Circuit Court for Prince George's County
Case No. CAE 18-36182

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2000

September Term, 2019

CAMP SPRINGS ALLENTOWN, LLC,

v.

KINGDOM WORK CONSTRUCTON CO., LLC

Graeff,
Leahy,
Wells,

JJ.

Opinion by Wells, J.

Filed: February 2, 2021

Appellant, Camp Springs Allentown, LLC, appeals from an order of the Circuit Court for Prince George's County granting appellee, Kingdom Work Construction Company, LLC, a mechanics' lien for the subcontracting work they had performed outside of the construction subcontract, which was also the subject of four change orders. Although appellant secured from appellee a "Subcontractor Partial Release of Liens," the circuit court found that the release was ambiguous and construed it against the maker, appellant. Further, the court found that even if the release was not ambiguous, appellant had breached the terms of the release. At the end of the trial, the circuit court entered an order establishing a final mechanics' lien reflecting the amount due for the change orders, plus interest.

Appellant filed this timely appeal and poses three questions for our review which we have rephrased:

1. Was the "Subcontractor Partial Release of Lien" ambiguous?

2. Did appellant breach the terms of the "Subcontractor Partial Release of Lien?"

3. Did appellee present sufficient evidence to establish a mechanics' lien in the amount requested?[1]

[1] The verbatim questions Appellant posed in its brief are:

1. Does Appellee's August 2018, lien release bar its mechanics' lien or otherwise waive the lien and June 2018 notice of a lien for any amount in excess of the amount stated in the Appellee's lien waiver?

2. Did Appellee's trial evidence satisfy the requirements of the Maryland Mechanics' lien statute so as to permit a lien in the amount of $282, 052?

(continued)

Contrary to what the circuit court found, we conclude that the "Subcontractor Partial Release of Lien" was not ambiguous. Regardless of ambiguity, we conclude that because appellant did not tender timely payment of the settlement balance to the appellee, appellant breached the implicit terms of the release. Finally, we conclude that the circuit court appropriately granted appellee a mechanics' lien for the change order work that appellee preformed, and which appellant accepted. We, therefore, affirm.

BACKGROUND

A. The Allentown Project

Camp Springs Allentown, LLC (hereafter, "Camp Springs") is a business entity created solely for the purpose of developing the Allentown Andrews Gateway Center, located in Suitland. The project was to include the construction of a Lidl grocery store, a Wawa convenience store and gas station, a community center, and townhomes spread over more than a dozen acres. Camp Springs hired Gene "Bo" Pinder, doing business as GAP Civil Construction, LLC, (hereafter, "Pinder"), as a general contractor to clear the undeveloped site of trees and brush.[2]

Pinder subcontracted the excavation and grading work to Kingdom Work Construction Company, (hereafter, "KWCC"), owned by Glen Jenkins. The negotiated price of the subcontract between Pinder and KWCC was $768,410.70. (*Id.*). That

3. Does Appellee's mechanics' lien fail to the extent that the lien account claimed exceeds Appellant's final agreed contract price?

[2] Pinder was never served with the complaint and was not a defendant below.

subcontract was signed on February 23, 2018. Pinder paid KWCC $50,000 to "mobilize," and KWCC began work on March 3, 2018.

A day or so after KWCC began, experts discovered that the site had "unsuitable" soil that had to be removed to create "pads" for the construction of the buildings. According to Jenkins' trial testimony, that discovery caused Pinder to demand KWCC perform tasks not called for in the subcontract. As a result, KWCC generated several change orders to document the work performed. Four of the change orders are at issue in this appeal. They are:

Change Order 1 for $45,750.00;

Change Order 3 for $81,620.00;

Change Order 4 for $19,350.00; and,

Change Order 5 for $30,792.00.

The total amount of these change orders is: $177,512.00. According to Jenkins, Pinder approved all the change orders. Further, Jenkins testified that each change order was meticulously documented, with "tickets" indicating exactly what work was done and when. Although KWCC submitted several written requests for payment of the change orders, Jenkins testified that Pinder did not respond to these requests.

While the reasons are disputed, on April 12, 2018 Pinder told KWCC to stop work and leave the work site. Jenkins told Pinder that KWCC was due $414,961.00 for work done under the contract, plus $177,512.00 for the change order work. According to Jenkins, with a credit to Pinder for the $50,000 startup money, that left a balance of $542,473.00 due to KWCC.

