

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION  
*et al.*,

Debtors.

CASE NUMBER 00-43394

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WHEELING-PITTSBURGH STEEL  
CORPORATION,

Plaintiff,

vs.

H.E. NEUMANN CO.,

Defendant.

ADVERSARY NUMBER 02-4920

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M E M O R A N D U M O P I N I O N

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This matter came before the Court on cross motions for summary judgment. On July 25, 2003, Defendant H.E. Neumann Co. ("Defendant" or "HENCO") filed a Motion for Summary Judgment and Plaintiff Wheeling-Pittsburgh Steel Corporation ("Plaintiff" or "WPSC") filed a Motion for Partial Summary Judgment. On August 4, 2003, Plaintiff filed Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment. Defendant filed a Reply Memorandum in Support Of H.E. Neumann Company's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment on August 6, 2003. On September 8, 2003,

Plaintiff filed a Reply of Wheeling-Pittsburgh Steel Corporation in Support of its Motion for Partial Summary Judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### S T A N D A R D   O F   R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v.*

*Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## D I S C U S S I O N

### Facts

On or about April 27, 1999, HENCO and WPSC executed a contract under which HENCO agreed to provide WPSC with goods and services in connection with various construction projects at WPSC plants (the "Agreement"). It is undisputed that, under the Agreement, HENCO waived its statutory right to file mechanic's liens against the property of WPSC.<sup>1</sup> The Agreement also required HENCO to satisfy and discharge any such mechanic's liens if any were to exist.<sup>2</sup> Finally, HENCO agreed to indemnify, hold harmless, and defend WPSC from and against any such liens.<sup>3</sup> The phrase "any such liens" refers to liens filed by or through HENCO by reason, or as a result of HENCO's noncompliance with any of its obligations under the Agreement. In addition, the Agreement provides that, generally, WPSC must pay HENCO within thirty (30) days from

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<sup>1</sup>The Agreement provides, "[HENCO] hereby irrevocably waives any rights it may now have or which it may acquire to file liens or charges against WPSC or its property with respect to [HENCO's] performance of Work governed by this Agreement." Pl.'s Mot. for Partial Summ. J., Ex. A, § 3.1. It further provides, "[i]t is the agreed intention of the parties that all Work governed by this Agreement shall be performed on the WPSC premises involved on a "No-Lien", or waiver of mechanics' lien basis to the extent permitted and allowed under the law of the State in which said WPSC premises are located." Pl.'s Mot. for Partial Summ. J., Ex. A, § 3.3.

<sup>2</sup>"[HENCO] also shall pay, satisfy and discharge all mechanics', materialmen's and other liens . . . which may be asserted against WPSC or its property by any person(s) or third party whomsoever claiming by or through [HENCO] by reason of, or as a result of noncompliance with any obligation, or any acts or omissions of [HENCO] . . . in connection with or relating to the performance of Work governed by this Agreement." Pl.'s Mot. for Partial Summ. J., Ex. A, § 3.2(a).

<sup>3</sup>"[HENCO] shall indemnify, hold harmless and defend WPSC from and against any and all such liens, notices, levies, claims, obligations, liabilities and costs asserted or filed against WPSC or its property." Pl.'s Mot. for Partial Summ. J., Ex. A, § 3.2(a).

acceptance of the related work.<sup>4</sup> The parties stipulated that the Agreement was valid, binding, and supported by good and sufficient consideration.<sup>5</sup>

HENCO provided labor and materials at certain WPSC plants located in Ohio and West Virginia during the calendar year 2000. After completion of the work, HENCO sent invoices to WPSC. Fifteen (15) invoices remained unpaid and outstanding as of the petition date, November 16, 2000, and with respect to eleven (11) of those invoices, over thirty (30) days had elapsed without payment, in violation of the Agreement. In response to this delinquency, on November 14 and 15, 2000, HENCO filed several mechanic's liens against certain properties of WPSC in Ohio and West Virginia.

On June 19, 2003, WPSC filed an amended complaint ("Complaint") against HENCO alleging five (5) causes of action: breach of contract; slander of title; determination of validity of liens; determination of the extent and priority of liens; and indemnification. HENCO moved for summary judgment on all counts and WPSC moved for summary judgment on three (3) counts: breach of contract; invalidation of HENCO's mechanic's liens; and indem-

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<sup>4</sup>"Final payment of any remaining sum(s) due [HENCO] under any of the Contract Documents shall be made within thirty (30) days after WPSC's final written acceptance of the Work to which such payment relates . . . ." Pl.'s Mot. for Partial Summ. J., Ex. A, § 4.2.

