

## ALERTS AND UPDATES

### Pennsylvania Court Digs New Ground for Excavator's Lien Claim: Firmer Foundation or Deeper Hole?

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Particularly with the recent amendments to the Pennsylvania Mechanics' Lien Law of 1963 (49 P.S. § 1101–1902, the "Lien Law"), any appellate decision construing the meaning of the Lien Law and its original and amended language can be considered a significant event. All decisions in this area, particularly appellate determinations, guide construction industry participants and their counsel in either positioning the project to be free from lien exposure or to maximize the Lien Law's potential for claim recovery should a contractor or subcontractor remain unpaid for services, labor and materials provided to a project. The Superior Court of Pennsylvania's recent decision in *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*<sup>1</sup> adds a new chapter to the history of potential lien claims in the state, albeit not without some controversy and a lengthy dissent.

#### Case Background

The matter involved a lien filed by B.N. Excavating ("BNE") for approximately \$119,000. BNE is, as its company title suggests, a site-preparation contractor, performing services for the general contractor on a development project located in Montgomery County, Pa. BNE asserted in its lien that it was providing "labor and materials for excavation work, including but not limited to a silt fence, temporary riser, emergency spillway, topsoil stripping, cut and fill, concrete pipe, subgrading for building pad, storm water bed, rock ribbing and other site work." Preliminary objections to BNE's lien claim immediately followed; and the trial court, relying on another superior court decision, *Sampson-Miller Associated Companies v. Landmark Realty Co.*,<sup>2</sup> sustained the preliminary objections to the lien claim. The core basis for the trial court's determination was its conclusion that because the mechanic's lien claim was for excavation performed incident to a planned construction never actually erected, the lien claim was barred by the *Sampson-Miller* decision. *Sampson-Miller* had "held that the plain words of the Mechanics' Lien Law established that 'no lien can attach to land for work unconnected to the construction of a building.'" In reaching this conclusion, the *Sampson-Miller* court first considered the statutory definition of erection, construction, alteration, or repair pursuant to 49 P.S. § 1201(12)(a), which included, *inter alia*, excavation 'when such work is incidental to . . . erection, construction, alteration or repair.'<sup>3</sup>

While *Sampson-Miller* long stood for the proposition that "no lien can attach to land for work unconnected to the construction of a building," the superior court in *B.N. Excavating, Inc.* focused on the contention in the lien claimant's response to the preliminary objections—as opposed to the lien claim itself—where it asserted its "work was in preparation for the erection of a structure."<sup>4</sup> From that starting point, the majority of the superior court in *B.N. Excavating, Inc.* concluded and held "we do not interpret the *Sampson-Miller* court's observations regarding the facts underlying the cases it reviewed or its application of the principle requiring the preliminary work to be connected with construction as creating a bright-line rule that a mechanics' lien can never attach to land absent an erected structure. Thus, we decline to equate the phrase 'incidental to the erection [or] construction' with the requirement that a structure actually exist, particularly where, as here, excavation clearly was performed in preparation for planned construction."<sup>5</sup>

The majority in *B.N. Excavating, Inc.* grounded its analysis on the view that the *Sampson-Miller* decision "did not reveal whether the excavation performed therein was in preparation for construction or whether it was completely independent of construction," dismissing some of the other language cited in the *Sampson-Miller* opinion as "dicta" emanating from a "hypothetical situation where a claimant would be precluded from filing a lien under its interpretation of the statute if 'for

whatever reason' the building was not constructed. . . ." The superior court in *B.N. Excavating, Inc.* viewed this analysis by the *Sampson-Miller* court as a "hypothetical . . . designed to highlight what the panel perceived as potential inequities with the lien law."<sup>6</sup>

To bolster its decision, the majority then turned to the *Dollar Bank, FSB v. EM2 Development Corp.*<sup>7</sup> determination, where the court held "that when excavation and related site work is performed as part of a 'continuous scheme to erect' a structure, the Mechanics' Lien Law would permit the lien to attach."<sup>8</sup> There, the superior court had concluded that the excavation work performed was not an act of home building; and therefore, it was not incidental to erection and construction. Consequently, it did not afford a lien claim tied to that work any priority over a competing mortgage interest that was in foreclosure. Stemming from that holding, the *B.N. Excavating, Inc.* majority concluded that because the claimant was performing "its excavation and related site improvements . . . incidental to construction or erection," they did not view that *Sampson-Miller* precluded relief under the Lien Law.