Jenkins testified that numerous requests for payment to Pinder went unanswered. In May 2018, Jenkins contacted Camp Springs. In what was a bid to get Pinder's attention, Jenkins asked Camp Springs not to pay Pinder because Pinder was not paying him. Unable to get a satisfactory response from either Camp Springs or Pinder, Jenkins said that on June 25, 2018, he served Camp Springs with notice of a mechanics' lien in the amount of $592,473.00, which was the sum of money Jenkins said KWCC was due under the contract plus the change orders.

According to Jenkins, filing the notice of a mechanics' lien triggered the desired response. In short order, Pinder sent Jenkins two letters. The first stated that after negotiating with Camp Springs, Pinder was able to get some of the change orders approved for payment in the amount of $130,800.00. The second letter, dated July 12, 2018, was Pinder's offer to settle under the subcontract for $254,421.00. The disputed change orders were to "be discussed at a later date." A first payment of $100,000.00 would be due on August 3, 2018 and the balance, $154,421.00, would be due by September 3, 2018. Needing money to keep his business afloat, Jenkins agreed to settle the subcontract with Pinder for the amounts stated. As part of the settlement, Jenkins requested that Camp Springs and Pinder pay him with a jointly issued check for both installments.

By August 6, Jenkins had not heard from Pinder or Camp Springs. After an email exchange with Camp Springs, Jenkins testified that he was told to come to Camp Springs' offices "[a]nd sign a partial release of lien" before he could receive his first payment under the negotiated settlement. After he arrived at the meeting, Jenkins said he signed the document titled "Subcontractor Partial Release of Liens," marked as trial exhibit 22. He

then received a check for $100,000.00 drawn on an account from Pinder's business, GAP Civil Construction, rather than a joint check with Camp Springs as Jenkins had requested.

September 3, 2018 arrived and departed without either Camp Springs or Pinder tendering Jenkins the balance owed as specified in the release. A month later, on October 4, 2018, KWCC filed a complaint to establish and enforce a mechanics' lien for $442,473.00, reflecting $154,421.00 for balance due on the negotiated settlement and $288,052.00 for the unpaid change orders, plus interest.

B. The Trial

The circuit court entered an order on April 19, 2019 establishing a final mechanics' lien in the amount of $154,421.00—the balance due under the Partial Release of Lien. By the time of trial, September 2019, Camp Springs had paid that amount.[3] With the subcontract amount resolved, the Circuit Court for Prince George's County conducted a two-day bench trial on KWCC's complaint to establish a mechanics' lien for the change order work. At trial, Jenkins testified as has been described. Much of the trial testimony centered on what work KWCC performed, the degree to which they performed it, specifically regarding the change orders.

At the end of trial, the court found that KWCC competently performed the change order work and KWCC had documented it all. As to whether Pinder and Camp Springs knew that KWCC performed the work and approved the change orders, the court found

[3] *See* R.E. 610, a check dated "5/3/19," drawn on Camp Springs' bank account and drafted to KWCC in the amount of $154,421.00

that "Pinder knew the work was done. He had people out there every day…. He knew it was done because he was even counting the dump trucks." Further, the court found that Camp Springs knew KWCC performed the change order work "because they had people on the site." "[A]nd [the court] [found] that Camp Springs benefitted from the work that Jenkins did."

As for the release, the court determined that the release concerned settlement of the contract only and not the change orders, as Camp Springs alleged. The credibility of the witnesses played a crucial role in the court's decision. On one hand, the court found that Jenkins was credible. On the other hand, the trial judge found Camp Springs' representative, Richard Solomon, was not credible. At one point when delivering his findings from the bench, the judge said simply, "I do not believe Mr. Solomon." The judge found that Solomon's claim that he "forgot" to issue a joint check, as Jenkins said he requested, was incredible. The court concluded that Camp Springs deliberately gave Pinder $100,000.00 so that he could write a check on his company's account and then get Jenkins to sign the partial lien release. Further, after not paying Jenkins the settlement balance for nine months, the court said that Solomon's excuse for not paying, namely, that Jenkins did ask for the balance, was "ludicrous."

