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# Commonwealth of Massachusetts

## SUPREME JUDICIAL COURT

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SJC No: DAR  
APPEALS COURT No.: 2017-P-0721

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CITY ELECTRIC SUPPLY COMPANY, D/B/A CONCORD ELECTRIC SUPPLY, LTD,  
PLAINTIFF/APPELLANT

Vs.

ARCH INSURANCE COMPANY,  
DEFENDANT/APPELLEE

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ON APPEAL FROM A DECISION OF THE NORFOLK SUPERIOR COURT  
[C.A. No. 1682-CV-01061]

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**APPLICATION OF PLAINTIFF-APPELLANT CITY ELECTRIC SUPPLY COMPANY  
FOR DIRECT APPELLATE REVIEW**

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*Attorney for Plaintiff-Appellant*

# I. REQUEST FOR DIRECT APPELLATE REVIEW

Plaintiff-Appellant City Electric Company d/b/a Concord Electric Supply, Ltd. ("CES") hereby requests, pursuant to G. L. c. 211A, § 10(A) and Mass. R. A. P. 11, direct appellate review by this Court of the Summary Judgment for Defendant, Arch Insurance Company, entered in the Norfolk County Superior Court (the "trial court") Civil Action No. 1682CV01061 on November 14, 2017. A certified copy of the Docket Report (the "Certified Docket") and copies of the trial court's Memorandum of Decision and Order on Defendant's Motion for Summary Judgment (the "Decision and Order") and Judgment of Dismissal Re: Arch Insurance Company (the "Judgment") are all attached hereto as parts of the Addendum. [Add. 24, 33, 39]

The trial court entered summary judgment for defendant, Arch Insurance Company ("Arch"), in CES's suit to enforce a lien bond under G. L. c. 254, § 14 (commonly referred to as a "target bond") for the sole reason that CES did not record a copy of the Complaint with the Registry of Deeds within thirty days of filing suit - a requirement that simply does not appear anywhere in G. L. c. 254, § 14, which governs suits on target bonds. G. L. c. 254, § 14. [Add. 55]

The question of whether Massachusetts law imposes any such requirement on a claimant enforcing a target bond is a matter of first impression in Massachusetts. The answer to this question will affect every current and future claimant whose Massachusetts mechanic's lien has or will be dissolved through the recording of a section fourteen target bond, as well as every surety and principal on those bonds and, therefore, there is a great public interest in obtaining clarity on this topic, so that current and future claimants may rest assured that they will be able to enforce the target bonds that guarantee the just amounts owed to them for labor and materials supplied on Massachusetts construction projects.<sup>1</sup> In light of the great public interest in this question, justice requires a final determination by the full Supreme Judicial Court.<sup>2</sup>

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<sup>1</sup> This Court has previously provided direct appellate review in cases comparable to this one. See NES Rentals v. Me. Drilling & Blasting, Inc., 465 Mass. 856, 857 (2013) (SJC transferred this case, interpreting G.L. c. 254, § 14, to this Court on its own motion); Tremont Tower Condo. LLC v. George B.H. Macomber Co., 436 Mass. 677 (2002) (SJC granted application for direct appellate review in mechanic's lien case, where, as here, lower court had read terms into statute that did not appear therein).

<sup>2</sup> The chief issue in this appeal, as framed above, is set forth in Section IV (Statement of the Issues), below, as the first numbered issue. The next two issues (Issue Nos. 2 and 3) are closely related to this chief issue and flow from it. The final two issues (Issue Nos. 4 and 5) stem from the fact that the trial court was clearly confused as to when the underlying mechanic's lien was dissolved and explicitly based its Decision and Order in favor of Arch on the indisputably erroneous assertion that the

## II. STATEMENT OF PRIOR PROCEEDINGS

On June 28, 2016, CES recorded a valid Notice of Contract \ with the Norfolk County Registry of Deeds showing an outstanding balance due to CES of \$283,056.54 from Michael Franciosi ("Franciosi") under a subcontract for materials provided for the construction of a hotel (the "Project") at 111 Boylston Street, Brookline, Massachusetts (the "Property"). See Decision and Order. [Add. 34] With the recording of the Notice of Contract, CES established its mechanic's lien on the property.

On July 14, 2016, pursuant to G. L. c. 254, § 14, the general contractor on the project, Tocci Building Corporation (as principal), and Arch (as surety) issued and recorded a document entitled Mechanic's Lien-Bond for Discharge, Bond No. SU1137323 (the "Arch Target Bond") with the Norfolk County Registry of Deeds. Decision and Order, 2. [Add. 34]; Complaint, ¶ 12. [Add. 42] The Arch Target Bond specifically targeted and dissolved CES's mechanic's lien,

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underlying mechanic's lien continued in force up to the thirty-first day after the commencement of the action to enforce the target bond. CES's mechanic's lien was, of course, dissolved immediately upon the recording of the target bond, which was substituted for the lien as security for CES's claim under the scheme prescribed in G. L. c. 254, § 14.

substituting the Arch Target Bond as security for CES' claim. Decision and Order, 2. [Add. 34]. See G. L. c. 254, § 14 (requiring that the section fourteen lien bond be "in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim ... " and providing that "[u]pon the recording of the bond, the lien shall be dissolved").