In completing its analysis, the court referred to two decisions from South Carolina as well as one case from Oklahoma in support of its conclusion, in reversing the trial court's determination on preliminary objections relying on the *Sampson-Miller* decision. The majority of the superior court panel reinstated the lien.

This decision provoked a respectful but detailed dissent by Judge Mundy. While she noted sympathy toward the policy issues (and presumably the unpaid lien claimant), she was more vocal about the majority's determination as misinterpretations of both the *Sampson-Miller* and *Dollar Bank* precedents. Judge Mundy began her dissent with further analysis and discussion of the *Sampson-Miller* opinion, commenting on the majority's characterization of the *Sampson-Miller* analysis as "dicta," and emphasizing that not only were the facts in *Sampson-Miller* quite plain, they were also consistent with the ultimate determination that the Lien Law required that "the work not only be connected to the construction of a permanent structure, but also that the permanent structure be, in fact, erected and not merely planned or contemplated."<sup>9</sup> Judge Mundy also referred to the *Sampson-Miller* court's recognition that at times, "the Mechanics' Lien Law yields 'anomalous if not inequitable results, particularly in light of the aims of such legislation to encourage construction and afford protection for laborers.'"<sup>10</sup> The dissent also noted the *Sampson-Miller* court's observation that courts in general "have generally reviewed [mechanics' lien] claims with a strict construction of the statute which created them."<sup>11</sup>

As for the majority's reference to *Dollar Bank*, Judge Mundy focused on the inapplicability of the *Dollar Bank* decision to the present facts. She also noted that she considered the majority's opinion to be an undue expansion of the *Dollar Bank* holding.

## **Analysis**

Regardless of the strong, detailed and supported views of the dissent, it is the majority opinion in *B.N. Excavating, Inc.* that now should be considered by all participants in the construction process as well as the lawyers who advise them. While it used to be safely said that "excavation, without more" was unlikely to expose the project to the potential mechanic's lien claims, the expanded analysis presented by this decision may cause reconsideration of that advice.

While it appears unusual to reach out to other jurisdictions' case law in the mechanic's lien area because each of the statutes are so different from others, it is also interesting to note that the majority appeared to focus mainly on certain select provisions of the Lien Law and not others that might have provided further assistance in the analysis. For example, what was not entirely apparent from the facts of the decision and the opinion was whether the work of the excavator had been

fully completed or whether the full performance of its work was prevented by some action outside of the lien claimant's control. This could have initiated a 49 P.S. § 1305 analysis. This section provides that "where, through no fault of the claimant, the improvement is not completed, the right to lien shall nevertheless exist."

As to the issue of the priority analysis discussed in the *Dollar Bank* case, the majority could also have made reference to section 1508, which in addressing priorities of lien, indicates that priority will attach, "[i]n the case of the erection or construction of an improvement, as of the date of the visible commencement upon the ground of the work of erecting or constructing the improvement." This language has a considerable history of analysis reaching as far back as the 1901 version of what is now the Mechanics' Lien Law of 1963, as amended, and gives recognition to ground-based activities by its own language.

In the future, these additional points of analysis may become the subjects of further cases analyzing the Lien Law and its provisions. However, until such other matters arise, the latest appellate expression and the conclusion reached in *B.N. Excavating, Inc.* warrant attention and the analysis such a determination deserves. As with all decisions that can be characterized as more expansive in nature, it might provide the firm foundation of assurance to some, while at the same time, creating a potentially deeper hole of exposure to others.

## For Further Information

If you have any questions about the information addressed in this *Alert*, please contact the author, vice chair of the Construction Group [Edward B. Gentilcore](#); chair of the Construction Group [Robert A. Prentice](#); any [member](#) of the [Construction Group](#); or the attorney in the firm with whom you are regularly in contact.

## Notes

1. *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2011 Pa. Super. 120; 2011 Pa. Super. LEXIS 628 (Pa. Super. June 7, 2011).
2. *Sampson-Miller Associated Companies v. Landmark Realty Co.*, 303 A.2d 43 (Pa. Super. 1973).
3. See *B.N. Excavating, Inc.* at \*3 (internal citation omitted).
4. *Id.* at \*9.
5. *Id.* at \*10–11.
6. *Id.* at \*11.
7. *Dollar Bank, FSB v. EM2 Development Corp.*, 716 A.2d 671, 673 (Pa. Super. 1998).
8. *B.N. Excavating, Inc.*, at \*13–14 (quoting *Dollar Bank*).
9. *Id.* at \*19.
10. *Id.* at \*22.
11. *Id.* at \*22.

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