Focusing on the release, the court found that "the release ha[d] a multitude of problems." Primarily, the court found that the document was "vague." Second, the court identified several incorrect factual statements. One line read, "Approved Change Orders to date: 0." The court said this was inaccurate because KWCC had long since stopped work on the project and there was a manifest controversy over the payment of the change

orders. Another inaccuracy was that the release omitted any mention of the $50,000.00 in start-up money that Pinder paid KWCC. And, contrary to what Camp Springs had argued, the court found the document was not a full or total release, but rather a "partial release," just as the document was titled. Ultimately, the court declared the release to be ambiguous and construed the ambiguities against the drafter, Camp Springs. The court then considered extrinsic evidence, specifically the July 12, 2018 letter from Pinder to Jenkins, and found that the change orders were not part of the release but, in fact, acknowledged work that KWCC had performed outside of the subcontract and for which KWCC timely billed Pinder. The court found that KWCC had not been compensated for that work.

The court concluded that regardless of whether the release was ambiguous or not, Camp Springs had breached the release by not paying KWCC the balance due as promised in a timely manner. The court found that Camp Springs tendered the $154,421.00 balance nine months after the due date, and only after the circuit court entered a final order establishing a mechanics' lien for KWCC in the amount of the balance. Based on these factors, the court concluded that Camp Springs had breached the terms of the release, and, therefore, KWCC was no longer bound by its terms. Satisfied that KWCC was due the full amounts for each of the four change orders submitted, plus interest, the court entered a final mechanics' lien in the amount of $322,972.22. Camp Springs requested an appeal bond of $350,000.00, which the court granted. Camp Springs subsequently filed this appeal.

DISCUSSION

I. The Lien Release

In its opening argument, Camp Springs asserts that the lien release bars KWCC from obtaining a mechanics' lien for the change orders. Specifically, Camp Springs argues that the court cannot grant a mechanics' lien in an amount greater than that originally demanded, as reflected in the lien release. Camp Springs flatly states that the lien release is not ambiguous and does not discuss whether they breached its terms.

KWCC argues this Court should simply ignore Camp Springs' argument that the release is a bar to KWCC recovering the value of the change order work. Because Camp Springs does not even acknowledge the possibility of breach, KWCC urges us to hold that Camp Springs has waived that argument. We are not so convinced. Camp Springs argues that the release is not ambiguous. They have seemingly declined not to address breach. Regardless, the trial court's findings were: (1) the release was ambiguous and (2) that Camp Springs breached the release. As those issues are at the heart of the trial court's determination that the lien release was not enforceable, we must examine each defense.

A. Standard of Review

When, as here, the case was tried below without a jury, this Court will review both the law and the evidence. We will not set aside the trial court's decision on the evidence unless clearly erroneous, giving due deference to the trial court's opportunity to judge the credibility of the witnesses. *See* Md. R. 8-131(c). "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011). "'When the ruling of a trial court requires the

interpretation and application of Maryland case law,' however, 'we give no deference to its conclusions of law.'" *Id.* (quoting *Elderkin v. Carroll*, 403 Md. 343, 353 (2008)).

B. The Mechanics' Lien Statute

Maryland Code Annotated, Real Property ("RP") Article, (1974, 2015 Repl. Vol), § 9-101 et seq., provides the statutory authority for the establishment of a mechanics' lien. As an in rem proceeding against property, an action to establish and enforce a mechanics' lien is "effective against the owner [of the property], for [the benefit of] subcontractors who perform their contractual obligations but are not paid." The mechanics' lien statute allows "a creditor for labor or materials to proceed in rem against improved property even though he could show no privity of contract with the owner, nor personal liability of the owner to him." Without a mechanics' lien, such a creditor would have no recourse against the owner of the property, even though the owner would enjoy the improvements to the property made possible by the creditor's work and materials. Instead, the creditor's remedy would be limited to obtaining a judgment against the person with whom he contracted, who would likely have no interest in the property and might be without assets.

To be entitled to a mechanics' lien in Maryland, one must satisfy the substantive and procedural criteria set forth in RP § 9–102(a) which provides that:

> Every building erected and every building repaired, rebuilt, or improved to the extent of 15 percent of its value is subject to establishment of a lien in accordance with this subtitle for the payment of all debts, without regard to the amount, contracted for work done for or about the building and for materials furnished for or about the building, including … the grading, filling, landscaping, and paving of the premises ….

See also Judd Fire Prot., Inc.v. Davidson, 138 Md. App. 654, 660 (2001) (citing *Wolf Org. v. Oles*, 119 Md. App. 357, 366–67 (1998) (additional citations omitted)).

