessary party to this mechanic's lien action, the trial court's decision should be affirmed.

STATEMENT OF FACTS

During all times relevant herein, Paris was registered with the Virginia State Corporation Commission and licensed to do business in Virginia.[1] (J.A. 6 at ¶ 3.) On or about October 1, 2008, the Owner entered into a written contract with Paris (the "Prime Contract"), as general contractor[2] to construct the Project. (J.A. 9 & 134-51.) The Prime Contract was a cost-

[1] As discussed in Part II(B) below, Paris's status with the Virginia State Corporation Commission was "cancelled" on November 30, 2010, but notwithstanding that fact Paris can still be reinstated to date or it can sue and be sued in the name of its trustees in dissolution.

[2] As discussed in footnote 6 below, the Prime Contract refers to Paris as "Construction Manager [who] is also the Constructor," but for purposes of Virginia's mechanic's lien laws and pursuant to Va. Code Ann. § 43-1 Paris is a "general contractor."

plus agreement that provided that the total contract sum would be the cost of the work including Paris's costs as described in Article 6, plus Paris's fee as set forth in Article 5. (J.A. 136 at § 1.3.) The Prime Contract established a fixed fee of $192,000, payable upon monthly pay requests submitted with a percent of completion of the contractor's fee due. (J.A. 141-42.) Because Paris was also the "Constructor," the Prime Contract required Paris to complete the work and to contract directly with subcontractors for "those portions of the work that the Construction Manager does not customarily perform with the Construction Manager's own personnel." (J.A. 139 at § 2.3.2.1.)

On or about October 15, 2008, Paris entered into a written subcontract with Synchronized for a portion of the work on the Project. (J.A. 9 at ¶ 24; J.A. 19-37.) It provided that Synchronized would be paid progress payments for its work completed based on monthly payment applications. (Id.) Paris would include the submittal in its next pay application submitted to the Architect, and agreed to pay Synchronized within five working days after Paris received payment from the Owner. (Id.)

By written agreement on September 1, 2009, the Owner and Paris amended the Prime Contract (the "September 2009 Amendment"). (J.A. 152-54.) As stated in Synchronized's Motion for Reconsideration, the

September 2009 Amendment "modified but did not replace the parties' existing Contract." (J.A. 120.) The purpose of this September 2009 Amendment was to induce VCB, the lender, to commit additional capital to the project up to $845,000. (J.A. 152-54.) It did not otherwise alter the cost-plus basis of the Prime Contract and, importantly, did not alter Paris's contractual right to a fee or reimbursement for its construction services under the Prime Contract. (Id.) Even after the September 2009 Amendment, Paris was still required to inspect the Property, to approve payments, and was entitled to collect its fee, its reimbursable costs, and its retainage.

Thereafter, Paris submitted pay applications and approved payments by an escrow agent to its subcontractors. (Id.) After the September 2009 Amendment, both the Owner *and Paris* had to approve all payments to subcontractors. (Id.) On or about January 18, 2010, Paris submitted construction draw # 10 ("Draw # 10") in which Mitch Paris, President of Paris, stated that Synchronized's work was 100% complete and Synchronized was owed $0.00.[3] (J.A. 184-185.) In Draw # 10, Paris also asserted a request for reimbursement of the cost for Paris's "Superintendent" in the amount of $16,000. (Id.) Because final payment

[3] Construction Draw # 10 was part of Exhibit E to Synchronized's Motion for Reconsideration.

was never made, Paris may also assert a claim for the remainder of its fee and retainage pursuant to Articles 5, 7.1.6, and 7.2.2 of the Prime Contract. (J.A. 142, 145, and 147.) A partial payment was made for Draw #10 in the amount of $54,673.93 in the form of three payments to subcontractors on April 7, 2010, but the balance of Draw # 10 was not paid. (J.A. 239.)

On March 11, 2010, Synchronized recorded a mechanic's lien asserting it was owed $208,250.80 for work performed on the Project. (J.A. 10 at ¶ 26; J.A. 38-41.) In defense of the lien, VCB and the Owner contended that no funds remained to satisfy Synchronized's lien. (J.A. 225-28.) In its Opening Brief, Synchronized asserts that the balance left on Paris's Prime Contract was $173,586.80. (Op. Br. at 11.) Even if Synchronized was right about the amount remaining due under the Prime Contract, which is disputed by the parties, insufficient funds remained to pay the lien claim of $208,250.80 and any claim made by Paris. As such, Paris had a financial stake in the outcome of Synchronized's lien enforcement action. Synchronized concedes in its Opening Brief that Prav and VCB have, at least, a partial payment defense to the mechanic's lien enforcement. (Op. Brief at 11.)

STANDARD OF REVIEW

The trial court's determination that Paris was a necessary party involved a question of law. Accordingly, the assignments of error in this case are reviewed *de novo*. Glasser & Glasser, PLC v. Jack Bays, Inc., 285 Va. 358, 369 (2013).

