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IN THE

# Supreme Court of Virginia

**RECORD NO. 160814**

ULKA DESAI, EXECUTRIX of the
ESTATE of LAKSHMI DESAI, and as the
SUCCESSOR TRUSTEE of THE REVOCABLE TRUST
AGREEMENT OF LAKSHMI DESAI as Amended,

*Appellants*

v.

A. R. DESIGN GROUP, INC.,

*Appellee.*

## OPENING BRIEF OF APPELLANTS

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## Nature of the Case and Material Proceedings Below

On September 16, 2015, A.R. Design Group, Inc., a Virginia corporation and licensed contractor filed two mechanic's liens.

One lien was filed against 1335 Woodside Drive, McLean, Va., which is hereinafter referred to as the "Woodside mechanics' lien," and one against 1025 Towlston Road, McLean, Va., which is hereinafter referred to as the "Towlston mechanics' lien."

On September 23, 2015, pursuant to Va. Code § 43-17.1, a Petition to Invalidate Mechanic's[sic] Liens ("Petition") was filed by Ulka Desai, in her capacity as Executrix of the Estate of Lakshmi Desai, and as the Successor Trustee of The Revocable Trust Agreement of Lakshmi Desai as Amended. (Jt. App. p 1)

Count I of the Petition challenged the lien filed on the Woodside property (Jt. App. p 63-65) alleging, *inter alia,* that the lien was defective because (1) it failed to name the owner which was the petitioning trust, (2) the lien affidavit was not signed as an agent for claimant, and (4) the mandatory time or times when the claim is or will be due was not included, namely the date from

when interest was to be paid was omitted from the Woodside mechanics' lien.

Count II of the Petition challenged the validity of the lien filed on the Towlston property (Jt. App. p 66-68) alleging, *inter alia,* that the lien was defective because (1) the lien affidavit was not signed as an agent for claimant, and (3) the mandatory time or times when the claim is or will be due was not included, namely the date from when interest was to be paid was omitted from the Towlston mechanics' lien.

This came before the Honorable Robert J. Smith, of Fairfax County Circuit Court for a hearing by the court beginning on February 29, 2016. At the conclusion thereof, Judge Smith, on March 2, 2016, entered an order which simply denied the Petition (Jt. App. p 52). The Court's ruling from the bench addressed the omission of the interest on the circuit court form CC 1512 that the lienor used. The court held it to be "an omission rather than an inaccuracy" because the circuit court form used did not include the interest paragraph (Jt. App. p 57 L. 6). Although the other

issues that are raised on this appeal were addressed in the Petition, in Petitioner's pre-trial memorandum and at closing argument, Judge Smith did not address any other issues that are raised in this appeal as error.

Petitioner timely filed the notice of appeal on March 30, 2016.

## Assignments of Error

1. As to the **Woodside lien** (Count I), the trial court erred in denying the Petition to Invalidate the Woodside mechanics' lien:

    a. Because the lien failed to name the owner. The error was preserved at the following: Petition ¶¶ 22, 44-46; Plaintiff Pre-trial Memorandum p. 9 (Record p. 209); Closing Argument by Plaintiff's counsel at transcript pages beginning at p. 116 L.12 through p. 118 L. 11 of March 2, 2016 hearing (Record p. 776-778) and the final Court Order (Jt. App. p 52); and,

    b. Where the lien was not properly verified by the agent of the claimant. This error was preserved at the fol-

lowing: Petition to Invalidate Mechanics' Lien ¶21, 52; Closing Argument by Plaintiffs' counsel at pages 124 L.12 through 125 L.16 of the March 2, 2016 transcript (Record p. 784-785) and the final Court Order (Jt. App. p 52); and,

c. Where the lien did not include the date for interest, nor the time or times when the mechanics' lien claim is or will be due and payable on the grounds that the "official" form provided on the web did not provide a place to insert that information. The error was preserved at the following: Petition to Invalidate Mechanic's Lien ¶20, 23, 41 & 48; Plaintiff Pre-trial Memorandum p. 9 (Record p.209); Closing Argument by Plaintiffs' counsel at pages 118 L.23 through 120 L.5 of the March 2, 2016 hearing transcript (Record p. 778-780), and the final Court Order (Jt. App. p 52).

