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Franklin County Legal Journal
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Brackenridge Construction Co., Inc., Claimant v.

Shippensburg DPP, LLC, Owner or Reputed Owner

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2017-4722

HOLDING: The court holds, for the reasons that follow, that (A.) BCC's Complaint conforms to the Pennsylvania Rules of Civil Procedure and is sufficiently specific, and (B.) it is not "clear and free from doubt that . . . [BCC] will be unable to prove facts legally sufficient to establish the right to relief[]" because of a preclusive bar of the Arbitration, *res judicata*, or collateral estoppel. Therefore, Shippensburg's Preliminary Objections are overruled. Shippensburg will be permitted to plead over within twenty (20) days from the date of this Order and Opinion.

HEADNOTES

Pleading – Speaking Demurrer

1. "A limited exception [to a speaking demurrer] is recognized where a plaintiff avers the existence of a written agreement and relies upon it to establish the cause of action; the defendant may properly annex the agreement without creating an impermissible speaking demurrer because it is a factual matter arising out of the complaint." *Smith v. Pennsylvania Employees Benefit Trust Fund*, 894 A.2d 874, 877 n.3 (Pa. Commw. Ct. 2006).

Mechanics' Lien Law

2. "The fact that Pa.R.C.P. 1656 requires very little in the way of specific averments suggests the need for a more detailed complaint is obviated because the essential information enumerated [in 49 P.S. § 1503] must be contained in the mechanics' lien claim which also must be attached to the complaint." *Terra Technical Services, LLC v. River Station Land, L.P.*, 124 A.3d 289, 303 (Pa. 2015). *See also* Pa.R.C.P. No. 1651(b).

Preliminary Objections – Standard of Review

3. The Court's standard of review is as follows:

> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

American Interior Construction & Blinds Inc. v. Benjamin's Desk, LLC, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing *Khawaja v. RE/MAX Central*, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)).

4. The Court need not accept—"legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[]"—as true. *C.S. v. Commonwealth Dep't of Human Services, Bureau of Hearings and Appeals,* 184 A.3d 600, 603 n.3 (Pa.

Commw. Ct. 2018) (citing *Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare,* 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)).

5. The Court is limited to an examination of the "averments in the complaint, together with the documents and exhibits attached thereto . . . in order to evaluate the sufficiency of the facts averred." *Denlinger, Inc. v. Agresta*, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

Judgment – Necessity of pleading former adjudication in general

6. Res judicata and collateral estoppel are affirmative defenses that typically must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a), and not as preliminary objections. *Weinar v. Lex*, 176 A.3d 907, 926 (Pa. Super. Ct. 2017).

Judgment – Raising question by demurrer or motion

7. Two exceptions to requirement of raising *res judicata* and collateral estoppel as affirmative defenses are when either: a complaint makes reference to the prior proceeding and "contains facts and issues pleaded by the prior action," or the plaintiff fails to raise the procedural defect in her own preliminary objection (to the purportedly improper preliminary objection). *Duquesne Slag Products Co. v. Lench*, 415 A.2d 53, 54 (Pa. 1980) (second exception); *Del Turco v. Peoples Sav. Ass'n*, 478 A.2d 456, 461 (Pa. Super. Ct. 1984) (first exception).

Pleading – Mode of objecting; preliminary objections

8. Because BCC did not file its own preliminary objections (nor raise the procedural defect), the Court finds that BCC has waived any claim that Shippensburg improperly raised in preliminary objections the affirmative defenses of *res judicata* and collateral estoppel. *See Lench*, 415 A.2d at 54. Thus, the Court "may entertain the merits of [these] affirmative defenses[,]" *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1167 (Pa. Commw. Ct. 2013), to the extent it reviews them pursuant to its standard of review. *See also* Pa.R.C.P. No. 1032(a) (waiver of objection not presented).

Mechanics' Liens – Nature of Lien in General

9. There are two fundamental bases for a lien filed by a contractor under the Mechanics' Lien Law, 49 P.S. § 1101 *et seq*. One, a contract (express or implied) between the contractor and the owner of property for, in brief, the improvement of property, the furnishing of labor, or the supplying of materials. 49 P.S. § 1201. Two, an underlying (unpaid) debt "due by the owner to the contractor . . . for labor or materials furnished in the erection or construction, or the alteration or repair of the improvement" that exceeds $500.00. 49 P.S. § 1301(a). *See Murray v. Zemon*, 167 A.2d 253, 255 (Pa. 1960) (stating that lien arises from debt, not act, of, furnishing labor and materials) (citing *Horn & Brannen Mfg. Co. v. Steelman*, 64 A. 409, 410 (Pa. 1906)).

Mechanics' Liens – Constitutional and Statutory Provisions

10. The intent of the Mechanics' Lien Law is to "protect the prepayment of labor and materials that a contractor invests in another's property by allowing the contractor to obtain a lien interest in the property involved." *Matternas v. Stehman*, 642 A.2d 1120, 1124 (Pa. Super Ct. 1994).

Mechanics' Liens – Amount Secured in General

11. A mechanics' lien is limited to the amount still due for labor and materials a contractor expended pursuant to a contract. *See Artsmith Dev. Grp.*, 868 A.2d 495, 496-97 (Pa. Super. Ct. 2005).

Alternative Dispute Resolution – Common Law or Statutory Arbitration

12. The Arbitration was an arbitration at common law, and not statutory, because Section 12.4 of the Agreement provided that the arbitration would be under the "current Construction Industry Arbitration Rules of the AAA" (unless the parties agreed to otherwise) and did not reference Pennsylvania's Uniform Arbitration Act. *See* 42 Pa.C.S. § 7302(a); *Gwin Engineers, Inc. v. Cricket Club Estates Dev. Grp.*, 555 A.2d 1328, 1329 (Pa. Super. Ct. 1989) (citing *Runewicz v. Keystone Ins. Co.*, 383 A.2d 189, 460-61 (Pa. 1978)).