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT PARIS WAS A NECESSARY PARTY BECAUSE THE GENERAL CONTRACTOR HAD A POSSESSORY OR EXPECTANCY INTEREST AND WAS SO BOUND UP WITH THE INTERESTS OF OTHER PARTIES AND THE SUBJECT MATTER OF THE SUIT THAT ITS LEGAL PRESENCE WAS NECESSARY.

A. Whether Paris's Contract Precluded It From Asserting a Claim Against the Owner Was Never Raised with the Trial Court and Cannot be Appealed.

Synchronized makes two new arguments in its Opening Brief that were not raised with the trial court. First, Synchronized argues that as a result of the September 2009 Amendment, Paris relinquished its duty to pay subcontractors and suppliers, thereby abandoning "its contractual right to collect from the Owner payments for the work of its subcontractors and suppliers." (Opening Brief at 18.) Second, Synchronized for the first time claims that Paris failed to complete three conditions precedent to Paris's right to final payment due under the subject contract. (Opening Brief at 22.) Where a party does not raise an issue before the trial court, this failure

prohibits an appellate court from considering the argument for the first time on appeal. Va. Sup. Ct. R. 5:25; Hawthorne v. VanMarter, 279 Va. 566, 581 (2010). Errors argued before the Supreme Court which were not properly preserved should be ignored. West v. L. Bromm Baking Co., 166 Va. 530, 534 (1936). "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court." West Alexandria Properties, Inc. v. First Virginia Mortg. & Real Estate Inv. Trust, 221 Va. 134, 138 (1980).

This Court should disregard Synchronized's arguments regarding Paris's alleged relinquishment of its contractual obligation to pay subcontractors and suppliers and Synchronized's assertion that Paris failed to complete the conditions precedent to Paris's right to final payment under the subject contract since these arguments were not properly preserved.

B. The Contract Does Not Preclude Paris from Making a Claim Against the Owner and Even if It Did, Paris Would Still Be Necessary.

1. Paris Is Not Precluded from Asserting a Claim Against the Owner.

In Part 1(A) of its Opening Brief, Synchronized contends that the terms of the Prime Contract precluded Paris from asserting a claim against the Owner for funds remaining due and therefore the mechanic's lien suit

could not defeat or diminish Paris's possessory or expectancy interest. This argument fails, however, because under a plain reading of the Prime Contract Paris could make a claim against the Owner and Paris is entitled to notice and an opportunity to be heard on that issue.

Article 5 of the Prime Contract sets forth a payment structure whereby Paris would be reimbursed for all labor and material costs *and Paris would be paid a fixed fee* in addition to that reimbursement. (J.A. 142) Pursuant to Article 5, Paris's fixed fee was to be distributed throughout the duration of the project based on the percentage of completion. This requirement was not altered by the September 2009 Amendment. As such, the fee would not be fully paid to Paris until the project was one hundred percent (100%) complete.

Additionally, Paris would likely claim reimbursable costs from the Owner as permitted in Article 6.1 of the Prime Contract. (J.A. 142.) Specifically, Article 6.1 permitted Paris to be reimbursed for certain operating expenses incurred by Paris. In fact, in Draw # 10 Paris was claiming $16,000 for "Superintendent" costs as allowed in Article 6.1.2 (J.A. 190) and that claim was never paid. (J.A. 239.) Finally, Paris would likely have a claim for retainage under Article 7.2.2 of the Prime Contract. (J.A. 147.) For Synchronized to argue that the terms of the Prime Contract

precluded Paris's recovery of its fee, its reimbursable costs, or retainage is simply inaccurate. For Synchronized to then argue that it should be allowed to present evidence of what Paris was or was not owed, as it does in footnote one of its brief, demonstrates all the more reason why Paris was entitled to notice and an opportunity to be heard.

Next, Synchronized argues that Paris relinquished the contractual duty to pay its subcontractors. This is not supported by the record and is simply not accurate. First, nothing in the September 2009 Amendment relinquished or changed Paris's contractual obligation to pay its subcontractors. The process by which Paris would submit pay applications to the Owner remained intact. Upon receipt of a payment request from Paris, the Owner and Paris would both have to approve payment and then the Escrow Agent would disburse the funds. (J.A. 154.) This is more closely akin to Paris contacting its bank and asking for a payment to be made by wire or cashier's check to a subcontractor. Under that scenario, payment is still coming from Paris, it is not a payment from Paris's bank.

Pursuant to the September 2009 Amendment, the cost under the Prime Contract became capped at a guaranteed maximum price. (J.A. 152-54.) Also, the parties agreed that the Owner and Paris would both have to approve payments and thereafter the escrow agent would disburse

some of the funds directly to subcontractors. (J.A. 154.) Because Paris was deciding whether to approve or reject those payments, Paris was directly in charge of both requesting and paying its subcontractors. Contrary to Synchronized's contention, the Amendment did not relinquish Paris's obligation to pay its subcontractors.