<sup>5</sup>"NOW THEREFORE, in consideration of the foregoing premises and mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, have agreed and do hereby agree as follows[.]" Pl.'s Mot. for Partial Summ. J., see Ex. A at preamble, ¶ 5.

nification.<sup>6</sup>

### Legal Analysis

#### A.) Breach of Contract:

HENCO asserts that, prior to the petition date, WPSC materially breached the Agreement by failing to pay outstanding invoices within thirty (30) days, as required by the Agreement. HENCO concludes that, since WPSC materially breached the Agreement, HENCO is not obligated to conform to the terms of the Agreement and therefore, is not barred from asserting mechanic's liens. In addition, HENCO argues that WPSC's failure to make payment as provided for in the Agreement constitutes a failure of consideration and relieves HENCO from performance.

WPSC asserts that HENCO breached the Agreement when it filed mechanic's liens in contravention to the Agreement's lien waiver clause. WPSC argues that failure to pay several invoices does not nullify a mechanic's lien waiver. WPSC concludes that, therefore, the lien waiver provision was in effect when HENCO filed the mechanic's liens against WPSC and such liens are invalid and must be released. Further, WPSC argues HENCO's failure to abide by the lien waiver clause and its unwillingness to withdraw the mechanic's liens at bar entitle WPSC to indemnification from HENCO

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<sup>6</sup>WPSC styles its motion as one for partial summary judgment; however, by failing to provide any facts or analysis to support Count II, slander of title, and further failing to address this Count in its motion, this Court finds that WPSC has abandoned its alleged cause of action for slander of title. Furthermore, although WPSC seeks summary judgment as to Count III, but fails to address Count IV, this Court finds the two counts so intertwined that this opinion covers Count IV as well as Count III, for the reasons set forth herein.

for all costs and attorney's fees incurred in connection with this action.

Both HENCO and WPSC concede that there are no genuine issues of material fact regarding breach of contract. Generally, the "interpretation of an unambiguous contract is a question of law," appropriate for the Court to determine on the papers. *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 270 F.3d 1117, 1123 (7th Cir. 2001) (citations omitted). Accordingly, summary judgment is appropriate to address Plaintiff's first cause of action, breach of contract.

A contractor, subcontractor, or materialman may waive its statutory right to file mechanic's liens. See *Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 512 S.E.2d 811, 818 (Va. 1999); *Iron Co. v. Murray*, 38 Ohio St. 323, 327 (1882). To be valid and binding, a "waiver of a mechanic's lien must be supported by a consideration." *Beebe Constr. Corp. v. Circle R. Co.*, 226 N.E.2d 573, 575 (Ohio App. 1967); *United Masonry Inc. of Va. v. Riggs Nat'l Bank of Washington, D.C.*, 357 S.E.2d 509, 513 (Va. 1987). Although a lien waiver clause must be supported by consideration to be valid and binding, a lien waiver clause within a bilateral contract need not be supported by independent consideration. *Steveco, Inc. v. C & G Inv. Assocs.*, No. 77AP-101, 1977 Ohio App. LEXIS 7341, at \*4 (Ohio Ct. App. August 4, 1977); *United Masonry Inc. of Va.*, 357 S.E.2d at 514.

HENCO argues that the failure of WPSC to make the payments as provided in the Agreement constitutes a failure of consideration. However, the cases HENCO cites in support of this argument are instances in which the sole consideration for the mechanic's lien waiver was the promise of payment and full payment was not provided, thereby causing a failure in consideration. *Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995); *Pierson v. Sewell*, 539 P.2d 590 (Idaho 1975); *Eason Oil Co. v. M. A. Swatek & Co.*, 36 P.2d 504 (Okla. 1934). HENCO mistakenly argues that, in the case at bar, the consideration for the mechanic's lien waiver was prompt payment of the amounts due, failing to acknowledge the bilateral nature of the Agreement and all additional terms providing consideration.