Alternative Dispute Resolution – Error of judgment or mistake of law

13. In a common law arbitration, the "'arbitrators are the final judges of both law and fact, and an arbitration award is not subject to a reversal for a mistake of either.'" *U.S. Spaces, Inc. v. Berkshire Hathaway Home Services, Fox & Roach*, 165 A.3d 931, 934 (Pa. Super. Ct. 2017) (quoting *McKenna v. Sosso*, 745 A.2d 1, 4 (Pa. Super. Ct. 1999)).

14. An arbitration award, generally, may not be vacated or modified and is therefore, binding on the parties. *See U.S. Spaces, Inc.*, 165 A.3d at 934.

Alternative Dispute Resolution – Construction

15. Courts resort to the rules of contractual construction to construe arbitration agreements. *Muse v. Cermak*, 630 A.2d 891, 893 (Pa. Super. Ct. 1993) (citations omitted).

16. A court "will not rewrite the contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words." *Muse*, 630 A.2d at 893 (quoting *Lindstrom v. Pennswood Village*, 612 A.2d 1048, 1051 (Pa. Super. Ct. 1992)).

17. An interpretation giving effect to all of a contract's provisions is the preferred interpretation. *Muse*, 630 A.2d at 893 n.2 (citing *Emlenton Area Mun. Authority v. Miles*, 548 A.2d 623, 626 (Pa. Super. Ct. 1988)).

Pleading – Mode of objecting; preliminary objections

18. The Court would have to "[s]urmise [or] conjecture" as to the terms of the amendment(s) or what the proper allocation between the two projects is to know what preclusive effect it might have, if any, on the instant action—this, the Court cannot do when ruling on preliminary objections. *See Schuykill Navy v. Langboard*, 728 A.2d 964, 968 (Pa. Super. Ct. 1999).

Judgment – Nature and requisites of former recovery as bar in general

19. *Res judicata*, or claim preclusion, bars claims and issues that have been previously litigated. *Matternas*, 642 A.2d at 1123.

20. The rule is that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties[,]" and thus, bars "a subsequent action involving the same claim, demand or cause of action." *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (quoting *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 832 n.2 (Pa. Super. Ct. 2008)).

Judgment – Matters which might have been litigated

21. Claims that could have been litigated but were not are also barred under claim preclusion. *Matternas*, 642 A.2d at 1125 (citing *Martin v. Poole*, 336 A.2d 363, 367 (Pa. Super. Ct. 1975)).

Judgment – Nature and requisites of former recovery as bar in general

22. "The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." *Chada v. Chada*, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) (quoting *Hammel v. Hammel*, 636 A.2d 214, 218 (Pa. Super. Ct. 1994) (citations omitted)).

Judgment – Nature and elements of bar or estoppel by former adjudication

23. Typically, this takes the form of determining whether the former and current action, both, possess the following elements: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the capacity of the parties. *Robinson Coal Co.*, 72 A.3d at 689 (quoting *Stoeckinger*, 948 A.2d at 832).

Mechanics' Liens – Nature and form in general

24. A mechanics' lien is an *in rem* action that attaches to the subject property. *See* 49 P.S. § 1301(a); *Wyatt Inc. v. Citizens Bank of Pennsylvania*, 976 A.2d 557, 570 n.9 (Pa. Super. Ct. 2009).

Mechanics' Liens – Amount secured in general

25. A mechanics' lien is "not intended to settle the contractual obligations of the parties[]" that are distinct from the labor and materials debt. *See*, *e.g., Wyatt*, 976 A.2d at 570 ("A Mechanics' Lien is distinct from a breach of contract action seeking remedies pursuant to the [Contractors and Subcontractors Payment Act][.]"); *Artsmith*, 868 A.2d at 497 ("Items other than labor and materials are more properly sought in an action for breach of the construction contract[] . . . ."); *Matternas*, 642 A.2d at 1124 ("There is no right of lien for damages for breach of contract."); *Halowich v. Amminiti*, 154 A.2d 406, 408 (Pa. Super. Ct. 1959) ("[A mechanics' lien] can be sustained 'only for work done or materials furnished, and not for unliquidated damages for breach of contract.'") (internal citation omitted)).

Mechanics' Liens – Nature and form in general

26. A mechanics' lien is a "'concurrent and cumulative remedy'" that "'does not derogate from any other available remedies[.]'" *See*, *e.g., Matternas*, 642 A.2d at 1123-124 (internal citations omitted) (citing cases).

27. Crucially, however, a plaintiff is limited, ultimately, to one satisfaction. *Wyatt*, 976 A.2d at 570 n.9; *Artsmith*, 868 A.2d at 497 n.1. That is, while "a plaintiff has the liberty to proceed against the property at the same time he resorts to personal action against the defendant[] . . . . the plaintiff cannot recover twice for the same loss." *Wyatt*, 676 A.2d at 570 n.9.

Mechanics' Liens – Review

28. "[P]reliminary objections should be sustained only where the case is clear and doubtless." *Wendt & Sons v. New Hedstrom Corp.*, 858 A.2d 631, 632 (Pa. Super. Ct. 2004) (citations omitted).

Judgment – Matters actually litigated and determined

29. Collateral estoppel, or issue preclusion, differs from *res judicata* in that *res judicata* bars claims that were or *could have been litigated* in a prior proceeding whereas collateral estoppel bars only those issues *that were actually litigated*. *Matternas*, 642 A.2d at 1125.