2. As to the **Towlston lien** (Count II), the court erred in failing to grant the petition to invalidate the Towlston mechanics' lien:

a. Where the lien failed to contain a proper verification by the agent of the claimant. The error was preserved at the following: Petition to Invalidate Mechanic's Lien ¶ 39, 46; Closing Argument by Plaintiffs' counsel at pages 124 L. 12 through 125 L.16 of the March 2, 2016 hearing transcript (Record p. 784-785) and the final Court Order (Jt. App. p 52); and,

b. Where the lien failed to identify the interest date or the time or times when the mechanics' lien claim is or will be due and payable, on the grounds that the "official" form CC 1512 provided on the web did not provide a place to insert that information. The error was preserved at the following: Petition to Invalidate Mechanic's Lien ¶¶ 38, 41, 61, 62; Plaintiff Pretrial Memorandum p. 3 (Record p.203); Closing Argument by Plaintiffs' counsel at pages 128 L.2 – 6

and also pages 118 L.23 through 120 L.5 of the March 2, 2016 hearing transcript (Record p. 778-780) and the final Court Order (Jt. App. p 52).

## Statement of Facts

### Woodside Property Mechanics' Lien

This mechanics' lien was filed on September 16, 2015 and did not name the record owner of the Woodside Property. The Woodside lien may be found at Jt. App. p 63-65 (Pls. Exhibit #34).

The lien named *"Ulka Desai and Ulka Desai, Executor of the Estate Lakshmi Desai."*

Title, however, was vested nine years before the lien was filed in the name of the decedent, "Lakshmi Desai, Trustee of the Revocable Trust Agreement of Lakshmi Desai, dated April 18, 1990" See, Jt. App. p 59-62 (Pls. Exh. #4). Ulka Desai was

named as the successor trustee of that trust after Lakshmi Desai passed away.

Title was never in the individual name of the decedent nor in the individual name of Ulka Desai as those names appear on the lien.

The "claimant" on this mechanics' lien was Defendant, A.R. Design Group, Inc. On the second page of the lien where the claimant was to sign, the name and signature on the line for Claimant was "*Abbas Rouhani, VP;*" who is not the claimant.

In the affidavit portion of this mechanics' lien, Mr. Rouhani identified himself as the Claimant and not as the agent for the Claimant. The name "*Abbas Rouhani VP*" was written in the space for Claimant and his name was not written in the space provided to identify that he was acting as the agent for the Claimant. In fact, that area of the affidavit was marked through with a hand drawn line (Jt. App. p 65). The relevant portion of the affidavit is reproduced as follows:

"I, Ritchelle Aquino, [notary or other officer] of the county (or city) aforesaid that ABBAS ROUHANI VP, claimant, or _____, agent for claimant, this day……..."

The mandatory time or times when the claim is or will be due was not included in the lien nor was the date when interest was claimed to be due included in the lien.

The circuit court form that the court referred to in its ruling was Form CC-1512 which omitted the mandatory due date and interest requirement (paragraph #5 of the form found in § 43-5). Also, excluded from the form were paragraph numbers for 3 & 4 although the text for those paragraphs was included on the form. The circuit court form was therefore flawed.

The circuit court forms for the subcontractor's memorandum of mechanics' lien (Form CC-1513) and also the sub-subcontractor's lien memorandum (Form CC-1514) both contain the required language about time and interest. It is only Form CC-1512 for a general contractor that was flawed.

## Towlston Mechanics' Lien

The Towlston mechanics' lien was filed September 16, 2015. (Jt. App. p 66-68).

The "claimant" on this mechanics' lien was Defendant, A.R. Design Group, Inc. On the second page of the lien where the claimant is to sign, the signature on the line for Claimant was only "*Abbas Rouhani, VP,*" who is not the claimant.

In the affidavit portion of this mechanics' lien, Mr. Rouhani identified himself as the Claimant and not as the agent for the Claimant. The name "*Abbas Rouhani VP*" was written in the space for Claimant and his name was not written in the space provided to identify that he was acting as the agent for the Claimant. In fact, that area of the affidavit was marked through with a hand drawn line (Jt. App. p 68). That relevant portion of the affidavit reads as follows:

"I, *Ritchelle Aquino*, [notary or other officer] of the county (or city) aforesaid that *ABBAS ROUHANI VP*, claimant, or _____, agent for claimant, this day……..."

Moreover, the Towlston lien did not include the mandatory time or times when the claim is or will be due nor did it include the date when interest was to be due.

The circuit court form that the trial court referred to in its ruling was Form CC-1512 which form erroneous omitted the mandatory time and interest requirements contrary to Code § 43-5.

## Standard of Review

This appeal involves the interpretation of the mechanics' lien statutes on uncontested facts. The standard of review is therefore de novo. *Ballagh v. Fauber Enterprises, Inc., 290 Va. 120 (2015)* and *Revi, LLC v. Chicago Title Ins. Co*., 290 Va. 203 (2015).