On August 16, 2016, CES timely filed a civil action pursuant to G. L. c. 254, § 14 in the Norfolk County Superior Court to enforce the Arch Target Bond. Certified Docket, 4 [Add. 27]; Complaint. [Add. 40] The Complaint did not assert a claim to enforce the lien upon the Property under M.G.L. c. 254, § 5, because the lien had been dissolved by the Arch Target Bond prior to the filing of the Complaint. Therefore, the civil action in the trial court was, from its inception, an action under G. L. c. 254, § 14, not § 5. Because the action was filed pursuant to G. L. c. 254, § 14, and because section fourteen (unlike section five) does not require recording of the complaint in the registry of deeds, CES did not record

an attested copy of the Complaint with the registry of deeds within thirty days of filing suit.<sup>3</sup>

Arch moved for summary judgment and attorneys' fees. Certified Docket, 5-6. [Add. 28-29] CES opposed Arch's Motion for Summary Judgment and Fees. Id. Superior Court Judge Beverly Cannone heard oral argument on Arch's motion on August 7, 2017. Id. at 6. [Add. 29]

On August 16, 2017, Judge Cannone issued the Decision and Order allowing Arch's Motion for Summary Judgment but denying Arch's Motion for Attorney's Fees. Decision and Order, 6. [Add. 38] Final judgment entered on behalf of Arch on November 14, 2017. Judgment. [Add. 39] CES timely appealed the Judgment. Certified Docket, 8. [Add. 31] The record has been compiled and transmitted. The appeal has been docketed, but briefs in the Appeals Court are not yet due.

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<sup>3</sup> On January 26, 2017, counsel for Arch contacted CES's predecessor counsel and claimed that the failure to record a copy of the Complaint defeated CES's claim. Decision and Order, 2. [Add. 34] While disagreeing with Arch's counsel's erroneous interpretation of the statute, CES recorded a copy of the complaint the following day, January 27, 2017, in an effort to avoid unnecessary litigation. See id.

### III. STATEMENT OF FACTS

CES supplied electrical materials for the construction of a Homewood Suites by Hilton hotel at the Property, pursuant to a subcontract with Franciosi. Decision and Order, 2. [Add. 34] Franciosi accepted the materials, but failed to make payment to CES, in breach of their agreement. Complaint ¶ 5. [Add. 41]

As already set forth above, CES then recorded its Notice of Contract on June 28, 2016. Decision and Order, 2. [Add. 34] On July 14, 2016, Arch issued and recorded the Arch Target Bond pursuant to M.G.L. c. 254, §14. Id. On August 17, 2016, CES filed its Complaint against Arch to enforce the Lien Bond pursuant to M.G.L. c. 254, §14. Id. Arch moved for summary judgment and CES opposed Arch's motion. Certified Docket, 5-6. [Add. 28-29] On August 16, 2017, the trial court allowed Arch's Motion for Summary Judgment. Decision and Order, 6. [Add. 38] CES timely appealed the entry of judgment for Arch. Certified Docket, 8. [Add. 31]

#### IV. STATEMENT OF THE ISSUES

The following issues were raised and preserved in the Superior Court and are ripe for Direct Appellate Review:

1. Whether Massachusetts law requires that a claimant under G. L. c. 254, § 14 record a copy of its complaint to enforce a target lien bond with the registry of deeds within thirty days of commencing the action, in spite of the fact that section fourteen contains no such requirement;
2. Whether the trial court erred in ordering that judgment enter on behalf of the defendant, Arch, because the plaintiff, CES, did not record an attested copy of the Complaint with the registry of deeds within thirty days of commencing its action to enforce a target lien bond under G. L. c. 254, § 14;
3. Whether the trial court erred in applying the requirement under G. L. c. 254, § 5 [Add. 49] that a claimant enforcing a mechanic's lien record a copy of its complaint within thirty days of commencing the action to CES's action under G. L. c. 254, § 14 to enforce a target lien bond and



ordering that judgment enter on behalf of Arch because CES did not comply with a requirement that applies only to a suit under section five;

4. Whether the trial court erred in finding that CES's mechanic's lien was not dissolved until the thirty-first day after CES commenced its action to enforce the target lien bond under G. L. c. 254, § 14, even though the target lien bond obviously had been recorded prior to the commencement of the action to enforce that bond and section fourteen specifically provides that the mechanic's lien is dissolved immediately upon the recording of the bond that is substituted for the lien;

5. Whether the trial court erred in ordering that judgment enter on behalf of Arch because of the trial court's erroneous finding that CES's mechanic's lien had been dissolved on the thirty-first day after CES commenced its action, when in fact CES's action was a suit on the target bond, not on the mechanic's lien, and the mechanic's lien had actually been dissolved immediately upon the recording of the target bond.