Judgment – Identify of issues, in general

30. Collateral estoppel does not require the identities of the cause of action or parties in both the former and later cases. *Thompson v. Karastan Rug Mills*, 323 A.2d 341, 344 (Pa. Super. Ct. 1974).

Judgment – Collateral estoppel or claim preclusion elements

31. Collateral estoppel applies if "(1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment." *Matternas*, 642 A.2d at 1125 (internal citation omitted) (citing *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (1989)).

Judgment – Scope and extent of estoppel in general

32. Collateral estoppel requires only that "a party be given a full and fair chance to litigate the issue." *Erisco Indus., Inc. v. W.C.A.B.*, 955 A.2d 1065, 1069 (Pa. Commw. Ct. 2008) (citing *Dep't of Transp. v. Martinelli*, 563 A.2d 973, 976-77 (Pa. Commw. Ct. 1989)).

33. This means that "[t]he fact that more conclusive evidence might be presented at a subsequent hearing is neither sufficient nor relevant grounds for disallowing the application of the doctrine[.]" *Erisco Indus., Inc*., 955 A.2d at 1069 (citing *Dep't of Transp.*, 563 A.2d at 976-77).

Pleading – Mode of objecting; preliminary objections

34. Shippensburg has the right to plead over within twenty (20) days from the date of this Order and Opinion. Pa. R.C.P. No. 1028(d); *City of Philadelphia v. Berman*, 863 A.2d 156, 162 (Pa. Commw. Ct. 2004) ("The cases that have construed [Pa.R.C.P. No. 1028(d)] have held uniformly that a defendant's right to file an answer is absolute.") (citations and internal quotation marks omitted).

Appearances:

Robert M. Palumbi, Esquire, *Counsel for Plaintiff*

Evan J. Gower, Esquire, *Counsel for Defendants*

Veronica L. Morrison, Esquire, *Counsel for Defendants*

OPINION OF COURT

Before Meyers, P.J.

Before the Court are Shippensburg DPP, LLC's ("Owner" or "Shippensburg") *Preliminary Objections in the Nature of a Motion to Strike Claimant's Complaint*.[1] Shippensburg challenges Brackenridge Construction Co., Inc.'s ("Claimant" or "BCC") *Statement of Mechanics' Lien* and *Complaint Upon Mechanics' Lien Claim* for failure to conform to court rules, insufficient specificity, and legal insufficiency. The thrust of Shippensburg's argument is that the issues raised and relief sought by BCC in its mechanics' lien and *Complaint* are the same as those decided in a prior arbitration proceeding between the parties. The court holds, for the reasons that follow, that (A.) BCC's *Complaint* conforms to the Pennsylvania Rules of Civil Procedure and is sufficiently specific, and (B.) it is not "clear and free from doubt that . . . [BCC] will be unable to prove facts legally sufficient to establish the right to relief[]" because of a preclusive bar of the Arbitration, res judicata, or collateral estoppel. Therefore, Shippensburg's *Preliminary Objections* are overruled. Shippensburg will be permitted to plead over within twenty (20) days from the date of this Order and Opinion.

PROCEDURAL & FACTUAL HISTORY

On April 4, 2016, BCC entered into an independent contractor agreement with Dollar Texas Properties XV, LLC c/o GBT Realty Corporation ("GBT") to "provide all labor, materials, equipment, and services necessary" for construction of Dollar General stores (the "Work") (altogether, the "Agreement"). *Preliminary Objections* Exhibit 1, § 3.1.1.[2] Under the Agreement, GBT would assign its rights to a special purpose entity, who would then own and finance the Work associated with a particular Dollar General. *Preliminary Objections* Exhibit 1, § 1.

The Agreement contained Binding Dispute Resolution and Lien Rights provisions under the Article 12 (Dispute Mitigation and Resolution) that read, in respective, parts:

1 The Court finds that deciding on the *Motion for Rule 1023.2 Sanctions* is premature at this stage of the litigation. Thus, although it has the benefit of the parties' briefs, the Court will limit its examination to only those pleadings that pertain to the *Preliminary Objections* when ruling on them.

2 BCC states the existence of this Agreement in its *Response in Opposition to Preliminary Objection* and explicitly relies on the Lien Rights provision contained in the Agreement in its *Response*. *Response in Opposition to Preliminary Objections* (page 6). *See Smith v. Pennsylvania Employees Benefit Trust Fund*, 894 A.2d 874, 877 n.3 (Pa. Commw. Ct. 2006) ("A limited exception [to a speaking demurrer] is recognized where a plaintiff avers the existence of a written agreement and relies upon it to establish the cause of action; the defendant may properly annex the agreement without creating an impermissible speaking demurrer because it is a factual matter arising out of the complaint."). Thus, the Court may consider the Agreement.

> 12.4 BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedures selected below.
>
> > Arbitration using the current Construction Industry Arbitration Rules of the AAA [American Arbitration Association] or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties. If the Parties cannot agree, then it shall be administrated by AAA.
>
> . . .
>
> 12.6 LIEN RIGHTS Nothing in this article shall limit any rights or remedies not expressly waived by the Contractor that the Contractor may have under lien laws.

Preliminary Objections Exhibit 1, §§ 12.4, 12.6.

In this case, GBT then assigned or otherwise transferred its rights to Shippensburg such that Shippensburg and BCC contracted,[3] for an agreed sum, for BCC to complete the Work at the premises in Southampton Township, Franklin County, Pennsylvania (the "Premises"), which Shippensburg owns. *Statement of Mechanics' Lien* ¶¶ 4-5 and Exhibit A. The Work would begin in 2017 and end sometime that summer.[4] *Response in Opposition to Preliminary Objections*, Exhibit A. BCC completed the Work on July 27, 2017. *Statement of Mechanics' Lien* ¶ 8.