Finally, Section 9-114(a) of the Real Property Article obligates a contractor to give "the owner a signed release of lien from each material supplier and subcontractor who provided work or materials under the contract." Relevant to this appeal, RP § 9-114 (b) states that "[a]n owner is not subject to a lien and is not otherwise liable for any work or materials included in the release under subsection (a) of this section."

It is through this last-cited subsection of the statute that Camp Springs alleges that KWCC may not prevail on its claim for a mechanics' lien for the change orders. Camp Springs' position is that the release was negotiated between Pinder and KWCC and that the release resolved all outstanding claims that KWCC had against Camp Springs. For its part, KWCC posits that the circuit court properly found that the release was ambiguous. Regardless of ambiguity, KWCC argues that Camp Springs breached the terms of the release and therefore it is no longer valid. We examine both defenses to the lien release: ambiguity and breach.

C. Contract Ambiguity

We have held that releases, such as the one here, are contracts and are to be construed according to the principles of contract interpretation. "[A] release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation." *Davis v. Magee*, 140 Md. App. 635, 649 (2011) (quoting *Pantazes v. Pantazes*, 77 Md. App. 712, 719–20 (1989)). "The primary source for determining the intention of the parties is the language of the contract

itself." *Chicago Title v. Lumbermen's Mut. Cas. Co.*, 120 Md. App. 538, 548 (1998) (quoting *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 291 (1996), *aff'd*, 346 Md. 122 (1997)). "The written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract." *Pantazes*, 77 Md. App. at 720 (citations omitted). "'[W]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed.'" *Davis*, 140 Md. App. at 649 (quoting *Pantazes*, 77 Md. App. at 720 (citations omitted)). The language of the contract "must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement." *Balt. Gas & Elec. Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540, 554 (1997).

Determination of whether a contract is ambiguous is a question of law. *Auction & Estate Representatives, Inc. v. Ashton*, 354 Md. 333, 341 (1999); *Calomiris v. Woods*, 353 Md. 425, 434 (1999). Contractual language is considered ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris*, 353 Md. at 436; *accord Pantazes*, 77 Md. App. at 718–19. If a court finds that the contract is ambiguous, it must consider parol or extrinsic evidence to determine the parties' intent when the contract was made. *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 332 (2014).

Here, the trial court determined that the release was ambiguous based on two main factors. *First*, the court stated that the release was "vague." *Second*, the court found that the release contained several "mistakes." One of the "mistakes" was that the release

omitted mention of the $50,000.00 payment that Pinder made to KWCC for the latter to begin work. Another "mistake" was that although it was titled "partial release of liens," the court noted that throughout the proceedings Camp Springs had argued it was a total release. Yet another "mistake" was that even though the document stated that there were "zero" change orders due, the court noted that there had been a long-standing dispute regarding the change orders.

The court then looked at the boilerplate language used in this release as well as several similar releases introduced at trial and, essentially, concluded that the document failed to capture what the court knew from the trial testimony was an ongoing dispute about change orders. The problem is that the trial court's review of several similar releases and trial testimony was parol evidence, which the court should not have considered until the court affirmatively determined that the document was ambiguous on its face. Only then could the court have considered extrinsic evidence. *Sierra Club*, 216 Md. App. at 332. Our reading of the court's oral ruling is that in undertaking its analysis, the court seemed to consider documents and testimony outside the four corners of the release to arrive at the conclusion that it was ambiguous.

Looking at the plain language of the release, we conclude that the document was not ambiguous. While the agreement seems to have omitted key pieces of information, such as the amount of the change orders and a credit reflecting the $50,000.00 Pinder had paid to KWCC, the document's terms do not offer varying interpretations. *Calomiris*, 353 Md. at 436 (finding that a contract's terms are ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning"). To the contrary, the

document seems to state the intentions of the parties. While it is true that the terms of the release seem to run counter to the trial evidence, that discrepancy did not render the document "susceptible of more than one meaning." While the trial testimony showed that there was a dispute about the change orders, one could also plausibly infer from the evidence that in signing the release, Jenkins bargained away his right to the recoup the change orders because he wanted to end the dispute with Camp Springs and get a quick monetary settlement. It was undisputed that Jenkins simply wanted cash from either Pinder or Camp Springs, to, in his words, "keep his doors open." Reading the plain language of the contract, one could reasonably conclude that the parties agreed to resolve their dispute for $254,421.00.