Second, nothing in the record suggests that Paris modified its subcontracts; therefore, it still owed contractual duties to its subcontractors and suppliers to pay them. Even if Paris did relinquish its contractual duty to pay its subcontractors, however, Synchronized would be unable to prove the essential element of its lien: that Paris owed money to Synchronized for work performed. See June 6 Opinion, J.A. 300 ("[N]o lien can be enforced against the bond without the resolution of two critical questions. First, the amount, if any, owed to the general contractor by the owner must be established. Second, the subcontractor must prove that the general contractor is legally bound to pay the subcontractor a specific amount of money."); see also John T. Wilson Co. v. McManus, 162 Va. 130, 135 (1934).

In sum, the September 2009 Amendment did not affect the necessity of Paris as a party in the mechanic's lien suit and did not change the duties and obligations under the Prime Contract. This September 2009

Amendment had no effect on Paris's ability to state a claim against the Owner and merely emphasized the importance of giving Paris notice and an opportunity to be heard regarding the payments owed to Synchronized. Essentially, Synchronized is attempting to contort the September 2009 Amendment into a document that removed Paris from the chain of privity in hopes of salvaging the fact that it named but failed to serve Paris with the suit. The September 2009 Amendment, however, did not change the chain of privity. Paris remained in privity with the Owner and was entitled to a fee. Synchronized was in contractual privity only with Paris. As such, Paris was a necessary party to the lien enforcement action as the contractual obligations between Paris and the Owner as well as between Paris and Synchronized were directly at issue. (See J.A. 300 (holding the elements of Synchronized's claim would "require the court to construe and interpret the various contractual obligations among the parties").)

2. Synchronized Claims It Can Represent Paris's Interest Yet at the Same Time Asserts that Paris Had No Contractual Claim to Payment Under the Prime Contract.

On page 22 of its Opening Brief, Synchronized next argues that Paris's right to payment was subject to three conditions precedent that Synchronized then argues had not been fulfilled. First, each of those conditions was likely met when the project concluded. Second, even if

Paris had not yet fulfilled conditions to receiving payment from the Owner, an issue that Paris is entitled to notice and an opportunity to be heard, that doesn't mean that it could never satisfy those conditions. At the very least, Paris had a *contingent* possessory or expectancy interest with its claims against the Owner. Asch v. Mt. Vernon Yacht Club, 251 Va. 89, 91 (1996) ("Where an individual is in the actual enjoyment of the subject matter, or has an express interest in it, either in possession or expectancy," they "are necessary parties to the suit.") Moreover, regardless of whether Paris was entitled to final payment pursuant to Article 7.2, Paris was entitled to progress payments pursuant to Article 7.1 which would include a percentage of its fee and its reimbursable "Superintendent" costs. (J.A. 145-47.)

Paris would also be materially interested and bound up in the determination of how much, if any, was owed from Paris to Synchronized and what the financial and contractual obligations were between Paris and Synchronized. These issues were in dispute and Paris should have been given notice and an opportunity to be heard because these issues directly affect Paris's remuneration under its Prime Contract and other parties' claims or obligations against Paris. Synchronized's argument that it can represent the interests of Paris, while at the same time claiming that Paris

did not retain a contractual claim for payment under the Prime Contract, underscores the divergent interests of Paris and Synchronized and the necessity of Paris being a party to the suit.

3. *Paris Has an Interest in the Bond and the Priority of Claims Established by Va. Code § 43-13 only Bolsters Paris's Status as a Necessary Party.*

On pages 23-24 of its Opening Brief, Synchronized argues that because Synchronized would have priority over Paris as to any remaining funds due under the Prime Contract, Paris is not a necessary party. Synchronized's argument, however, demonstrates why Paris has an interest in the bond and is a necessary party to the suit.

Synchronized contends that the balance left on Paris's Prime Contract was $173,586.80. (Op. Br. at 11.) VCB and the Owner contend that no funds remained to satisfy Synchronized's lien. (J.A. 225-28.) Even if Synchronized was right about the amount remaining due under the Prime Contract, which is disputed by the parties, insufficient funds remained to pay the lien claim of $208,250.80 and any claim made by Paris. If the trial court ruled that Synchronized's claim was valid and it was entitled to the bond, there would be no funds left to pay Paris. If on the other hand, the trial court ruled that Synchronized's lien was invalid *or* that it was entitled to less than $173,586.80, then there could be sufficient funds to pay Paris. As

such, Paris had a financial stake in the outcome of Synchronized's lien enforcement action.

Synchronized wants to assert that it has a valid claim against Paris, giving it priority over any claim Paris may have, all without Paris present. But because Paris's rights would be affected if Synchronized establishes a valid claim, Paris should have notice and the opportunity to dispute the claim. Indeed, Paris would likely dispute the validity of Synchronized's claim as evidence by draw # 10 in which Paris's President stated that Synchronized's work was 100% complete and Synchronized is owed $0.00. (J.A. 184-185.)

Finally, Synchronized asserts the validity of its claim based on varying and divergent arguments. In Part 1(A) of the Opening Brief, Synchronized argues that Paris does not have any claims against the Owner. If proven true, Synchronized's claims would be barred by Va. Code § 43-7 which says that the subcontractor's lien "shall not exceed the amount in which the owner is indebted to the general contractor." In Part 3, however, Synchronized switches positions and argues that the Owner owes money to Paris and that Synchronized should be allowed to prove the amount that is owed to Paris. Synchronized cannot have it both ways.