A dispute arose between the parties concerning performance and payment of the Work. On December 15, 2017, BCC filed a *Statement of Mechanics' Lien* against Shippensburg, as the Premises owner, for certain completed, but unpaid, work in the amount of $76,707.48, described as the "furnish[ing] [of] labor, equipment, materials, supervision and other

3 The Court does not have the written contract or agreement (or amendment) between BCC and Shippensburg before it, as the amendments that follow the Agreement are incomplete, unsigned, and make no mention of Shippensburg. BCC, however, acknowledges the existence of a contract between the parties and explicitly relies on it for its mechanics' lien claim. *See Statement of Mechanics' Lien* ¶ 4 ("This claim relates to labor and materials provided by Brackenridge performed upon, and delivered to, the Premises *pursuant to the terms of a contract* with Shippensburg for an agreed sum.") (emphasis added)); *Response in Opposition to Preliminary Objections*, page 4 and Exhibit A (Arbitration Award), page 1. Indeed, a contract (express or implied) between the contractor and the owner of property is foundational to any mechanics' lien. 49 P.S. § 1201(4). Because the Court is permitted to make reasonably deducible inferences from BCC's *Complaint*, which attached its *Statement of Mechanics' Lien*, the Court finds it proper to consider that such a contract did exist between BCC and Shippensburg. *See Smith*, 894 A.2d 874, 877 n.3; fn. 2, *supra*, and Section B. (Court's standard of review), *infra*, of this Opinion.

4 The exact date for *when* the parties agreed that the Work would be completed by—whether originally or subsequently—is not certain, as it appears that the date was contested by the parties and is part of what gave rise to the arbitration proceeding as well as the instant litigation. The specific issue of *what the completion date is* is, however, not currently before the Court, and need not be precise for the Court to rule on the *Preliminary Objections*.

items related to the concrete, steel, masonry, exterior face, and mechanical construction necessary for the erection of a Dollar General store" (the "Lien Work"). Then, in July of 2018, BCC filed a breach of contract claim against GBT for, *inter alia*, "unpaid balances due for work performed under the [April 4, 2016 Agreement and amendments of it]" at the Premises (and at a second location).[5] *Response in Opposition to Preliminary Objections*, page 4 and Exhibit A (quoting the Arbitration Award).

The parties proceeded to arbitration on January 22 and 23, 2019 (the "Arbitration"). *Response in Opposition to Preliminary Objections*, page 4. On March 11, 2019, the Arbitrator[6] rendered its decision in the form of an Award, finding BCC to be the prevailing party. *Response in Opposition to Preliminary Objections*, Exhibit A. The Award read, in pertinent part:[7]

> I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by Dollar Tree Properties XV, LLC (Dollar Tree) dated April 4, 2016, and having been duly sworn, and having duly heard the proofs and allegations of the parties at oral hearings . . . .
>
> . . .
>
> This Arbitration resulted from a dispute between Claimant [BCC] and Respondent [GBT] that arose during the performance of two separate projects in which [BCC] was Contractor and [GBT] the Owner. Both projects were performed under amendments to an agreement dated April 4, 2016 (Agreement) between BCC and GBT and will be referenced in this Award as the Shippensburg Project and the Shippensburg Amendment and Lakeville Project and Lakeville Amendment or collectively as Projects and Amendments.
>
> There are six separate claims consisting of claims and counterclaims involved in this dispute.
>
> 1. A claim by [BCC] for the unpaid balances due for work performed under the Agreement and Amendments.
>
> 2. A claim by [BCC] for interest on the unpaid balance referenced in claim 1 above.

5 The second location is Lakeville and is not presently before the Court. *See Response in Opposition to Preliminary Objections*, Exhibit A (Arbitration Award).

6 John H. Perkins served as the Arbitrator. *Preliminary Objections*, Exhibit 2.

7 The Court has replaced Claimant with BCC and Respondent with GBT where bracketed for ease of reading.

> 3. A claim by [BCC] for penalties and legal fees under Pennsylvania's Contractor and Subcontractors payment Act.
>
> 4. A counterclaim by [GBT] that [BCC] owes liquidated damages to [GBT] for failure to complete the work on the Projects on time.
>
> 5. A counterclaim by [GBT] that [BCC] owes [GBT] money for performing paving work that was in [BCC's] scope of work for the Lakeville Project.
>
> 6. A counterclaim by [GBT] for punch list work not performed by [BCC].
>
> . . .
>
> This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

Response in Opposition to Preliminary Objections, Exhibit A. The Arbitrator found in favor of BCC for claims # 1 and # 2 for an award of $179,188.21, and in favor of GBT for claim # 5 in the amount of $70,000 that offset BCC's award ($179,188.21 - $70,000) to $109,188.21. *Id.*

Each party sought modifications to the Award, but the Arbitrator denied both. *Response in Opposition to Preliminary Objections*, page 5-6 and Exhibit B. BCC sought to decrease the offsetting amount of its Award while GBT sought to change the text at the end of the Award—

> from: "This Award is in full settlement of all claims submitted to this Arbitration."
>
> to: "This Award is in full settlement of all claims submitted to this Arbitration, ***including any derivative lien claims by Claimant arising out of or related to the same contract involved in this Arbitration***."

Id., page 6 (emphasis in original). BCC has yet to be paid any of its Award. *Id*., page 4.