One bit of ambiguity could be said to exist in the use of the term "partial." Although the release is termed a "partial release of liens," Camp Springs asserted throughout the trial, and before this Court, that the release was a full release of all KWCC's claims against Camp Springs. For support, Camp Springs cites an unreported federal opinion, *Hagen Constr. v. Whiting-Turner Contracting Co.*, Civ. No. JKB-18-1201, 2019 WL 454097 (D. Md. Feb. 4, 2019). As an unreported opinion, *Hagen Construction*, is not binding on this Court under its current rules. On the merits, the case is apposite. As KWCC notes in its brief, the United States District Court for the District of Maryland held that a subcontractor's series of partial releases for a contractor, extinguished a labor claim raised by Hagen Construction. *Id.* at *2-4. The court held that reading all the releases together suggested that the releases included any "extra work that Hagen was claiming," including the labor inefficiency claim. *Id.* at *12. But, as KWCC notes, the critical difference is that

the contractor paid the subcontractor the full amounts in the releases. *Id.* at *7. Camp Springs' argument notwithstanding, we think a plain reading of the document shows that KWCC agreed to resolve its contract dispute with Camp Springs for the sum stated, there being no outstanding change orders.

D. Breach of Contract

Generally, a breach of contract is defined as a "failure, without legal excuse, to perform any promise that forms the whole or part of a contract." *Kunda v. Morse*, 229 Md. App. 295, 304 (2016) (citing *Weaver v. ZeniMax Media, Inc*., 175 Md. App. 16, 51 (2007)); *see also* 23 Richard A. Lord, Williston on Contracts § 63:1 (4th ed., Supp. 2006). A promise has been defined as "a manifestation of intention to act ... in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Weaver*, 175 Md. App. at 51 (citing Restatement (Second) of Contracts § 2 (1) (1981)). The term "default" may be used interchangeably with "breach." *Kunda*, 229 Md. App. at 304; *see also Nylen v. Geeraert*, 246 Md. 4, 10 (1967) ("When [the term "default" is] used in respect of an obligation created by contract, the ordinary meaning is failure of performance[.]").

In general, where one party has materially breached a contract, the other party is no longer obligated to perform. *See Barufaldi v. Ocean City Chamber of Commerce*, 196 Md. App. 1, 26 (2010); *Della Ratta, Inc. v. Am. Better Cmty. Developers*., 38 Md. App. 119, 137 (1977) (holding that "there was no duty of performance" where "[t]he express condition precedent to [that] performance" had "not . . . been performed or excused"). "A breach is material when it 'is such that further performance of the contract would be

different in substance from that which was contracted for.'" *Barufaldi*, 196 Md. App. at 23 (other internal quotation marks omitted) (quoting *Dialist Co. v. Pulford*, 42 Md. App. 173, 178 (1979)). Here, Jenkins' undisputed testimony was that Camp Springs required him to sign the release on behalf of KWCC, and in return, Camp Springs would tender the initial payment of $100,000.00 when the release was signed on August 9 and the balance of $154,412.00 within a month, or by September 9, 2018. The release, however, is silent about when the balance was due. Because of this omission, the court was within its discretion to determine that Camp Springs was to perform and tender the balance to KWCC within a reasonable time. "[I]t is a general principle of contract law that when a contract calls for performance but does not specify a time, a reasonable time will be implied. The principle rests upon a presumption that the parties intended for performance to take place within a reasonable time." *Prison Health Servs., Inc. v. Balt. Cty.*, 172 Md. App. 1, 13 (2006) (citing *USEMCO, Inc. v. Marbro Co., Inc.*, 60 Md. App. 351, 365 (1984)).

Jenkins testified that based on his negotiations with Pinder, the balance was due by September 9 or within a month of signing the release. We conclude that while the release is silent as to when Camp Springs had to tender the balance, a delay of more than half a year was, under the circumstances, unreasonable. By August 9, 2018, it was clear to Camp Springs that KWCC had not been paid. It is reasonable to draw this conclusion because Camp Springs was privy to the settlement negotiations between Pinder and Jenkins. Camp Springs asked Jenkins to come to their offices to sign the release. The release contained the amounts that Pinder and Jenkins negotiated. Camp Springs tendered the first payment of $100,000.00 to Jenkins at the meeting once he signed the release. The court could have

considered this evidence in determining when performance was expected. *Prison Health Servs.*, 172 Md. App. at 13.