## V. ARGUMENT

### **A. Introduction**

As set forth above, on August 16, 2017, the trial court issued its Decision and Order allowing Arch's Motion for Summary Judgment. Decision and Order, 6. [Add. 38] In allowing Arch's Motion for Summary Judgment, the trial court actually acknowledged that G. L. c. 254, § 14 contains no requirement that the claimant record an attested copy of its complaint. Id. at 5. [Add. 37] Nonetheless, the trial court impermissibly imported the requirement to record a copy of the complaint from section five into section fourteen, thereby reading a new requirement into section fourteen that the Legislature chose not to include. Id. Massachusetts law does not require that a claimant on a target bond under G. L. c. 254, § 14 perform the meaningless exercise of recording a copy of its complaint to enforce the target bond with the registry of deeds. The plain language of section fourteen governs and, as the trial court acknowledged, section fourteen simply does not include any such requirement. See G. L. c. 254, § 14.

This Court should grant direct appellate review and reverse the trial court's summary judgment

decision for numerous reasons, in addition to the obvious reason that no such requirement appears in section fourteen. First, the trial court's holding, reading a new requirement into section fourteen that the Legislature did not include, violates virtually every applicable rule of statutory construction. Second, a review of the statutory history demonstrates that the Legislature's omission of a requirement to record a section fourteen complaint was certainly purposeful. Third, declining to read the trial court's added requirement into section fourteen preserves that section's logical statutory scheme and avoids the illogical results that the trial court's interpretation would produce. Finally, the trial court's Decision and Order demonstrates a fundamental misunderstanding of the interplay between a mechanic's lien and a target bond and bases its decision in favor of Arch on a glaringly incorrect legal finding, a clear and reversible error.

**B. The trial court's decision to read an additional requirement into G. L. c. 254, § 14, which does not appear anywhere in the section - even a requirement that is imported from another section of the same chapter - violates this Court's longstanding principles of statutory construction.**

The plain language of G. L. c. 254, § 14 is clear and unambiguous. It provides that the "claimant may enforce the [target] bond by a civil action . . . ." G. L. c. 254, § 14. Section fourteen also provides a specific deadline within which the claimant must file the civil action. Id. Nowhere does section fourteen require that the claimant record a copy of the complaint with the registry of deeds. Id.

Reading this requirement into section fourteen violates numerous, established principles of statutory construction in Massachusetts. In 2004, this Court considered an Appeals Court ruling that read an entitlement to attorney's fees and costs into the mechanic's lien law. This Court reversed the Appeals Court, stating that "[s]tatutory language is the primary source of legislative intent." Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co., 440 Mass. 723, 727 (2004) citing Hoffman v. Howmedica, Inc., 373 Mass. 32, 37 (1977). This Court continued, "[w]here the language is plain and unambiguous, it is conclusive of the Legislature's purpose." Id. citing Pyle v. School Comm. Of S. Hadley, 423 Mass. 283, 285 (1996).

This Court also made clear that, as here, an omission in a statute can be just as clear and

unambiguous -- and just as conclusive -- as explicit language. See Id. quoting General Elec. Co. v. Department of Env'tl. Protection, 429 Mass. 798, 803 quoting King v. Viscoloid Co., 219 Mass. 420, 425 (1914) ("We do not 'read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose'"). See also Modern Continental Constr. Co. v. Lowell, 391 Mass. 829, 839-40 (1984) citing Pacella v. Metropolitan Dist. Comm'n, 339 Mass. 338, 342 (1959) ("[S]tatutes must be interpreted as enacted and statutory omissions cannot be supplied by the court"); Pacella, 339 Mass. at 346 ("It is not for [the courts] ... to impose rigid standards and requirements which the Legislature has not seen fit clearly to impose ... and which the legislative history suggests may have been intentionally omitted"); NES Rentals v. Me. Drilling & Blasting, Inc., 465 Mass. 856, 857 (2013) quoting Leary v. Contributory Retirement Appeal Bd., 421 Mass. 344, 348 (1995) ("where the statute is detailed and precise, we regard [an] omission as purposeful"). By reading a requirement into the statute that does not exist in the plain language of the section, the trial court violated this Court's

long-established precedent as to statutory construction.

The fact that the trial court imported a requirement from another section of chapter 254 (addressing an entirely different situation) does not save the trial court's impermissible interpretation. "Where language in certain provisions is noticeably absent from other provisions of the same statute, such as here, we have consistently held that 'the language should not be implied where it is not present.'" Id. at 728, citing Hallett v. Contributory Retirement Appeal Bd., 431 Mass. 66, 69 (2000) quoting First Nat'l Bank v. Judge Baker Guidance Ctr., 13 Mass.App.Ct. 144, 153 (1982). "[W]here the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." Id. quoting 2A N. Singer, Sutherland Statutory Construction §46:06, at 194 (6<sup>th</sup> ed. 2000).

**C. The legislative history of G. L. c. 254 establishes definitively that the lack of any requirement to record a complaint under section fourteen with the registry of deeds was purposeful.**

From 1915 to 1972, the mechanic's lien statute provided for only two enforcement actions, the first to enforce a mechanic's lien under what is now section

five and the second to enforce a blanket lien bond under what is now section twelve [Add. 51]. 1915 Mass. Acts ch. 292, §§ 4 and 9 (pp. 347-350). [Add. 60-63] The language creating both actions contained then, as it does now, the requirement that the complaint (then referred to as the subpoena) be recorded at the registry of deeds. Id. The target lien bond also existed in 1915, but an action to enforce it did not. Id. at § 11 (p. 351). [Add. 64] Instead, the target bond could only be obtained after suit on the mechanic's lien was filed under present-day section 5. Id. Therefore, the target lien bond could only be enforced through an existing action to enforce the underlying mechanic's lien. Id.