The parties disagree on the effect of the Arbitration. A few months after the Arbitration, on May 9, 2019, BCC filed its *Complaint Upon Mechanics' Lien* in this Court. BCC neither attached the Agreement nor mentioned the Arbitration. Shippensburg opposed the action, timely filing *Preliminary Objections in the Nature of a Motion to Strike Claimant's Complaint* (and supporting brief) on May 28, 2019. BCC filed its *Response in Opposition to Preliminary Objections* on August 15, 2019. The Court then held oral argument on September 12, 2019.

DISCUSSION & ANALYSIS

Shippensburg filed *Preliminary Objections* to BCC's *Complaint* for failure to conform to a court rule and insufficient specificity and for legally insufficient.[8]

A. Failing to Conform to a Rule of Court and Insufficient Specificity of a Pleading

A party may file preliminary objections for "failure of a pleading to conform to law or rule of court" and for "insufficient specificity in a pleading[.]" Pa.R.C.P. No. 1028(a)(2),(3). Shippensburg argues that BCC's *Complaint* fails to conform with Pa.R.C.P. No. 1019, concerning contents and averments of pleadings, while BCC contends it merely needs to conform with Pa.R.C.P. No. 1656, which specifically governs a mechanics' lien complaint.

The Supreme Court squarely answered this question, in BCC's favor, stating "[t]he fact that *Pa.R.C.P*. 1656 requires very little in the way of specific averments suggests the need for a more detailed complaint is obviated because the essential information enumerated [in 49 P.S. § 1503[9]] must be contained in the mechanics' lien claim which also must be attached to the complaint." *Terra Technical Services, LLC v. River Station Land, L.P.*, 124 A.3d 289, 303 (Pa. 2015). *See also* Pa.R.C.P. No. 1651(b). Pa.R.C.P. No. 1656 requires that the plaintiff set forth (1) the name and address of each party to the action; (2) the date of the filing of the claim; and (3) a demand for judgment, in the complaint and attach a copy of its lien claim as an exhibit.

Here, BCC satisfied the requirements of Pa.R.C.P. No. 1656. BCC stated BCC's and Shippensburg's name and address (¶¶ 1-2), the date of the filing of the claim (¶ 3), a demand for judgment (WHEREFORE ¶), and attached its lien claim as Exhibit A of its *Complaint*. Moreover, because BCC contracted with Shippensburg for an agreed sum, BCC merely needed to—in its lien claim—identify their contract and provide a "*general*

8 The Court has rearranged Count I and Count II of Shippensburg's preliminary objections for ease of discussion.

9 49 P.S. § 1503 requires that a mechanics' lien claim state:

(1) the name of the party claimant, and whether he files as contractor or subcontractor; **[Introduction, ¶ 1]**
(2) the name and address of the owner or reputed owner; **[¶¶ 2-3]**
(3) the date of completion of the claimant's work; **[¶ 8]**
(4) if filed by a subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;
(5) if filed by a contractor under a contract or contracts for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor or materials furnished; **[¶¶ 4, 6-7]**
(6) in all other cases than that set forth in clause (5) of this section, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof;
(7) the amount or sum claimed to be due; and **[¶ 9]**
(8) such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them. **[¶ 5]**

statement of the kind and character of the labor or materials furnished[,]" along with the other requirements of 49 P.S. § 1503, all of which BCC included. *Compare* § 1503(5) (emphasis added) *with* § 1503(6) ("*detailed* statement of the kind and character of the labor or materials furnished[] . . . and [their] prices") (emphasis added). *See* fn. 9 of this Opinion, *supra*, for **bracketed references [ ]** where such information is found in the *Statement of Mechanics' Lien*. Thus, BCC's lien claim and *Complaint* are sufficiently specific to give Shippensburg fair notice of BCC's mechanics' lien claim and the material facts supporting it. *See Carlson v. Community Ambulance Services, Inc.*, 824 A.2d 1228, 1232 (Pa. Super. Ct. 2003) (citing *Yacoub v. Lehigh Valley* Medical, 805 A.2d 579, 588 (Pa. Super. Ct. 2002)).

Therefore, Count II of Shippensburg's Preliminary Objections are **OVERRULED**.

B. Legal Insufficiency of a Pleading

A party may file preliminary objections for "legal insufficiency of a pleading (demurrer)[.]" Pa. R.C.P. No. 1028(a)(4). The Court's standard of review is as follows:

> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

American Interior Construction & Blinds Inc. v. Benjamin's Desk, LLC, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing *Khawaja v. RE/MAX Central*, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)). In addition, the Court need not accept—"legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[]"—as true. *C.S. v. Commonwealth Dep't of Human Services, Bureau of Hearings and Appeals*, 184 A.3d 600, (Pa. Commw. Ct. 2018) (citing *Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)). The Court is limited to an examination of the "averments in the complaint, together with the documents and exhibits attached thereto . . . in order to evaluate the sufficiency of the facts averred." *Denlinger, Inc. v. Agresta*, 714 A.2d

1048, 1050 (Pa. Super. Ct. 1998).[10]

Thus, the issue before the Court is whether BCC's *Statement of Mechanics' Lien* and *Complaint*, have, on their face, "failed to assert a cause of action as a matter of law." *In re Estate of Jordan*, 650 A.2d 895, 899 (Pa. Super. Ct. 1994). Shippensburg has limited its challenge[11] to the purported *res judicata* or collateral estoppel effect of the Arbitration on the mechanics' lien.[12]

a. The Mechanics' Lien[13]