Further, we determine Camp Springs' argument that Jenkins was required to demand the balance payment is without merit. Camp Springs did not pay the balance due under the release until after KWCC requested a mechanics' lien ***and*** the circuit court signed an order granting them one. It was only then, eight months later, that Camp Springs tendered a check, dated May 3, 2019, for the balance. The parties had an agreement and the unimpeached evidence is that Camp Springs only paid the amount owing after the circuit court ordered them to pay.[4] We conclude that Camp Springs' failure to pay KWCC until after they were sued, was not timely and was a material breach of the release. *Barufaldi*, 196 Md. App. at 26.

II. The Circuit Court Properly Granted KWCC a Mechanics' Lien for Work That It Performed but for Which It Was Not Paid

We now turn to whether KWCC proved it was entitled to the amount of the mechanics' lien ordered by the court. After a review of the record and the trial transcript, we determine that in reaching its decision, the court considered the following testimony and evidence:

- Plaintiff's Exhibit 28: The soil engineer's report. The court found that the engineering company, Froehling and Robertson, completed a geotechnical study of the Allentown Gateway construction site on March 5, 2018. They

[4] Similarly, Camp Springs' argument that KWCC was obligated to return the initial $100,000 paid under the terms of the release is without merit.

determined, essentially, that in certain places the site's soil was unsuitable to begin construction and would have to removed and the soil stabilized.

- Nathan Schwarz, a Froehling and Robertson manager, testified about what had to be done at the Allentown site to bring the soil to a condition suitable upon which to build. Such work would include excavating subsurface soils, hauling in "good fill material," and "proof rolling," to determine "the sturdiness of the [soil] subgrade," among other things.
- Plaintiff's Exhibit 4: The March 7, 2018 letter from Jenkins to Pinder regarding change orders was "crucial" to the court's decision-making. This letter, referencing "Change Order #1," details that KWCC had to strip and haul away unsuitable soil, wood chips, stumps and other debris that was not removed by the clearing excavator. KWCC had to haul in approved soil and crushed concrete. The letter details how the additional costs would be computed.
- Plaintiff's Exhibit 5: Pinder's reply to Jenkins, dated, March 7, 2018, in which he approved change order 1. "Please continue to remove the piles of unsuitable soil at the rate outlined in the change order." Pinder admits in the letter that he will have to get approval to remove and dispose of soil above "9500 c[ubic] y[ards]," which was the amount Camp Springs had already approved.
- Plaintiff's Exhibit 8 detailed change order 3, and set forth the loads KWCC hauled, the dates of the hauling, and the costs of each load.

- Plaintiff's Exhibit 9 reflected the work KWCC did in change order 4.
- Plaintiff's Exhibit 10 showed the work KWCC performed in change order 5.
- The court noted that KWCC's contemporaneous documentation of the change order work performed was extensive and detailed. We note that multiple exhibits of such documentation span about 80 pages of the record extract.
- Plaintiff's Exhibit 11: An email exchange, dated April 10, 2018, between Jenkins and Pinder. First, at 4:41 p.m. Jenkins attaches his payment form for change orders 1 and 5. Nine minutes later, Pinder replies: "I accept the change order. I'll work on the R[equest] F[or] P[ayment]."
- Plaintiff's Exhibit 12: KWCC's RFP totaling $579,922.70.
- Plaintiff's Exhibit 31: Pinder's certification to Camp Springs that the work on site was done per the specifications in the contract.

The court found "without a doubt . . . that the work was done." The court weighed the evidence and concluded that there was no evidence that materially contradicted KWCC's evidence, except for Camp Springs' employee Alvarado Hernandez's testimony about the number of dump trucks moved back and forth; and Solomon's testimony, which the court did not credit because it was riddled with hearsay. The court stated the following:

> THE COURT: . . . **the Court is convinced that Jenkins did the work billed for. He did the change order work**. What the change order said he did[,] I believe he did. The expert verified this. They came back to retest that the land was strong enough. They had to do the dump truck over the land to make sure it didn't sag.

(emphasis supplied). "I find that the change order work was done." "I find that the work was done professionally. There is no evidence to the contrary."

And, the court was convinced "that Pinder knew the work was done. He had people out there every day. . . . He knew it was done because he was even out there counting dump trucks." Further, the court concluded that Camp Springs also knew that KWCC had performed the change order work. "I find for sure that Camp Springs knew the work was done. They had their own people on the site." Based on the record, we see no reason to fault the court's factual findings. *See Anderson*, 200 Md. App. at 249. We conclude that the evidence satisfied the requirements of RP § 9–102 to permit the court to order a mechanics' lien. Contrary to what Camp Springs argues, KWCC proved that it performed "grading, filling, landscaping, and paving of the premises" for Camp Springs as stated in RP § 9–102(a).