4. *Synchronized's Argument that the Contract Between Paris and the Owner Precluded Paris from Asserting a Claim under the Contract Does not Change the Fact Paris Was a Necessary Party to This Litigation.*

In its Opening Brief at page 24, Synchronized argues that Paris is not a necessary party because Paris cannot bring a claim against the Owner under the contract. Synchronized's argument is unavailing for several reasons.

First, Synchronized's argument that it should be allowed to prove that Paris does or does not have certain claims against the Owner demonstrates that Paris is a necessary party. If Synchronized was allowed to present evidence that Paris was barred from asserting claims against the Owner without giving Paris notice and an opportunity to be heard, the result would either have a preclusive effect of barring Paris from ever asserting such a claim[4] or expose the Owner to the risk of having to litigate these claims twice. In re: Richardson Builders, Inc., 123 B.R. 736, 740 (Bankr. W.D. Va. 1990). Whether it does or does not have a claim against the Owner is Paris's argument to make, not Synchronized's. If Paris chooses not to appear and defend its rights and interests after having been served

[4] Synchronized argues in footnote 1 of its Brief that Paris would be barred from asserting a claim against the Owner by *res judicata* or collateral estoppel as a result of Synchronized's mechanic's lien action. This is one of the concerns and bases for the court holding that the general contractor was a necessary party in Richardson. 123 B.R. at 740.

and given notice and an opportunity to be heard, then and only then could Synchronized be allowed to prove that Paris does or does not have certain claims. Synchronized should not be allowed to decide through its service or non-service of Paris whether Paris has the right to defend itself.

Second, even if Synchronized could make a showing that Paris has no claim under its contract with the Owner, Synchronized must still establish the contractual and financial arrangements and obligations between Synchronized and Paris. The September 2009 Amendment did not alter or affect the subcontract between Paris and Synchronized. Synchronized and Paris's contractual arrangements were establish by a separate and distinct agreement entered on or about October 15, 2008, where Paris subcontracted with Synchronized to perform a portion of the work on the Project. (J.A. 9 at ¶ 24; J.A. 19-37.) The September 2009 Amendment did not alter or affect this subcontract. Accordingly, Synchronized must prove that it performed certain work under a subcontract with Paris, that it fulfilled its obligations and satisfied all conditions to its payment under such subcontract, that it has not been paid by Paris, and it must prove the amount that is due and owing to it by Paris. As such, Paris is "materially interested" and "directly bound up" in this

subject matter and Synchronized was required to give Paris notice and an opportunity to be heard. See Walt Robbins, Inc., 232 Va. at 47.

5. The Trial Court's Decision Was Based on a Legal Analysis, Not a Factual Analysis, and Synchronized's Reliance on the "Record Below" Fails to Consider Paris's Due Process Rights If the Record Had Been Established Without Giving Paris Notice and an Opportunity to Be Present.

While Appellant's brief repeatedly discusses what the "record below" established, the trial court was not required to make any factual findings to resolve the Motion to Dismiss. Rather, the trial court needed to determine what issues and defenses would be adjudicated in the case and whether Paris was necessary with respect to those issues. Once the trial court identified the issues in the case, the rest of the analysis was based on legal principles and not evidence or the resolution of disputed facts. In making this determination, the trial court said the following:

> The principles of law that apply to determining whether a party is necessary do not turn on whether the court has the "ability" to resolve disputed issues or whether there would be enough evidence or information to try them, even if a party is not joined in the proceeding. Rather, as stressed previously, the key inquiry is to ascertain what parties have a material interest in the subject matter and what parties have interests in the case that are "bound up" with those of the other parties. Once such parties have been identified, they must be given notice and an opportunity to be heard. This must be done before the court can proceed. In this regard, it must be emphasized that the court's ruling does not mean that the general contractor must actually appear in court and participate in the litigation. Rather,

> the court finds that as a necessary party, the general contractor must be served with process and given the chance to do so.

(J.A. 302.)

Moreover, Paris was never given notice of the suit or the opportunity to establish the "record below," and the trial court specifically rejected Synchronized's argument that it could establish its lien right without Paris present to develop the record. Regardless of the trial court's "ability" to resolve disputed issues, the ***due process*** rights of Paris are what drive the necessary party analysis, and Synchronized glosses over the fact that the "record below" may be very different if Paris were given notice and the opportunity to defend and assert its rights at trial.

II. The Trial Court Applied the Correct Standard in Determining that Paris Was a Necessary Party.

A. Paris Has an Interest in the Bond; However, the Standard for Whether a Party Is Necessary Is Broader than Just Those Parties with an Interest in the Bond—It Also Includes all Parties with a Material Interest in the Subject Matter of the Suit.

In its second Assignment of Error, Synchronized argues that the trial court applied an incorrect standard in analyzing whether the general contractor was a necessary party. (Opening Brief at 1-2.) Specifically, Synchronized argues that necessary parties should be limited to those who have an interest in the property, or in this case the bond. (Id. at 25-26.)