Contrary to HENCO's assertion, this is not an instance of failure of consideration. First, the Agreement does not provide that the direct and exclusive consideration for HENCO's lien waiver was payment in full. Second, the Agreement is a bilateral contract in which WPSC and HENCO are each bound to fulfill reciprocal obligations, including: WPSC's obligation to be bound by the Agreement for at least five (5) years, to pay HENCO within thirty (30) days of its acceptance of work performed, to secure and pay for any permits, licenses, or easements necessary to the work performed by HENCO, and to hire HENCO to perform work on a non-exclusive basis; and HENCO's obligation to warrant and guarantee the quality of workmanship and materials, to provide for workshop

safety, to waive its right to file mechanic's liens, and to indemnify WPSC in certain circumstances. Pl.'s Mot. for Partial Summ. J., Ex. A, §§ 2.1, 4.2, 20.1; preamble ¶ 2; § 8; § 13 and § 3. Included within a bilateral contract and absent any exclusive link to WPSC's obligation to pay, the lien waiver clause does not need separate, independent consideration to be valid and binding.

The Agreement was supported by consideration. In addition to the reciprocal obligations listed above, the preamble explicitly provides that the Agreement was executed in consideration of mutual covenants and other good and valuable consideration, and neither party claims the Agreement itself is not supported by consideration. Thus, the Court finds the Agreement was a bilateral contract supported by consideration. Accordingly, the Agreement's lien waiver clause, although not supported by independent consideration, is supported by sufficient consideration and was valid and binding when executed.

HENCO argues that, even if the lien waiver clause was valid upon the Agreement's initial execution, the waiver clause is no longer binding because WPSC materially breached the Agreement pre-petition by failing to provide payments as proscribed. Generally, the material breach of a contract, without legal excuse, discharges the other party from any obligation to perform under the contract. HENCO concludes, therefore, the Agreement no longer prohibits HENCO from filing mechanic's liens.

If the language of a contract is clear and unambiguous, the court need not go beyond the plain language of an agreement to determine the rights and obligations of the parties. *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920 (Ohio 1989); *HN Corp. v. Cyprus Kanawha Corp.*, 465 S.E.2d 391 (W. Va. 1995). Under Article 3 of the Agreement, HENCO explicitly waived its right to file mechanic's liens against WPSC's property and agreed to indemnify WPSC against any liens filed against it as a result of HENCO's failure to comply with its contractual obligations. The Agreement also explicitly requires WPSC to make payment within thirty (30) days of receipt of the respective invoice. Neither party argues that the language of the Agreement is ambiguous. Therefore, in determining the parties' respective rights and duties under the Agreement, this Court's analysis must examine the language of the Agreement.

Generally, failure to perform a material duty discharges the other party from any obligation to perform under the agreement. However, in the context of a mechanic's lien waiver in which the promise of payment was not the sole consideration, failure to provide payment does not release the party from its waiver. See *J. A. Bock, Validity and Effect of Provision in Contract against Mechanic's Lien*, 76 A.L.R.2d 1087 (2003). Virginia<sup>7</sup> and Ohio

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<sup>7</sup>Because Virginia and West Virginia were one state until the early 1860's, West Virginia courts have repeatedly recognized the impact of Virginia common law on that of West Virginia. See, e.g., *Painter v. Coleman*, 566 S.E.2d 588, 592 (W. Va. 2002) (citations omitted) ("decisional law of Virginia is clearly a part of this state's common law, because 'at the time West Virginia was founded, we

courts have held that a clear and unambiguous mechanic's lien waiver precludes the filing of a mechanic's lien, even if the contract was breached by the failure to pay.

The covenant waiving a mechanic's lien cannot depend on the owner's agreement to pay, because there could not be a lien in any event if the owner made the payments according to the contract. The law gives a lien when there is a failure to pay, and if that contractor waives his lien, then it must follow that it is waived in the event there is a failure on the part of the owner to make the payment.