In 1972, the legislature rewrote both section twelve and section fourteen. 1972 Mass. Acts ch. 774, §§ 9 and 10 (pp. 718-20). [Add. 71-73] In so doing, the legislature retained the action to enforce a blanket lien bond under section twelve, along with that section's requirement that the subpoena (complaint) be recorded at the registry of deeds. Id. at § 9 (p. 720). [Add. 73] In the very next section of that same act (section ten), the legislature provided that a target lien bond could be obtained and

recorded outside of the context of a lien foreclosure suit, created a new action to enforce that target lien bond, yet included no requirement that a copy of the complaint be recorded in the registry of deeds.

Therefore, in two consecutive sections of the 1972 Act, the Legislature rewrote section twelve and section fourteen, providing for an action to enforce a bond (blanket bond in section twelve, target bond in section fourteen), but requiring recording of the complaint only in section twelve and not in section fourteen. There can be no doubt that the legislature's omission of a requirement to record the complaint on a target bond was entirely purposeful and this Court should decline to read a provision into section fourteen that the Legislature deliberately chose to omit.

**D. CES's adherence to the plain language of the statute produces a logical result, while the trial court's interpretation, reading a requirement into the statute where none exists, results in an illogical statutory scenario.**

Another longstanding principle of statutory construction in Massachusetts is that statutory interpretations that lead to illogical results are disfavored. See Trace Constr. Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346, 357 (2011)



("Whatever the rationale, we will give effect to the plain meaning of the text where, as here, the chosen language does not produce an illogical result"). See also Sullivan v. Brookline, 435 Mass. 353, 360 (2001) ("A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result").

Reading section fourteen consistent with its plain language results in a logical statutory scheme for the enforcement of a target lien bond, where the target bond itself provides all the information that a title researcher would need to determine the status of the lien - i.e. that the lien is dissolved due to the target bond and the property unencumbered by that lien. To the contrary, the trial court's reading of chapter 254, requiring that complaints to enforce target bonds be recorded at the registry of deeds, would result in entirely superfluous filings that would provide title researchers with no relevant information regarding the status of title of a particular property. See NES Rentals v. Me. Drilling & Blasting, Inc., 465 Mass. 856, 869 (2013) ("Once a

bond is recorded in accordance with §14, the lien is dissolved on the record, and any concern about uncertainty of title arising from that lien is eliminated").

Furthermore, the provisions of section five do not correspond with the situation under section fourteen, producing another illogical result. The consequence of failing to timely record a copy of the complaint under section five is that the lien is dissolved. G. L. c. 254, § 5. By the time an action has been instituted under section fourteen, the lien has already necessarily been dissolved by operation of the target bond. G. L. c. 254, § 14. Therefore, the trial court has either imported a toothless requirement into section fourteen or the courts must impermissibly make up their own consequences in the context of section fourteen.

**E. The trial court's legal findings, on which its Decision and Order rests, are indisputably incorrect and constitute reversible error.**

At the very beginning of its Decision and Order, the trial court set forth its findings, holding that "by law, because CES failed to record an attested copy of the Complaint in the Registry of Deeds within 30 days of filing the Complaint, CES's mechanic's lien

was dissolved on the 31st day (after it filed the Complaint) and judgment must therefore be entered in favor of the defendant, Arch" (emphasis added).

Decision and Order, 1-2. [Add. 33-34] This finding is trial court's stated basis for entering judgment on behalf of Arch, and it is indisputably incorrect.

CES's mechanic's lien had already been dissolved by the recording of the Arch Target Bond. See G. L. c. 254, § 14. Far from defeating CES's claim, the dissolution of CES's mechanic's lien and substitution of the Arch Target Bond in its place was, under the statutory scheme set forth in section fourteen, a necessary precedent to the action to enforce the target bond. See Id. The trial court based its dismissal of CES's suit on a fundamental misunderstanding of the operation of the mechanic's lien law, and particularly the target bond section.

## VI. WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

As set forth in the Request for Direct Appellate Review, above, the question of whether a claimant enforcing a target bond is required to record a copy of its complaint to enforce the bond in the registry of deeds is a question of first impression.

Furthermore, allowing the trial court's decision to stand would create a new requirement for target bond claimants that appears nowhere in the relevant section. Reading unnecessary hurdles into the statute subverts the primary purpose of chapter 254, which is "to provide security to contractors, subcontractors, laborers, and suppliers for the value of their services and goods provided for improving the owner's real estate ... ." NES Rentals, 465 Mass. at 860 quoting Hammill-McCormick Assocs., Inc. v. New England Tel. & Tel. Co., 399 Mass. 541, 542-543 (1987). Allowing the trial court's decision to stand will not only wipe out CES's security on a \$283,000 debt, but will imperil the security of untold other claimants relying on target bonds to get paid. As such, this is question of such public interest that justice requires

a final determination by the full Supreme Judicial  
Court.

Respectfully submitted,  
Plaintiff-Appellant,  
City Electric Company d/b/a Concord  
Electric Supply, Ltd.