There are two fundamental bases for a lien filed by a contractor under the Mechanics' Lien Law, 49 P.S. § 1101 *et seq*. One, a contract (express or implied) between the contractor and the owner of property for, in brief, the improvement of property, the furnishing of labor, or the supplying of materials.[14] 49 P.S. § 1201. Two, an underlying (unpaid) debt "due by the owner to the contractor . . . for labor or materials furnished in the erection or construction, or the alteration or repair of the improvement" that exceeds $500.00. 49 P.S. § 1301(a). *See Murray v. Zemon*, 167 A.2d 253, 255 (Pa. 1960) (stating that lien arises from debt, not act, of, furnishing labor and materials) (citing *Horn & Brannen Mfg. Co. v. Steelman*, 64 A. 409, 410 (Pa. 1906)). The intent of the Mechanics' Lien Law is to "protect the prepayment of labor and materials that a contractor invests in another's property by allowing the contractor to obtain a lien interest in the property involved." *Matternas v. Stehman*, 642 A.2d 1120, 1124 (Pa. Super Ct. 1994). Thus, a mechanics' lien is limited to the amount still due for labor and materials a contractor expended pursuant to a contract. *See Artsmith Dev. Grp.*, 868 A.2d 495, 496-97 (Pa. Super. Ct. 2005).

Here, it is *not* "clear and free from doubt that" BCC will be "unable

10 In addition, the Court may consider those matters that the Court previously found it could consider (i.e., the Agreement and fact that some contract existed between BCC and Shippensburg). *See* fn. 2-3 of this Opinion, *supra* .

11 Notwithstanding the challenges the Court addressed in Section A. of this Opinion, *supra*.

12 *Res judicata* and collateral estoppel are affirmative defenses that typically must be responsively pleaded as new matter pursuant to Pa.R.C.P. No. 1030(a), and not as preliminary objections. *Weinar v. Lex*, 176 A.2d 907, 926 (Pa. Super. Ct. 2017). However, two exceptions to this requirement are when either: a complaint makes reference to the prior proceeding and "contains facts and issues pleaded by the prior action," or the plaintiff fails to raise the procedural defect in her own preliminary objection (to the purportedly improper preliminary objection). *Duquesne Slag Products Co. v. Lench*, 415 A.2d 53, 54 (Pa. 1980) (second exception); *Del Turco v. Peoples Sav. Ass'n*, 478 A.2d 456, 461 (Pa. Super. Ct. 1984) (first exception). Because BCC did not file its own preliminary objections (nor raise the procedural defect), the Court finds that BCC has waived any claim that Shippensburg improperly raised these defenses. *See Lench*, 415 A.2d at 54. Thus, the Court "may entertain the merits of [these] affirmative defenses[.]" *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1167 (Pa. Commw. Ct. 2013), to the extent it reviews them pursuant to its standard of review. *See also* Pa.R.C.P. No. 1032(a) (waiver of objection not presented).

13 Shippensburg does not challenge BCC's mechanics' lien for lack of conformity to the Mechanics' Lien Law. *See* 49 P.S. § 1505 (Procedure for contesting claim; preliminary objections). Accordingly, the Court will limit its discussion and analysis, here, before addressing the preclusion matter(s).

14 Contractor, owner, property, improvement, labor, and material are all defined terms under 49 P.S. § 1201, and are used as such by the Court.

to prove facts legally sufficient to establish [its] right to relief[]" for its lien claim. BCC, a contractor, entered into a contract with Shippensburg, the Premises owner, for an agreed sum for labor and materials furnished to the Premises. BCC alleges that there is a $76,707.48 debt from that labor and materials that Shippensburg has failed to pay. Shippensburg has not argued that BCC's lien is satisfied because of payment (nor could it because no payment was ever made).[15] Therefore, subject to the preclusion issue, BCC has established a mechanics' lien claim sufficient to withstand a demurrer.

b. The Agreement & Arbitration, *Res Judicata*, and Collateral Estoppel

The Court first addresses the Arbitration before turning to the doctrines of *res judicata* and collateral estoppel.

i. The Agreement & Arbitration

The Arbitration was an arbitration at common law, and not statutory, because Section 12.4 of the Agreement provided that the arbitration would be under the "current Construction Industry Arbitration Rules of the AAA" (unless the parties agreed to otherwise) and did not reference Pennsylvania's Uniform Arbitration Act. *See* 42 Pa.C.S. § 7302(a); *Gwin Engineers, Inc. v. Cricket Club Estates Dev. Grp.*, 555 A.2d 1328, 1329 (Pa. Super. Ct. 1989) (citing *Runewicz v. Keystone Ins. Co.*, 383 A.2d 189, 460-61 (Pa. 1978)). In a common law arbitration, the "'arbitrators are the final judges of both law and fact, and an arbitration award is not subject to a reversal for a mistake of either.'" *U.S. Spaces, Inc. v. Berkshire Hathaway Home Services, Fox & Roach*, 165 A.3d 931, 934 (Pa. Super. Ct. 2017) (quoting *McKenna v. Sosso*, 745 A.2d 1, 4 (Pa. Super. Ct. 1999)). An arbitration award, generally, may not be vacated or modified and is therefore, binding on the parties. *See U.S. Spaces, Inc.*, 165 A.3d at 934.

Courts resort to the rules of contractual construction to construe arbitration agreements. *Muse v. Cermak*, 630 A.2d 891, 893 (Pa. Super. Ct. 1993) (citations omitted). A court "will not rewrite the contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words." *Id*. (quoting *Lindstrom v. Pennswood Village*, 612 A.2d 1048, 1051 (Pa. Super. Ct. 1992). An interpretation giving effect to all of a contract's provisions is the preferred interpretation. *Id*. at 893 n.2 (citing *Emlenton Area Mun. Authority v. Miles*, 548 A.2d 623, 626 (Pa. Super. Ct. 1988)).