First, as discussed above, Paris does have an interest in the funds subject to the bond because if Synchronized is paid the remaining funds due under the Prime Contract, there may be nothing left to satisfy any claims by Paris for its fee, reimbursable costs, or retainage. Second, Synchronized's argument fails because it seeks to narrow the well-established and broad definition of necessary parties to just a portion of the subject matter of the suit and is therefore contrary to settled Virginia law.

Specifically, Paris was materially interested in the financial and contractual issues being adjudicated by the trial court. As explained in the trial court's February 6, 2013 letter opinion, Paris was materially interested either legally or beneficially in the subject matter or event of the suit and its interest was bound up with that of the other parties. As such, Paris was a necessary party to the Synchronized's suit to enforce its mechanic's lien.

1. The Subject Matter of This Mechanic's Lien Suit Includes Several Financial and Contractual Determinations and Paris Is Materially Interested in Those Determinations.

This Court has clearly and consistently held that the definition of a necessary party is broadly construed and is not limited to a property interest in the subject real estate, but rather, rests on whether a party has an interest in the subject matter of the suit which is likely to be diminished or defeated by a plaintiff's claim. See, e.g., Asch v. Mt. Vernon Yacht Club,

251 Va. 89, 91 (1996); Mendenhall v. Douglas L. Cooper, Inc., 239 Va. 71, 75 (1990).

While Synchronized attempts to restrict this Court's definition of a necessary party, this Court has consistently reinforced its broad application. For example, in Asch, this Court opened its discussion of necessary parties by explaining that "[w]e have defined necessary parties *broadly*" and stated that:

> Where an individual is in the actual enjoyment *of the subject matter, or has an express interest in it*, either in possession or expectancy, *which is likely either to be defeated or diminished by the plaintiff's claim*, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests *are necessary parties to the suit*.

251 Va. at 91 (emphasis added).

Looking at the interests a potential party may have in the subject matter and relief sought in a plaintiff's suit, this Court has explained that the analysis of a necessary party "is controlled by principles of due process of law." Walt Robbins, Inc. v. Damon Corp., 232 Va. 43, 47 (1986). "It is fundamental, of course, that no person may be deprived of his property without due process of law. One of the essentials of due process is notice. This is especially true in proceedings of a judicial nature affecting the property rights of citizens." Id. (citing Finkel Products v. Bell, 205 Va. 927,

931 (1965)). As such, a court does not have the power to proceed without the presence of all necessary parties because:

> [A necessary party's] interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

Asch, 251 Va. at 91; Mendenhall, 239 Va. at 74.

The trial court properly focused on the subject matter of the suit, Paris's interest in the subject matter, and the "bound up" nature of Paris's interests in the subject matter and relief sought, to conclude that Paris was a necessary party, without which, the trial court was powerless to proceed. In analyzing the subject matter of the suit, the trial court first recognized that the fact the lien had been bonded off did not affect Paris's interest in the suit. Even after the bond has been posted, the plaintiff has the burden of proving all of the same elements of the mechanic's lien claim. Va. Code Ann. §§ 43-70 & 43-71; see also Harris v. CMAME Beaumeade LP, 20 Va. Cir. 376 (Loudon County 1990) (holding that the owner and general contractor were necessary parties to a mechanic's lien suit even after the lien had been bonded off).

Furthermore, the parties' interest in the bond is only part of the subject matter of the lien enforcement action. The bond "speaks only to the

remedy in the case, *and is only a part of the entire subject matter.*" (J.A. 105 (emphasis added).) The subject matter also includes "*several financial questions that directly involve the general contractor.*" (J.A. 106.) In particular, three crucial elements of Synchronized's suit involved financial questions directly impacting the general contractor:

(1) The amount owed from the owner to the general contractor;

(2) The amount owed from the general contractor to the subcontractor; and

(3) The contractual and financial arrangements between the owner and general contractor and between the general contractor and the subcontractor.

(Id.) These financial issues and contractual obligations were derived from a number of requirements that a lien claimant must meet in order to have an enforceable lien.[5]

First, Section 43-7(a) of the Code of Virginia provides that the amount for which a subcontractor may claim a lien shall not exceed the amount by which the owner is indebted to the general contractor at the time the

[5] On pages 27-28 of its brief, Synchronized points to this Court's opinion in Raney to suggest that any claim Paris may have is "unfounded" and thus Paris is not a necessary party. Synchronized, however, initially included Paris as a defendant, yet under its analysis and after failing to serve Paris, Synchronized now wishes to unilaterally decide whether Paris's interests are founded or unfounded. Ultimately the trial court would have to determine the merits of claims by and against Paris and therefore Paris is a necessary party to the suit.

mechanic's lien notice is given or may thereafter become indebted to the general contractor. As such, a subcontractor cannot enforce a mechanic's lien unless the owner is indebted to the general contractor, and the subcontractor's claim can be reduced by any setoffs or counterclaims which the owner may have against the general contractor. Va. Code § 43-7; see Richardson Builders, Inc., 123 B.R. at 738. Therefore, before a plaintiff can enforce any lien against a bond, the amount, if any, the owner owes the general contractor must be established.[6]