/s/ Thomas E. Day

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CERTIFICATE OF COMPLIANCE  
PURSUANT TO RULE 16(K) OF THE  
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Thomas E. Day, Esq., hereby certify that the foregoing Application for Direct Appellate Review complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass.R.A.P.11 Direct Appellate Review;

Mass.R.A.P.16(a)(6) (pertinent findings or memorandum of decision);

Mass.R.A.P.16(e) (references to the record);

Mass.R.A.P.16(f) (reproduction of statutes, rules, regulations;

Mass.R.A.P.(16)(h) (length of briefs);

Mass.R.A.P.18 (appendix to the briefs); and

Mass.R.A.P.20 (form of briefs, appendices and other papers).

For the Plaintiff-Appellant,

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**APPELLANT'S AFFIDAVIT OF SERVICE PURSUANT TO  
RULE 13(d)**

Pursuant to Rule 13(d) of the Massachusetts Rules of Appellate Procedure, I, Thomas E. Day, do hereby attest under the pains and penalties of perjury that the day of filing was within the time fixed for filing, as I electronically filed Plaintiff-Appellant's Application for Direct Appellate Review with the Clerk of the Supreme Judicial Court, and that a copy of same will be automatically sent to the Clerk of the Massachusetts Appeals Court; and that I further certify that a copy of the foregoing document has been mailed and e-mailed to the following counsel:

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**ADDENDUM**

Norfolk County Superior Court Certified Copy of Docket Report	Add. 24
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1972 Mass. Acts ch. 774	Add. 65





**COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
Docket Report**

**1682CV01061 City Electric Supply Company d/b/a Concord Electric Supply, LTD vs. Michael Franciosi  
Doing Business as Electrical Professionals et al**

<b>CASE TYPE:</b>	Contract / Business Cases	<b>FILE DATE:</b>	08/17/2016
<b>ACTION CODE:</b>	A02	<b>CASE TRACK:</b>	F - Fast Track
<b>DESCRIPTION:</b>	Goods Sold and Delivered		
<b>CASE DISPOSITION DATE</b>	11/14/2017	<b>CASE STATUS:</b>	Open
<b>CASE DISPOSITION:</b>	Judgment after Finding on Motion	<b>STATUS DATE:</b>	08/17/2016
<b>CASE JUDGE:</b>		<b>CASE SESSION:</b>	Civil B

**LINKED CASE**

**DCM TRACK**

Tickler Description	Due Date	Completion Date
Service	11/15/2016	10/21/2016
Rule 12/19/20 Served By	12/15/2016	11/14/2017
Rule 15 Served By	12/15/2016	11/14/2017
Answer	12/15/2016	
Rule 15 Filed By	01/17/2017	11/14/2017
Rule 12/19/20 Filed By	01/17/2017	11/14/2017
Rule 12/19/20 Heard By	02/13/2017	11/14/2017
Rule 15 Heard By	02/13/2017	11/14/2017
Discovery	06/13/2017	11/14/2017
Rule 56 Served By	07/13/2017	11/14/2017
Rule 56 Filed By	08/14/2017	11/14/2017
Under Advisement	09/06/2017	10/27/2017
Final Pre-Trial Conference	12/11/2017	11/14/2017
Under Advisement	01/19/2018	12/21/2017
Appeal - No Transcript	02/06/2018	05/03/2018
Judgment	08/17/2018	11/14/2017

**PARTIES**

<b>Plaintiff</b> City Electric Supply Company d/b/a Concord Electric Supply, LTD	<b>Private Counsel</b> Thomas E Day Egan Flanagan And Cohen PC Egan Flanagan And Cohen PC 67 Market St PO Box 9035 Springfield, MA 01102-9035 Work Phone (413) 737-0260 Added Date: 02/02/2018	<b>655409</b>
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COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
Docket Report

<b>Defendant</b> Arch Insurance Company	<b>Private Counsel</b> John W DiNicola DiNicola, Seligson & Upton, LLP DiNicola, Seligson & Upton, LLP 6 Beacon St Suite 700 Boston, MA 02108 Work Phone (617) 279-2592 Added Date: 02/21/2017	<b>629618</b>
<b>Defendant</b> Michael Franciosi Doing Business as Electrical Professionals 24 Castle Street Leominster, MA 01453	Robert F Casey Robert F. Casey, Jr., PC Robert F. Casey, Jr., PC 249 Ayer Rd Suite 102 Harvard, MA 01451 Work Phone (978) 772-2223 Added Date: 11/14/2017	<b>077700</b>

## PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date

## EVENTS

Date	Session	Event	Result	Resulting Judge
08/07/2017	Civil B	Rule 56 Hearing	Held - Under advisement Held as Scheduled	Cannone Cannone
10/23/2017	Civil B	Damage Assessment Hearing	Held as Scheduled	Connors
12/20/2017	Civil B	Motion Hearing	Not Held	Delaney
12/20/2017	Civil D / VC	Motion Hearing	Held as Scheduled Held - Under advisement	Buckley Buckley



COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
Docket Report

FINANCIAL DETAILS					
Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
08/17/2016	Civil Filing Fee (per Plaintiff) Receipt: 4719 Date: 08/17/2016	240.00	240.00	0.00	0.00
08/17/2016	Civil Security Fee (G.L. c. 262, § 4A) Receipt: 4719 Date: 08/17/2016	20.00	20.00	0.00	0.00
08/17/2016	Civil Surcharge (G.L. c. 262, § 4C) Receipt: 4719 Date: 08/17/2016	15.00	15.00	0.00	0.00
<b>Total</b>		<b>275.00</b>	<b>275.00</b>	<b>0.00</b>	<b>0.00</b>

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
<b>Total</b>				



COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
Docket Report

**INFORMATIONAL DOCKET ENTRIES**

Date	Ref	Description	Judge
08/17/2016		Attorney appearance On this date Jessica Estelle Murphy, Esq. added as Private Counsel for Plaintiff City Electric Supply Company	
08/17/2016		Case assigned to: DCM Track F - Fast Track was added on 08/17/2016 (SENT TO ATTORNEY)	
08/17/2016	1	Original civil complaint filed.	
08/17/2016	2	Civil action cover sheet filed.	
08/24/2016		One Trial case reviewed by Clerk, case to remain in the Superior Court.	Hickey
09/19/2016	3	Service Returned for Defendant Michael Franciosi Doing Business as Electrical Professionals: Service made at last and usual-served 9/6/16(re'cd9/16/16)	
09/19/2016	4	Service Returned for Defendant Arch Insurance Company: Service via certified mail-9/6/16(re'cd9/16/16)	
09/23/2016	5	Received from Defendant Arch Insurance Company: Answer to original complaint;	
09/23/2016		Attorney appearance On this date M. Brangwynne, Esq. added as Private Counsel for Defendant Arch Insurance Company	
10/18/2016	6	Affidavit of service on Arch Insurance (RE:P#4.0, original return of service). (rec'd 10/17/16)	
10/21/2016	7	City Electric Supply Company Doing Business as Concord Electric Supply LTD's request for Default 55(a) (rec'd 10/20/16)  Applies To: Michael Franciosi Doing Business as Electrical Professionals (Defendant)	
10/21/2016	8	Entered as to: Defendant Michael Franciosi Doing Business as Electrical Professionals: Defaulted by 55(a) request;	
10/21/2016		Document: A Default order Mass. R. Civ. P. 55(a) was generated and sent to: Attorney: Jessica Estelle Murphy, Esq. Defendant: Michael Franciosi Attorney: M. Brangwynne, Esq.	
11/02/2016		Pleading titled, Defendant's Answer and suggestion of Bankruptcy, filed with the court on 11/02/2016, returned to Michael Franciosi Doing Business as Electrical Professionals A default was entered on 10/21/2016 for failure to answer. A 9A motion to vacate default needs to be filed and allowed	



COMMONWEALTH OF MASSACHUSETTS  
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11/25/2016	9	City Electric Supply Comany Doing Business as Concord Electric Supply LTD's request for Default JUDGMENT 55(b)(1) (rec'd 11/22/16)
		Applies To: Michael Franciosi Doing Business as Electrical Professionals (Defendant)
11/25/2016	9.1	Affidavit filed by Plaintiff City Electric Supply Comany Doing Business as Concord Electric Supply LTD in support of (rec'd 11/22/16)
		Applies To: Murphy, Esq., Jessica Estelle (Attorney) on behalf of City Electric Supply Comany Doing Business as Concord Electric Supply LTD (Plaintiff)
02/01/2017	10	Plaintiff City Electric Supply Comany Doing Business as Concord Electric Supply LTD's Motion for assessment of damages and Request for Entry of Separate and Final Judgment against Michal Franciosi (Rec'd. 1/30/2017)
02/01/2017	10.1	Affidavit of Marc Mylonakis, credit Manager, City Electric Supply Company d/b/a
02/01/2017	10.2	Affidavit of Jessica E. Murphy, Esq.
02/21/2017		Attorney appearance On this date Michael E. Brangwynne, Esq. dismissed/withdrawn as Private Counsel for Defendant Arch Insurance Company
02/21/2017		Attorney appearance On this date John W. DiNicola, II, Esq. added as Private Counsel for Defendant Arch Insurance Company
03/06/2017	11	Defendant Arch Insurance Company's Motion for summary judgment, MRCP 56 (rec'd3/2/17)
03/06/2017	11.1	Arch Insurance Company's Memorandum in support of motion for summary judgment (rec'd3/2/17)
03/06/2017	11.2	Affidavit of John W. DiNicola II, Esq (re'cd3/2/17)
03/06/2017	11.3	Opposition to p#11.0 defendant Arch Insurance Company's motion for summary judgment filed by City Electric Supply Comany Doing Business as Concord Electric Supply LTD (rec'd3/2/17)
03/06/2017	11.4	Defendant Arch Insurance Company's Joint Statement of material facts (re'c d3/2/17)
03/06/2017	11.5	Joint appendix for Summary Judgment motion package filed.  (rec'd3/2/17)
03/06/2017	11.6	Affidavit of compliance with Superior Court Rule 9A (rec 'cd3/2/17)
		Applies To: DiNicola, II, Esq., John W. (Attorney) on behalf of Arch Insurance Company (Defendant)