Here, neither party has argued that the Arbitration Award should be vacated or modified, nor has any party made an application to the Court to enter an order confirming it pursuant to 42 Pa.C.S. § 7342. The Agreement additionally provides that the arbitration will be "binding" on the parties

15 *See also* 49 P.S. § 1510, Discharge of lien or reduction of lien.

with the respect to the *matters submitted*. Shippensburg argues that BCC's mechanics' lien claim is necessarily included in that. BCC disagrees.

The Court agrees with BCC. That is, the issue is not "free and clear from doubt." First, Section 12.6 (Lien Rights) of the Agreement between the parties unequivocally states "[n]othing in this article shall limit any rights or remedies not expressly waived by the Contractor that the Contract may have under lien laws." "[A]rticle" in this provision refers to Article 12, titled Dispute Mitigation and Resolution, which includes Section 12.4 (Binding Dispute Resolution). Section 12.4 provides that unresolved matters between the parties be submitted to a binding arbitration dispute resolution procedure. Taking Sections 12.4 and 12.6 at their plain and ordinary meaning while giving effect to both results in an interpretation that the Arbitration is binding for the matters submitted but preserves a contractor's lien rights that were not submitted (unless the contractor expressly waived them). The Court has not been directed to any express waiver of BCC's lien rights. Indeed, BCC contends that it has not waived such rights, and is pursuing them in the instant action. *See Weinar*, 176 A.2d at 926 ("While Weinar's . . . complaint described the underlying arbitration, it did not do so in a manner that made it 'clear and free from doubt' that the arbitration award barred Weinar's claims. Rather, it suggested that the claims are not barred.").

Second, the Court finds persuasive, to the extent that it is indicative of the claims actually considered in the Arbitration, the Arbitrator's refusal to modify its award, at Shippensburg's request, to read: "This Award is in full settlement of all claims submitted to this Arbitration, ***including any derivative lien claims by Claimant arising out of or related to the same contract involved in this Arbitration***." While the Arbitrator's refusal to modify is not itself conclusive on the issue, the refusal does offer some support for the contention that the Arbitrator did not consider BCC's mechanics' lien.

Third, the Arbitration concerned two projects, the Shippensburg Project and the Lakeville Project, both of which were performed pursuant to the Agreement and each project's respective amendments. As previously stated, the Court does not have any amendment between Shippensburg and BCC before it. Additionally, the Arbitration Award does not clearly distinguish the allocation of its award between the two projects. Therefore, the Court would have to "[s]urmise [or] conjecture" as to the terms of the amendment(s) or what the proper allocation between the two projects is to know what preclusive effect it might have, if any, on the instant action—this, the Court cannot do when ruling on preliminary objections. *See Schuykill Navy v. Langboard*, 728 A.2d 964, 968 (Pa. Super. Ct. 1999).

Thus, to the extent that the Arbitration is binding on the parties, the

Court cannot conclude it is "clear and free from doubt" that the Arbitrator considered a mechanics' lien claim in rendering his decision, and is therefore, in that respect, not binding between the parties under that analysis.

ii. *Res Judicata*

Res judicata, or claim preclusion, bars claims and issues that have been previously litigated. *Matternas*, 642 A.2d at 1123. The rule is that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties[,]" and thus, bars "a subsequent action involving the same claim, demand or cause of action." *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (quoting *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 832 n.2 (Pa. Super. Ct. 2008)). This includes claims that could have been litigated but were not. *Matternas*, 642 A.2d at 1125 (citing *Martin v. Poole*, 336 A.2d 363, 367 (Pa. Super. Ct. 1975)).

"The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." *Chada v. Chada*, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) (quoting *Hammel v. Hammel*, 636 A.2d 214, 218 (Pa. Super. Ct. 1994) (citations omitted)). *Compare Chada*, 756 A.2d at 43-44 (*res judicata* barred later purported fraud action seeking a constructive trust over farm because ultimate issue in previous equitable distribution action and current fraud action both concerned ownership in farm) *with Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013) (*res judicata* did not bar later replevin action seeking return of coal because ultimate issue in previous action concerned ownership of money in escrow account whereas replevin action concerned ownership of coal).

Typically, this inquiry takes the form of determining whether the former and current action, both, possess the following elements: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the capacity of the parties. *Goodall*, 72 A.3d at 689 (quoting *Stoeckinger*, 948 A.2d at 832).

A mechanics' lien is an *in rem* action that attaches to the subject property. *See* 49 P.S. § 1301(a); *Wyatt Inc. v. Citizens Bank of Pennsylvania*, 976 A.2d 557, 570 n.9 (Pa. Super. Ct. 2009). The lien is "not intended to settle the contractual obligations of the parties[]" that are distinct from the labor and materials debt. *See*, *e.g., Wyatt*, 976 A.2d at 570 ("A Mechanics' Lien is distinct from a breach of contract action seeking remedies pursuant to the [Contractors and Subcontractors Payment Act][.]"); *Artsmith*, 868 A.2d at 497 ("Items other than labor and materials are more properly sought in an action for breach of the construction contract[] . . . ."); *Matternas*, 642 A.2d at 1124 ("There is no right of lien for damages for breach of

contract."); *Halowich v. Amminiti*, 154 A.2d 406, 408 (Pa. Super. Ct. 1959) ("[A mechanics' lien] can be sustained 'only for work done or materials furnished, and not for unliquidated damages for breach of contract.'") (internal citation omitted)). Indeed, 49 P.S. § 1702 provides that "[n]othing in this act shall alter or affect the right of a claimant to proceed in any other manner for the collection of his debt." 49 P.S. § 1702. Therefore, courts describe a mechanics' lien as a "'concurrent and cumulative remedy'" that "'does not derogate from any other available remedies[.]'" *See*, *e.g., Matternas*, 642 A.2d at 1123-124 (internal citations omitted) (citing cases). Crucially, however, a plaintiff is limited, ultimately, to one satisfaction. *Wyatt*, 976 A.2d at 570 n.9; *Artsmith*, 868 A.2d at 497 n.1. That is, while "a plaintiff has the liberty to proceed against the property at the same time he resorts to personal action against the defendant[] . . . . the plaintiff cannot recover twice for the same loss." *Wyatt*, 676 A.2d at. 570 n.9.