Additionally, the contractual and financial obligations between the general contractor and the subcontractor must be established. "[I]f the general contractor is not indebted to the subcontractor, the subcontractor is not entitled to a lien." John T. Wilson Co. v. McManus, 162 Va. 130, 135 (1934); see Va. Code Ann. § 43-22 (requiring the plaintiff to prove "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"). As such, "the inquiry necessarily

[6] Even though Synchronized refers to Paris throughout its brief as the "construction manager," Paris is the general contractor under the Virginia's mechanic's lien statutes for purposes of this lien enforcement suit. Va. Code § 43-1 (defining "general contractor" to include "contractors, laborers, and persons furnishing materials, who contract directly with the owner."); West Alexandria Properties, Inc., 221 Va. 139 ("A person making improvements to land is deemed a general contractor if that person is in contractual privity with the owner.").

involves the contract relations and state of accounts existing between the contractor and the one seeking to enforce the lien, and that without the establishment of the debt, there can be no right of recovery, which renders the claimant's right to a lien dependent on the establishment of his claim or debt against the contractor, for which purpose the contractor is a necessary party." Tarmac Acquisition, Inc. v. Goldline Concrete Const., Inc., 26 Va. Cir. 312, 313 (Loudon County 1992).

As discussed in both of the trial court's letter opinions, Synchronized's lien could not have been enforced against the bond without the resolution of contractual and financial obligations that directly involved Paris. (J.A. 107 & 300.) First, the amount, if any, owed to Paris by the Owner must have been established. Second, Synchronized was required to prove that Paris was legally bound to pay Synchronized the amount of money claimed against the bond.

In order to resolve these issues, the trial court would have to hear evidence about the financial and contractual obligations between Paris and the Owner and between Paris and Synchronized. The trial court would also have to construe and interpret the contracts and amendments thereto between Paris and the Owner and between Paris and Synchronized. These were essential elements of the subject matter of this case, and the

record and briefs by the parties demonstrated that the facts surrounding these issues were heavily disputed. (J.A. 300-01.)

In sum, "*[a]ll* of the financial and contractual obligations of the general contractor were at stake in the case" and the court was required to "*fully adjudicate the rights and duties of the general contractor with respect to both the subcontractor and the owner.*" (J.A. 107 (emphasis added).) These rights and obligations could not be fairly adjudicated without Paris being properly before the trial court as a defendant in the case.

In fact, the Owner and VCB asserted a payment defense to Synchronized's lien, pursuant to Section 43-7 of the Code of Virginia, contending the Owner did not owe Paris the amount of Synchronized's lien. (J.A. 225-28.) Moreover, Synchronized concedes in its Opening Brief that the Owner and VCB have at least a partial payment defense because the amount it says is owed from the Owner to Paris is less than the amount of Synchronized's lien. (Op. Br. at 11.)

Here, the trial court properly concluded that the subject matter of the suit, included not just the narrow issue of whether Paris had a possessory and expectancy interest in the bond itself, but also adjudication of the financial issues of which Paris was materially interested. The trial court correctly concluded that Paris was "materially interested either legally or

beneficially in the subject matter or event of the suit" and Paris's interests were "directly 'bound up' with that of the other parties." (J.A. 107.) Indeed, Synchronized argues that Paris will be bound by *res judicata* as a result of Synchronized's mechanic's lien suit, which underscores Paris's undeniable interest in the subject matter of the suit. (Opening Brief at n.1.)

Indeed, if those issues had been adjudicated without Paris properly before the Court, then the Owner could be subject to a second litigation of those issues by Paris. Alternatively, the Owner, VCB and the Trustee would have been prejudiced without Paris as a defendant and properly before the Court because there could not have been complete and fair adjudication of all the elements required to establish Synchronized's claimed lien. Likewise, Paris would be prejudiced by not having notice and an opportunity to defend its interests. See In Re: Richardson Builders, Inc., 123 B.R. at 740.

As such, Synchronized should have served Paris, giving Paris notice and an opportunity to be heard. If Paris, after being served, had chosen not to respond or participate then it would have been properly before the court, in default, and its rights could have been properly adjudicated in its absence. However, that choice of whether to participate was Paris's choice

alone and not Synchronized's choice. Because Synchronized failed to serve Paris, the trial court properly dismissed the action.

2. *Virginia Courts Have Uniformly Applied the Supreme Court's Standard for Necessary Parties and Have Held that General Contractors Are Necessary.*

Virginia courts have repeatedly held that when a general contractor's financial and contractual obligations to the owner or a subcontractor are at issue in a case, then the general contractor is a necessary party in a mechanic's lien enforcement action.[7] There is no split of authority among the circuit courts on this issue. Further, there is no confusion among the circuit courts as to how to apply this Court's analysis of necessary parties.