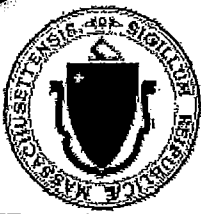
COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
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03/06/2017	11.7	Rule 9A list of documents filed.  (rec'd3/2/17)  Applies To: DiNicola, II, Esq., John W. (Attorney) on behalf of Arch Insurance Company (Defendant)	
03/06/2017	11.8	Rule 9A notice of filing  (rec'd3/2/17)  Applies To: DiNicola, II, Esq., John W. (Attorney) on behalf of Arch Insurance Company (Defendant)	
03/29/2017	12	Affidavit of compliance with Superior Court Rule 9A of No Opposition(rec'd3/27/17)  Applies To: Murphy, Esq., Jessica Estelle (Attorney) on behalf of City Electric Supply Comany Doing Business as Concord Electric Supply LTD (Plaintiff)	
04/26/2017		Endorsement on Motion for Assessment of Damages (#10.0): No Action Taken on Assessment of Damages pending a hearing on co-defendant, Arch Insurance Company's Summary Judgment motion. (dated 4/24/17) notice sent dl	Locke
07/10/2017	13	The following form was generated:  Notice to Appear for hearing on August 7,2017 at 2:00pm before Judge Cannone regarding (p#11.0) Defendant Arch Ins Co's motion for summary judgment Sent On: 07/10/2017 13:55:07	
08/07/2017		Matter taken under advisement The following event: Rule 56 Hearing scheduled for 08/07/2017 02:00 PM has been resulted as follows: Result: The hearing of p.#11.0 Deft Arch Insurance Company's Motion For Summary Judgment was conducted before the court, Cannone, J., and taken under advisement.	Cannone
08/18/2017		Endorsement on Motion for summary judgment, MRCP 56 (#11.0): After hearing, motion ALLOWED Arch Insurance Company's Motion for Attorney's Fees is DENIED. See Memorandum of Decision and Order of this date. (dated 8/16/17) notice sent dl	Cannone
08/18/2017	14	MEMORANDUM & ORDER:  and Decision on Defendant's Motion for Summary Judgment (dated 8/16/17) copy sent dl	Cannone
09/25/2017	15	ORDER: Notice sent for Assessment of Damages hearing on Monday, October 23, 2017, Judge Connors Presiding, Court Room 3 at 2:00 PM	Connors
10/17/2017	16	Affidavit of Jessica E. Murphy, Esq., pursuant to M.R.C.P 55(b)(2) (received 10/16/2017)	
10/17/2017	17	Affidavit of (SECOND) Marc Mylonakis (received 10/16/2017)	



COMMONWEALTH OF MASSACHUSETTS  
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10/23/2017		Event Result: Judge: Connors, Hon. Thomas A The following event: Damage Assessment Hearing scheduled for 10/23/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	Connors
11/14/2017		Attorney appearance On this date Robert F Casey, Jr., Esq. added for Defendant Michael Franciosi Doing Business as Electrical Professionals	
11/14/2017	18	Plaintiff, Defendant City Electric Supply Comany Doing Business as Concord Electric Supply LTD, Michael Franciosi Doing Business as Electrical Professionals's Joint Motion to Vacate Default (Rec. 11/13/2017)	
11/14/2017		Endorsement on Motion to remove Default as to defendant Michael Franciosi dba (#18.0): ALLOWED by assent. cs  Judge: Connors, Hon. Thomas A	Connors
11/14/2017	19	Party(s) file Agreement for Judgment Re: Defendant Michael Franciosi d/b/a Electrical Professionals  Applies To: Michael Franciosi Doing Business as Electrical Professionals (Defendant)	
11/14/2017	20	SUMMARY JUDGMENT for Defendant(s), Arch Insurance Company against Plaintiff(s), City Electric Supply Company d/b/a Concord Electric Supply, LTD, without statutory costs. It is ORDERED and ADJUDGED: that the complaint of the plaintiff City Electric Supply Company d/b/a Concord Electric Supply, Ltd against Defendant Arch Insurance Company be Dismissed. cs  Judge: Cannone, Hon. Beverly J	Cannone
11/14/2017		Disposed for statistical purposes	
12/07/2017	21	Plaintiff City Electric Supply Company d/b/a Concord Electric Supply, LTD's EMERGENCY Motion to Withdraw as Counsel for Plaintiff and to Extend Time for Filing Notice for Appeal (ATTORNEY'S MOTION)	
12/08/2017	22	Plaintiff City Electric Supply Company d/b/a Concord Electric Supply, LTD's Response to P#21.0 Emergency Motion to Withdraw as Counsel for Plaintiff and to Extend Time for Filing Notice for Appeal (FAX) (rec'd 12/7/17)	
12/11/2017	23	Opposition to Mirick O'Connell's Motion to Withdraw as counsel and to extend time to file Notice for Appeal filed by (faxed copy)  Applies To: Arch Insurance Company (Defendant)	
12/14/2017		Endorsement on Motion to withdraw as counsel and extend time for filing notice of appeal (#21.0): Other action taken The deadline in which to file a Notice of Appeal is stayed, pending a hearing on this motion (:#21.0). A hearing on this motion shall be held on Wednesday, December 20, 2017 at 2:00 p.m. (dated 12/8/17) notice sent dl  Judge: Connors, Hon. Thomas A	Connors