*Walker & Laberge Co., Inc. v. First Nat'l Bank of Boston*, 146 S.E.2d 239, 245 (Va. 1966) (citations omitted); see *VNB Mortgage Corp., etc. v. Lone Star Indus., Inc.*, 209 S.E.2d 909, 911-12 (Va. 1974); *Steveco Inc.*, 1977 Ohio App. LEXIS 7341, at \*8. Mechanic's liens are creatures of statute and are permitted in response to a failure of payment. The rationale behind a lien waiver is to prohibit the contractor from asserting an otherwise available lien in response to failure of payment. *Id.* A subsequent lack of payment does not invalidate a mechanic's lien waiver. To hold otherwise would render a mechanic's lien waiver a nullity. Accordingly, WPSC's failure to make payments did not invalidate the Agreement's lien waiver provision and the waiver obligation remains.

A breach of contract occurs when a party fails to perform

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adopted the common law of England and the law of the State of Virginia, except for those portions specifically changed by our legislature or Constitution.") Thus, although Virginia law may not be controlling in West Virginia, it provides insight into West Virginia law.

in accordance with a contract, without legal excuse. HENCO waived its lien rights and agreed to discharge any liens filed against WPSC's property by anyone claiming by or through HENCO. As analyzed above, WPSC's failure to pay HENCO does not discharge HENCO's contractual obligation to abide by the Agreement's lien waiver provision. In spite of these obligations, HENCO filed several mechanic's liens against WPSC's property in Ohio and West Virginia. By filing these mechanic's liens, HENCO violated its contractual waiver. Accordingly, summary judgment is granted in favor of WPSC regarding Count I of the Complaint, breach of contract.

**B.) Determination of the validity of liens under 28 U.S.C. § 157 and the extent and priority of liens under 11 U.S.C. § 506(a):**

WPSC requested the Court to determine the value of HENCO's interest in the real property securing the mechanic's lien. Bankruptcy courts have authority to determine the validity of liens, as provided by 28 U.S.C. § 157(b)(2)(K). The Bankruptcy Code provides, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void[.]"<sup>8</sup> 11 U.S.C. § 506(d). A claim is not allowed if "such claim is unenforce-able against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim

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<sup>8</sup>Exceptions to this provision are not relevant.

is contingent or unmatured." 11 U.S.C. § 502(b)(1). As established above, because HENCO's mechanic's liens breach the Agreement, they are invalid and unenforceable. As a consequence, HENCO's mechanic's liens are void. Accordingly, summary judgment is granted in favor of WPSC regarding Counts III and IV of the Complaint.

**C.) Indemnification:**

The Agreement provides that HENCO shall indemnify, hold harmless, and defend WPSC from and against any lien filed by HENCO related to obligations under the Agreement. It also provides that HENCO "shall pay, satisfy and discharge all mechanics' . . . liens, . . . and all . . . costs (including cost of investigation, attorneys' fees, and all other costs of litigation or threatened litigation) which may be asserted against WPSC" related to work performed governed by this Agreement. Pl.'s Mot. for Partial Summ. J., See Ex. A, § 3.2. HENCO filed mechanic's liens prohibited by the Agreement's lien waiver clause, and subsequently refused to release such liens contrary to its contractual obligation. Accordingly, pursuant to the terms of the Agreement, HENCO is required to indemnify WPSC for all damages that have resulted from HENCO's mechanic's liens, including all costs and expenses, including reasonable attorneys' fees, associated with legal proceedings necessitated to obtain a determination about the validity of the liens. Summary judgment is granted in favor of WPSC regarding Count V of the Complaint for indemnification.

However, the issue of the amount of costs and expenses including the reasonableness thereof, is an issue of fact. As a consequence, although this Court holds that WPSC is entitled to indemnification from HENCO, there has been no determination as to the amount of costs WPSC is entitled to receive.

An appropriate order shall enter.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

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PITTSBURGH-CANFIELD CORPORATION, \*  
et al.,

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CASE NUMBER 00-43394

Debtors.

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WHEELING-PITTSBURGH STEEL  
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Plaintiff,

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vs.

ADVERSARY NUMBER 02-4920

H.E. NEUMANN CO.,

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Defendant.

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For the reasons set forth in this Court's Memorandum Opinion entered this date, summary judgment is granted in favor of Wheeling-Pittsburgh Steel Corporation ("WPSC"). Accordingly, H.E. Neumann Co. ("HENCO") is ordered to remove the mechanics' liens at issue. Further proceedings will be necessary to determine the amount, if any, of HENCO's indemnification obligation to WPSC.

IT IS SO ORDERED.

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HONORABLE KAY WOODS

UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of August, 2005, addressed to:

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