## Authorities and Argument

## Applicable Statutes:

### Code Section 43-4

Code Section 43-4 mandates what is necessary to perfect the lien. The provisions of that code section relevant to this appeal read as follows:

> **§ 43-4 Perfection of lien by general contractor; recordation and notice.**
>
> A general contractor, … in order to perfect the lien given by § 43-3, … shall file a memorandum of lien. … The memorandum **shall show the names of the owner** of the property sought to be charged, … and **the time or times when the same is or will be due and payable**, **verified by the oath of the claimant, or his agent**, including a statement declaring his intention to claim the benefit of the lien….” *(Emphasis added)*

### Code Section 43-5

Code Section 43-5 permits the lienor to fulfil the mandates of §43-4 if the lien is substantially in the form provided. The relevant portions of that form read as follows:

**§ 43-5. Sufficiency of memorandum and affidavit required by § 43-4.**

The memorandum and affidavit required by § 43-4 shall be sufficient if substantially in form and effect as follows:

Memorandum for Mechanic's Lien Claimed by General Contractor.

**Name of owner:** _____

Address of owner:_____

***

5. **Date from which interest on the above amount is claimed:**

**Date**: _____

It is the intent of the claimant to claim the benefit of a lien.

The undersigned hereby certifies that he has mailed a copy of this memorandum of lien to the owner of the property at the owner's last known address: _____ (address), on _____(date of mailing).

_____ **(Name of claimant).**

Affidavit.

State of Virginia,

County (or city) of _____, to wit:

> I, _____ (notary or other officer) for the county (or city) aforesaid, do certify **that _____ claimant, or _____, agent for claimant**, this day made oath before me in my county (or city) aforesaid that _____ (the owner) is justly indebted to claimant….
>
> Given under my hand this the ___day of _____, 20___
>
> _____ (Notary Public or Magistrate, et cetera.)
>
> *(Emphasis added)*

## Woodside Lien Did Not Name the Owner

Contrary to the mandate in Code §43-4, the lien did not name the owner of the property and is therefore void. The court erred in not sustaining the Petition and invalidating the Woodside lien for that reason.

The term "owner" as used in Code § 43-4 is given its ordinary meaning. It "means the fee simple owner of the real estate, the one who has the right of possession to the land, the person who may be, in fact, responsible for the debt to the mechanic and for the subsequent lien against the property." *Loyola Fed. Sav. &*

*Loan Ass'n v. Herndon Lumber & Millwork, Inc.*, 218 Va. 803, 805 (1978).

The lien named "Ulka Desai and Ulka Desai, Executor of the Estate Lakshmi Desai."

Title, however, was vested nine years before the lien in the name of "Lakshmi Desai, Trustee of the Revocable Trust Agreement of Lakshmi Desai, dated April 18, 1990" (Jt. App. p 60). After Lakshmi Desai's death, Ulka Desai was named as the successor trustee of that trust.

Ulka Desai, in her individual capacity, is not the owner of the property. Since the estate of Lakshmi Desai did not own the property when the lien was filed, Ulka Desai as Executor is not the owner and therefore not subject to the mechanics' lien.

The naming on the lien of Ms. Desai individually or as the executor of the estate was not a substantial compliance with the code requirement.

Substantial compliance has been held to mean where there has been a deviation from the conditions of a contract which is

"…trifling in particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received substantially the benefit he expected, and is therefore bound to pay." *Akers v. James T. Barnes of Washington, D.C.., Inc.,* 227 Va. 367, 371 (1984).

It was not a trifling deviation to name a person who is not the owner of the property.

## Both Woodside and Towlston Liens Failed to Include Interest or Time When Payment Was Due

Code § 43-4 mandates that the lien include "…the time or times when the [claim] is or will be due and payable." The statutory lien form in § 43-5 calls for "Date from which interest on the above amount is claimed:"

The difference in the "interest" language in the statutory form and "due date" requirement in § 43-4 has yet to be resolved by this court.

A mechanics' lien is a serious and powerful tool to protect those who provide labor and materials to improve real estate. Perfection of a lien must be strictly complied with subject to the language in § 43-5which permits some lee-way in completing the lien form if there is substantial compliance in its completion.

"The mere filing of the memorandum of lien is enough by it-self to 'tie-up' a piece of property until the question of the lien is resolved." *Woodington Elec., Inc. v. Lincoln Sav. And Loan Ass'n,* 238 Va. 623. 630 (1989).

Appellee's argued below and on appeal that they were not claiming interest and therefore do not need to insert a date from which interest is claimed. Appellants argue that "[d]ate from which interest on the above debt is claimed" means the date the debt is due. Thus, a claim of zero interest by claimant means that the lien fails to identify when the debt is due and therefor there has been no substantial compliance with § 43-5.