In Tarmac Acquisition, Inc., the Circuit Court addressed the failure of a sub-subcontractor to name the general contractor as a party defendant in a mechanic's lien suit. 26 Va. Cir. at 312. The court concluded that the general contractor was a necessary party because it had an immediate interest in the subject matter of the suit that could "be defeated or diminished":

> [T]he inquiry necessarily involves the contract relations and state of accounts existing between the contractor and the one seeking to enforce the lien, and that without the establishment of the debt, there can be no right of recovery, which renders the

[7] Notably, in many other jurisdictions outside of Virginia a general contractor is a necessary party to a mechanic's lien suit. See, generally, 53 Am. Jur. 2d "Mechanic's Liens" §369 (1970).

> claimant's right to a lien dependent on the establishment of his claim or debt against the contractor, for which purpose the contractor is a necessary or indispensable party.

Id. at 313; see also Harris, 20 Va. Cir. at 376 (Both "the owner and the general contractor are necessary parties ... [and] must have notice and are entitled to participate in the suit.").

The court in Richardson also concluded that the general contractor is a necessary party because "the amount the owner owes the general will always be an issue in the subcontractor's action." 123 B.R. at 740. The court reasoned that either the general contractor would be bound by the amount found owing in the lien suit, or the owner would be harmed because the general contractor, or a trustee in the general contractor's bankruptcy, could bring a subsequent action for unpaid contract amounts. Either way, the court determined that the general contractor was a necessary party.[8] Id.

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[8] Synchronized tries to distinguish Richardson because it says the Prime Contract precludes the risk of the Owner incurring inconsistent obligations. That is simply not true. As discussed above, Paris could assert a claim for the remainder of its fee, reimbursable costs, and retainage. Paris still has time remaining on its statute of limitations to sue the Owner. Also, if Paris files bankruptcy, a bankruptcy trustee could file suit against the Owner. Just like in Richardson, if Paris is bound by the determination in this case of how much is owed under the Prime Contract, as Synchronized contends in footnote 1 of its Opening Brief, then Paris is necessary. If, on the other hand, Paris is not bound by this court's determination then there is risk that the Owner could be forced to defend multiple lawsuits over the same

B. Synchronized's Status with the State Corporation Commission Has No Affect On Its Ability To Sue, Be Sued, Or Be Served with a Lawsuit.

Because Paris's rights would be affected by Synchronized's action (as Synchronized admits in footnote one), Paris must have been given notice and the opportunity to be heard. Although Synchronized originally included Paris as a party defendant in its mechanic's lien action, Synchronized failed to properly serve Paris within one year, resulting in Paris's dismissal from the suit. Despite originally recognizing the need to include Paris as a defendant in its lawsuit, Synchronized now seems to suggest that service and notice on Paris was unimportant because Paris was in cancelled status with the State Corporation Commission and the State of Wyoming. Paris's corporate status, however, had absolutely no effect on Synchronized's ability to properly serve Paris and bring Paris within the trial court's jurisdiction.

Indeed, Paris, to this day, has the ability to be reinstated as a corporate entity. Under Virginia law, the existence of a Virginia corporation or limited liability company can be reinstated or restored within five years of

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issues. Additionally, there is risk that this trial court could find that the Owner owes one amount and another court in a separate suit brought by Paris or a bankruptcy trustee could find that the Owner owes a different amount. As such, there is no distinction between Richardson and the case at bar.

the date on which its existence or certificate of registration was canceled. Va. Code § 13.1-754; Va. Code § 13.1-1050.4. Upon reinstatement or restoration, the existence of a Virginia business entity is deemed to have continued from the date of termination or cancellation, without interruption. Id. Likewise, a foreign business entity that was authorized to transact business in Virginia also may have its certificate of authority or registration reentered or reinstated within five years of revocation or cancellation. Va. Code § 13.1-769.1; Va. Code § 13.1-1056.3.

Even if Paris could not be reinstated, Paris is still capable of filing suit and being sued through its trustees in dissolution. Va. Code Ann. §§ 13.1-906(B)(4) & 13.1-914(C). Additionally, Synchronized had the ability to properly serve Paris through the Secretary of the Commonwealth or the Clerk of the State Corporation Commission regardless of Synchronized's status with the State Corporation Commission. Va. Code § 8.01-301. As such, Paris's status with the State Corporation Commission has no bearing on the determination that it was a necessary party.

III. THE TRIAL COURT CORRECTLY DECIDED THAT SYNCHRONIZED COULD NOT PRESENT PROOF OF THE BALANCE DUE TO PARIS WITHOUT SERVING PARIS AND GIVING PARIS NOTICE AND AN OPPORTUNITY TO BE HEARD.

A. Due Process Required Synchronized to Serve Paris, Not to Represent Paris in the Lawsuit.

On page 34 of its Opening Brief, Synchronized argues that it "proffered and submitted documents" to the trial court and "has the ability and resources available to it to carry its burden of proof at trial." (Op. Brief at 34.) Then, on page 35, Synchronized argues it should be allowed to prove the balance due to Paris under the Prime Contract. But these arguments ignore the **due process** rights of Paris, and gloss over the fact that the record may be very different if Paris were given notice and the opportunity to defend and assert its rights at trial.