As for Camp Springs' argument that KWCC could not obtain a mechanics' lien for more than the amount stated in the original contract, we think this argument is without merit. In *Diener v. Cubbage*, 259 Md. 555, 562 (1970), the Court of Appeals held a sub-subcontractor could obtain a mechanics' lien against an owner, who was not a party to the contract between subcontractors, for the reasonable value of the labor performed. Towne Development Company ("Towne"), owned by the Dieners, was the general contractor. *Id.* at 557. Towne subcontracted the carpentry work to Suburban Carpentry Corporation ("Suburban"), who in turn, sub-subcontracted the same work to Lewis and David Cubbage. *Id.* The Cubbages walked off the job after Suburban failed to pay them for several weeks. Then, the Cubbages sought a mechanics' lien in the amount of $8,967, which the circuit

court ordered Towne to pay. *Id.* The Dieners subsequently appealed, asserting that the mechanics' lien was void. *Id.* at 558.

The Court of Appeals considered what it said was an issue of first impression, namely, appellants' argument that because "they [were] not parties to the contract between the subcontractor and the sub-subcontractor, they should not be bound by that contract price. Instead they claim[ed] they [were] liable only for the reasonable value of the labor performed." *Id.* at 560. After reviewing precedent from other jurisdictions, the Court held that the Dieners were liable for the amount of the lien, because that was what was owed under the contract. *Id.* at 562. The Court also stated that this was the proper outcome because "the contract presents cogent evidence of the reasonable value of the Cubbages' labor." *Id.* "In any event there was sufficient evidence for the chancellor's determination that the contract price was the reasonable value of the work performed." *Id.*

Camp Springs takes from *Diener* that a subcontractor like KWCC cannot obtain a mechanics' lien for more than the negotiated contract amount. KWCC argues that *Diener* stands for the proposition that a subcontractor may obtain a mechanics' lien in the amount of the reasonable value of the labor performed, which in the Cubbages' case, also happened to be the contract price. We agree with KWCC.

In support of this reading of *Diener*, we note that the Court also said

> **Reasonable value, then, is the measure of damages**, *but the contract price can be used in determining what those damages are*. We are in agreement with those authorities which hold that while the contract is not binding on the owner, *the contract price is nonetheless prima facie proof of the reasonable value, and the owner has the burden of introducing evidence to show unreasonableness.*

Id. at 582 (emphasis supplied). We hold that consistent with the provisions of RP § 9–102(a), an owner is subject to a mechanics' lien for the value of a subcontractor's improvement to the property. And consistent with *Diener*, the contract *can* be used as a measure to determine damages. *Diener*, 259 Md. at 582. *Diener* does not stand for the proposition that a subcontractor can only seek a mechanics' lien strictly for the amount due under the contract. *See also O-Porto Const. Co., Inc. v. Devon/Lanham, LLC*, 129 Md. App. 301, 308 (1999) (finding that a change order in the amount of $600 was to be included in determining value of mechanics' lien and so, holding "that the cost of all repairs and improvements performed on the property should be considered in determining the percentage of value requirement contained in RP § 9–102(a).").

The Court of Appeals has determined that "the mechanic's lien law historically has been construed in the most liberal and comprehensive manner in favor of mechanics and materialmen." *Ridge Heating Air Conditioning & Plumbing, Inc. v. Brennen*, 366 Md. 336, 340 (2001) (citing *Winkler Constr. Co., v. Jerome*, 355 Md. 231, 246 (1999)). We conclude that the mechanics' lien statute is an exercise of the court's equitable powers to aid a subcontractor in recovering the value of his labor to improve the owner's property. Consequently, interpreting *Diener* to hold that a subcontractor cannot recover the value of labor and materials improving an owner's property for work done to the owner's property but outside the contract, such as a change order, would be manifestly unfair and antithetical to the purposes of the statute.

Finally, we think Camp Springs' argument that KWCC was obligated to prove that its work improved the project's value by 15% to be a misinterpretation of the statute. In

the first place, this issue is not preserved. We cannot find in the trial record where Camp Springs made this specific argument below. As it was not presented to the circuit court, but made for the first time on appeal, we think this issue was not preserved. *See* Md. R. 8-131(a).