Here, the Court finds that it cannot conclude it is "clear and free from doubt" that *res judicata* would bar BCC's instant action. The Court could not conclude in its analysis of the Agreement and the Arbitration that the Arbitrator even considered a mechanics' lien claim. If the Arbitrator did not, then this instant action would in no way be a re-litigation of a same claim. Additionally, without the benefit of, or evidence concerning, the contract between Shippensburg and BCC, the Court would be left to speculate, improperly, as to whether the "contractual rights," *Response in Opposition to Preliminary Objections*, page 8, allegedly decided in the Arbitration were distinct from the labor and materials debt which is the basis for BCC's mechanics' lien claim. Thus, the Court finds that there is doubt whether the identities of the cause of action element of claim preclusion is met, recognizing that the question is that of the ultimate issue and not merely how a party chooses to categorize her cause of action. Moreover, the fact still remains that BCC has yet to be paid. The Mechanics' Lien Law clearly allows contractors the ability to pursue concurrent causes of action (but not duplicative relief). At this point of the litigation, putting BCC out of court at this point on a demurrer would severely undermine that precept when the issue is not "clear and free from doubt." *See* "[P]reliminary objections should be sustained only where the case is clear and doubtless." *Wendt & Sons v. New Hedstrom Corp.*, 858 A.2d 631, 632 (Pa. Super. Ct. 2004) (citations omitted).

iii. Collateral Estoppel

Collateral estoppel, or issue preclusion, differs from *res judicata* in that *res judicata* bars claims that were or *could have been litigated* in a prior proceeding whereas collateral estoppel bars only those issues *that were actually litigated*. *Matternas*, 642 A.2d at 1125. In addition, collateral

estoppel does not require the identities of the cause of action or parties in both the former and later cases. *Thompson v. Karastan Rug Mills* , 323 A.2d 341, 344 (Pa. Super. Ct. 1974).

Collateral estoppel applies if "(1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment." *Matternas*, 642 A.2d at 1125 (internal citation omitted) (citing *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (1989)).

Finally, collateral estoppel requires only that "a party be given a full and fair chance to litigate the issue." *Erisco Indus., Inc. v. W.C.A.B.*, 955 A.2d 1065, 1069 (Pa. Commw. Ct. 2008) (citing *Dep't of Transp. v. Martinelli*, 563 A.2d 973, 976-77 (Pa. Commw. Ct. 1989)). This means that "[t]he fact that more conclusive evidence might be presented at a subsequent hearing is neither sufficient nor relevant grounds for disallowing the application of the doctrine[.]" *Id*.

Here, the Court finds that it cannot conclude it is "clear and free from doubt" that collateral estoppel would bar the instant action, for much of the same reasons that supported the same as to *res judicata* as well as its analysis of the Agreement and Arbitration. That is, for the Court to find that collateral estoppel bars the instant action, the Court would have to find that BCC had a "full and fair chance to litigate the issue" or that the Arbitrator *actually decided* it. Admitting the material facts in the *Complaint* as true, and resolving doubt in the favor of sustaining preliminary objections, the Court cannot find that BCC, in the Arbitration, had a "chance" litigate the mechanics' lien claim or that Arbitrator did in fact decide it. While the true reason why the Arbitrator chose not to modify the Award, whatever that is, is beyond the knowledge of this Court, his refusal to do so creates doubt as to whether he actually considered the lien, especially considering the attendant circumstances already mentioned by the Court.

Thus, the Court finds that BCC has established a mechanics' lien claim sufficient to withstand a demurrer grounded on the purported preclusive effects of the Arbitration, *res judicata* or collateral estoppel.

Therefore, Count I of Shippensburg's Preliminary Objections are **OVERRULED**.

CONCLUSION

First, (A.) BCC's *Complaint* conforms to the Pennsylvania Rules of

Civil Procedure and is sufficiently specific to give Shippensburg fair notice of its mechanics' lien claim and the material facts supporting it. Second, (B.), at this point, it is not "clear and free from doubt that . . . [BCC] will be unable to prove facts legally sufficient to establish the right to relief[]" because of a preclusive bar of the Arbitration, *res judicata*, or collateral estoppel.

Therefore, Shippensburg's *Preliminary Objections* are **OVERRULED**.

Shippensburg has the right to plead over within twenty (20) days from the date of this Order and Opinion. Pa. R.C.P. No. 1028(d); *City of Philadelphia v. Berman*, 863 A.2d 156, 162 (Pa. Commw. Ct. 2004) ("The cases that have construed [Pa.R.C.P. No. 1028(d)] have held uniformly that a defendant's right to file an answer is absolute.") (citations and internal quotation marks omitted). An appropriate Order follows.

ORDER OF COURT

AND NOW THIS 24th day of October, 2019, upon review of Shippensburg DPP, LLC's ("Shippensburg") *Preliminary Objections in the Nature of a Motion to Strike Claimant's Complaint*, filed on May 28, 2019, the record, oral argument, and the applicable law,

THE COURT HEREBY ORDERS that Shippensburg's *Preliminary Objections* are **OVERRULED.** Shippensburg shall have **twenty (20) days from the date of this Order** to plead over and file a responsive pleading.

This Order is pursuant to the attached Opinion.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.