The crux of a necessary party analysis is due process. Walt Robins, Inc., 232 Va. at 47. Regardless of whether Paris would choose to assert its interests at trial, Paris must have been given notice and the opportunity to be heard. Without such notice, and without being properly before the court, not only is Paris prejudiced, the rights of the parties are prejudiced by the risk of relitigation and the lack of finality as to any judgment that affects Paris's interests. In Re: Richardson Builders, Inc., 123 B.R. at 740.

As the trial court properly recognized, "[t]he principles of law that apply to determining whether a party is necessary *do not turn on whether the court has the "ability" to resolve disputed issues or whether there would be enough evidence or information to try them*, [but rather] what parties have a material interest in the subject matter and what parties have interests in the case that are "bound up" with those of the other parties." (J.A. 302.)

B. Because Virginia Code § 43-22 Does Not Specify What Parties Are Necessary, the Trial Court Did Not Err in Relying Upon Established Supreme Court Precedent.

Synchronized argues that the trial court erred because Va. Code § 43-22 does not explicitly require a general contractor to be named as a party to the suit. (Op. Brief at 35.) Synchronized is wrong. Virginia Code § 43-22 does not specify any necessary parties. Nonetheless, this Court has held that, despite the lack of any specific reference in Section 43-22, all parties with an interest in the subject matter of a mechanic's lien suit are necessary parties, without which the suit cannot proceed. See e.g. Mendenhall, 239 Va. at 75 (holding the owner, trustee, and beneficiary, among others, are necessary parties despite the fact that Section 43-22 does not specifically designate them as necessary). As such, while Va. Code § 43-22 does not expressly require a general contractor to defend or

be made a party to an enforcement suit brought by a subcontractor, Virginia law is clear that a party need not be named in Va. Code § 43-22 to be considered a necessary party to a mechanic's lien enforcement action. Walt Robbins, Inc. v. Damon Corporation, 232 Va. 43, 47-48 (1986) (the issue of a necessary party is controlled by due process of law, not by Va. Code § 43-22); ADS Constr., Inc. v. Bacon Constr., Co., 85 Va. Cir. 456, 457 (Loudon County 2012) (same).

C. Synchronized Is Directly Adverse to the Interest of Paris and Cannot Properly Represent Paris's Interests in Paris's Absence.

Finally, Synchronized argues that it has the ability to present evidence on the status of the accounts under the Prime Contract, without Paris present, and that Paris will not be prejudiced. In fact, Synchronized asserts that it can adequately represent Paris's interests because "Synchronized has essentially the same identity of legal interest in proving [the balance due under Paris's contract with Prav] as would Paris if it was a viable entity pursuing such a claim against Prav." (Opening Brief at 21 n.1.)

This argument is unavailing for several reasons. First, Synchronized's argument in Section I(A) of its Opening Brief shows that it cannot fairly and objectively represent the interests of Paris on the issues

of how much money, if any, the Owner owes to Paris and what the contractual and financial obligations are owed to between the Owner and Paris. In Section 1(A), Synchronized argues that Paris is barred by the Prime Contract from asserting any claims and would therefore be entitled to nothing. Paris would certainly disagree and should at least be given notice and an opportunity to be heard on this issue.

Second, Synchronized focuses solely on the Prime Contract and ignores two key issues that must be decided by the trial court in order to adjudicate the validity of the mechanic's lien: (1) the amount Paris owed Synchronized and (2) the contractual and financial arrangements established between Paris and Synchronized. As to these financial and contractual obligations, Synchronized clearly does not have "essentially the same identity of legal interest" as Paris.

In fact, not only does Paris not have the "same identity of legal interest," Synchronized stands in a directly adversarial position to Paris. This direct adversity is most prominently indicated by the fact Synchronized originally named Paris *as a defendant*. As the trial court explained, "the lien plaintiff seeks to enforce against the bond must be based on proof of a claim for money that the subcontractor has against the general contractor."

(J.A. 107.) And as the trial court further explained in its opinion letter on the motion for reconsideration:

> In addition, the court rejects the argument that the plaintiff can somehow represent the interests of the general contractor. In this litigation, the general contractor and the plaintiff are adverse to one another. Thus, any attempt by the plaintiff to assert any position that the general contractor should take on any disputed issue would not be appropriate.

(J.A. 301.) Synchronized clearly cannot adequately represent Paris's interests in terms of what Paris owes Synchronized or in terms of what the Owner owes Paris.

CONCLUSION

The trial court committed no error when it determined that Paris was a necessary party to Synchronized's mechanic's lien suit. As such, and for the foregoing reasons, VCB and the Trustee respectfully request that this Court affirm the trial court's decision.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, I hereby certify that on the 28th day of April, 2014, one (1) electronic copy and fifteen (15) printed copies of the foregoing Brief of Appellee were hand-delivered to the Clerk of the Supreme Court of Virginia, and three (3) printed copies and one (1) electronic copy were served by first class U.S. mail upon the following:

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