Even if the issue was preserved, Camp Springs offers no support for its interpretation. The first sentence of RP § 9–102(a) begins: "Every building erected and every building repaired, rebuilt, or improved to the extent of 15% of its value is subject to establishment of a lien…." We conclude that the phrase, "15% of its value," modifies the clause about buildings that are "repaired, rebuilt, or improved." This is an independent clause separated by "and." Consequently, the sentence could be written as two separate sentences: (1) "Every building erected is subject to establishment of a lien…." (2) "Every building repaired, rebuilt, or improved to the extent of 15 percent of its value is subject to establishment of a lien…." Accordingly, we determine that the requirement of proof of improvement of the property's value by 15%, refers to buildings "**repaired, rebuilt, or improved**," not to **new** construction.

Brendsel v. Winchester Constr. Co., Inc, 392 Md. 601 (2006), seems to support our reading of the statute. There, Winchester Construction Company ("Winchester"), a contractor working on the renovation of Wye Hall, a historic home owned by Brendsel and his wife, petitioned to establish and enforce a mechanics' lien. *Id.* at 604. Brendsel filed a counterclaim alleging that Winchester had breached the construction contract and violated the Maryland Consumer Protection Act. Winchester sought arbitration, as the contract allowed. *Id.* The Circuit Court for Queen Anne's County granted Winchester's

petition to compel arbitration, and Brendsel appealed. This Court affirmed, *Brendsel v. Winchester Constr. Co., Inc*,162 Md. App. 558 (2005). Brendesl requested certiorari and the Court of Appeals granted the petition.

The Court of Appeals answered the question of whether a contractor who has a dispute with an owner must submit to arbitration (as allowed by the contract) or may seek a mechanics' lien. *Id.* at 603. In resolving that question, the Court noted that one issue that arose after Winchester petitioned for a mechanics' lien concerned the circuit court's request that Winchester supplement its petition by showing that the improvements to Brendsel's property represented at least 15% of the property's value. *Id.* at 607. In explaining the rationale for the circuit court's request, the Court of Appeals explained:

> Where the work involves improvements to a building (**as opposed to the erection of a new building**), RP § 9–102 permits a mechanics' lien only if the building is improved to the extent of 15% of its value, and RP § 9–105(a) and Md. Rule 12–302(b) require the petition to allege the kind of work done or the kind and amount of materials furnished.

(emphasis supplied). While this is dicta, it reveals the Court's interpretation of the statute: In requesting a mechanics' lien, the requirement of showing a 15% increase in value applies only to renovations or repairs, not to new construction. *See also O-Porto Constr.*, 129 Md. App. at 302-03 (explaining that a 15% increase in value includes costs of all repairs and improvements on a renovation project). And, perhaps, making an even stronger argument for our reading of the statute, in *Winkler Construction* the Court of Appeals rephrased RP § 9–102(a)'s first sentence into a correlative conjunction: "[E]very building that is **either** newly erected **or** repaired to the extent of 15% of its value is subject to a lien—a

mechanic's lien—for the payment of all debts contracted for work done and materials supplied for or about the building." *Winkler Constr.*', 355 Md. at 235 (emphasis supplied); *see also Ridge Heating*, 366 Md at 340 (quoting *Winkle*r, 355 Md. at 235). Again, while dicta, it reveals the Court's reading of the mechanics' lien statute, which aligns with our interpretation.

Finally, Camp Springs' argument that because KWCC was not constructing a building, and it does not qualify for a mechanics' lien, is unavailing for two reasons. First, the parties negotiated a mechanics' lien release, as we have discussed. If Camp Springs did not believe that KWCC could obtain a mechanics' lien for clearing the land, as opposed to construction of a building, then there was no need to negotiate such a release. Second, KWCC's labor and materials literally laid the groundwork for the construction of the buildings that Camp Springs was going to erect. To allow Camp Springs to avoid responsibility for paying for material and labor that enhanced the value of its property runs counter to the purposes of the mechanics' lien statute. *Ridge Heating*, 366 Md. at 340 (The mechanics' lien statute should be liberally construed to aid materialmen and mechanics.).

For these reasons, if preserved, Camp Springs' argument requiring KWCC to have proven that KWCC's work increased the value of the Allentown Road project by 15%, is not meritorious. Reversal is not required.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.