"Virginia courts have long recognized that the right to inter-est for the loan or forbearance of money…when not expressly

waived, is implied and *begins when the debt is due and payable*." (Emphasis added) *Parsons v. Parsons,* 167 Va. 374, 382 (1937) and *Johnson v. Johnson*, 183 Va. 892, 909 (1945)..

Following the *Parsons* and *Johnson* cases, a Virginia Circuit Court Judge, in *Marple v. Kerns,* No. 5814., 1984 WL 276232, at *2 (Va. Cir. Ct. Feb. 1984) held that in the mechanics' lien "[i]nterest should run from the date the debt was due."

Appellee, as lien claimant, argues that since it is not claiming interest in this case its notice of lien does not violate the requirements of the Code. If this argument is correct, then a way is provided for legal mischief. By waiving an interest claim on the notice of lien, lien-claiming-contractors who are not timely in filing their liens can leave owners, lenders and title companies without the necessary preliminary information to quickly determine if a filed lien is valid, and, accordingly, deliberately exercise a lawful, but harmful delay, to tie-up title to property awaiting extended litigation. On the other hand, liens can quickly be chal-

lenged as being untimely when the under-oath statement of the due date, on its face, reveals that it is out of time.

In order for the interest language in § 43-5 to be in substantially compliance with §43-4, the interest date needs to be the date when the debt is due or will become due. Without clarification of the "interest" terminology, the interest date has no meaning and a claimant can use the artifice of not claiming interest in order to file a title threatening lien out of time.

Owners, their lenders and title companies need to know that when they read the date in the lien they are looking at the due date of the debt and not some other date.

## Both Woodside & Towlston Liens Were Not Properly Verified

In the affidavit portion of each of these two mechanics' liens, Mr. Rouhani identified himself as the Claimant and not as the agent for the Claimant. The trial court did not address this issue in its denial of the petition.

A.R. Design Group, Inc. was named on the front page as the Claimant. On the second page the name "*Abbas Rouhani VP*" was printed in the space for Claimant's signature.

Code § 43-4 mandates that the lien be "verified by the oath of the claimant, or his agent …."

In the area of the affidavit form where the Claimant's signature was to be notarized, Mr. Rouhani identified himself as the Claimant and not as the agent of the claimant. In fact, a line was drawn through the space where he was to indicate if he was signing as the agent for claimant. He was clearly not signing as an agent.

The relevant portions of both affidavits read as follows (Jt. App. p 65 & 68):

"I, *Ritchelle Aquino*, [notary or officer] of the ~~county~~ (or city) aforesaid that *ABBAS ROUHANI VP*, claimant, or _____, agent for claimant, this day……..."

In 1912 this Court held that where the execution of an affidavit to perfect a mechanics' lien by the president without saying that he was acting as agent of the corporate lien claimant was not

sufficient and the lien was not perfected. *Clement v. Adams Bros.-Paynes Co.,* 113 Va. 547 (1912). The *Clements* court held that it could not imply agency by virtue of the signor being the president of the corporation because the office of president confers of itself no power to bind the corporation or control its property unless the power has been conferred by its board of directors.

The Virginia Supreme Court has not addressed this issue since then nor has the requirement to state that the signing was as an agent been changed

In 2001, a bankruptcy court dealt with a signature on a mechanics" lien that read "Daniel G. Davis, the President and owner of Daniel Davis Construction, Inc." *In re Terry*, 262 B.R. 657 (2001). The *Terry* bankruptcy court held that the signing was substantial compliance and relied upon the 1919 enactment of Code § 49-7 which code section read:

> "[a]n affidavit filed for a corporation…may be made by its president, vice-president…without any special authorization therefore, or by any person authorized by a majority of its

> stockholders, directors, partners or members to make the same."

Code § 49-7 and the decision in *Terry* are not applicable to the case at bar because Abbas Rouhani VP signed as the claimant on both liens and specifically marked through and deleted the space where he was to state that he was acting as the agent of claimant.

Code § 49-7 does not apply because the signor's actual authority is not at issue. The requirement in the lien is that signor states that he is acting as agent for the corporation; which he did not do.

## Conclusion

Petitioner prays that Judge Smith's ruling be reversed and that both liens be declared invalid for the reasons stated.

Ulka Desai, Executrix of the Estate of Lakshmi Desai, and as the Successor Trustee of The Revocable Trust Agreement Of Lakshmi Desai as Amended

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**Certificate --Rule 5:26(e)**

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and ten paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email to Marla Diaz,

Whiteford Taylor & Preston, LLP, 3190 Fairview Park Drive, Suite 300, Falls Church, VA 22042 on this 2nd day of December, 2016.

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