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12/18/2017	24	General correspondence regarding Original of p#22.0 Response from City Electric to motion to withdraw as counsel(re'cd 12/8/17)	
12/20/2017		Matter taken under advisement Judge: Buckley, Hon. Elaine M The following event: Motion Hearing scheduled for 12/20/2017 02:00 PM has been resulted as follows: Result: Held - Under advisement	Buckl�y
12/21/2017		General correspondence regarding Affidavit of John O. Mirick, Esq., Submitted for In Camera Review returned by mail to attorney Mirick. jph3, a.c.	
12/22/2017		Endorsement on Motion to withdraw as counsel and extend time to file appeal - After hearing (#21.0): ALLOWED See separate Order of this date. (dated 12/21/17) notice sent dl  Judge: Buckley, Hon. Elaine M	Buckley
12/22/2017	25	ORDER: (dated 12/21/17) copy sent dl  Judge: Buckley, Hon. Elaine M	Buckley
12/22/2017	26	General correspondence regarding Original of P#24 - Arch's opposition to Mirick O'Connell's motion to withdraw as counsel (rec'd 12/13/17)	
01/11/2018	27	Notice of appeal filed as to judgment entered on November 14,2017  Applies To: City Electric Supply Company d/b/a Concord Electric Supply, LTD (Plaintiff)	
01/12/2018	28	Notice of appeal sent to  Applies To: DiNicola, II, Esq., John W (Attorney) on behalf of Arch Insurance Company (Defendant); Casey, Jr., Esq., Robert F (Attorney) on behalf of Michael Franciosi Doing Business as Electrical Professionals (Defendant); Murphy, Esq., Jessica Estelle (Attorney) on behalf of City Electric Supply Company d/b/a Concord Electric Supply, LTD (Plaintiff)	
01/23/2018	29	Notice to Court RE: NO transcript ordered and does not intend to order (received 1/19/2018)  Applies To: City Electric Supply Company d/b/a Concord Electric Supply, LTD (Plaintiff)	
02/02/2018		Attorney appearance On this date Thomas E Day, Esq. added as Private Counsel for Plaintiff City Electric Supply Company d/b/a Concord Electric Supply, LTD	
02/02/2018		Attorney appearance On this date Jessica Estelle Murphy, Esq. dismissed/withdrawn as Private Counsel for Plaintiff City Electric Supply Company d/b/a Concord Electric Supply, LTD	





COMMONWEALTH OF MASSACHUSETTS  
NORFOLK COUNTY  
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05/03/2018		Appeal: notice of assembly of record sent to Counsel
		Applies To: Day, Esq., Thomas E (Attorney) on behalf of City Electric Supply Company d/b/a Concord Electric Supply, LTD (Plaintiff); DiNicola, II, Esq., John W (Attorney) on behalf of Arch Insurance Company (Defendant); Casey, Jr., Esq., Robert F (Attorney) on behalf of Michael Franciosi Doing Business as Electrical Professionals (Defendant); Brangwynne, Esq., Michael E (Attorney) on behalf of Arch Insurance Company (Defendant)
05/03/2018	30	Notice to Clerk of the Appeals Court of Assembly of Record
05/03/2018	31	Appeal: Statement of the Case on Appeal (Cover Sheet).

I ATTEST THAT THIS DOCUMENT IS A  
CERTIFIED PHOTOCOPY OF AN ORIGINAL  
ON FILE.

*Cynthia A. Kramer*  
Deputy Assistant Clerk  
5/3/18

*Don't*

14

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 16-01061

CITY ELECTRIC SUPPLY COMPANY d/b/a CONCORD ELECTRIC SUPPLY, LTD.

vs.

MICHAEL FRANCIOSI d/b/a ELECTRICAL PROFESSIONALS and ARCH  
INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

The plaintiff, City Electric Supply Company d/b/a Concord Electric Supply, Ltd., (CES) supplied electrical materials that were used in the construction of the Homewood Suites by Hilton at 111 Boylston St., Brookline, Massachusetts. CES brought this action seeking payment for materials in the amount of \$283,056.54. The complaint included a claim against the defendant, Arch Insurance Company (Arch), to recover under the lien bond Arch issued pursuant to G. L. c. 254, § 14, to clear CES's mechanic's lien from the property.

The defendant, Arch, has moved for summary judgment alleging that plaintiff, CES, failed to comply with the Mechanic's Lien Law, G. L. c. 254. Arch argues that CES failed to record, or present for recording at the Registry of Deeds, an attested copy of the Complaint, within 30 days of commencement of the suit, as required by G. L. c. 254, § 5. CES argues that suit on a lien bond under G. L. c. 254, § 14, does not require an attested copy of the Complaint to be recorded and therefore Arch's motion should be denied. This court finds that by law, because CES failed to record an attested copy of the Complaint in the Registry of Deeds within 30 days

of filing the Complaint, CES's mechanic's lien was dissolved on the 31<sup>st</sup> day (after it filed the Complaint) and judgment must therefore be entered in favor of the defendant, Arch.

### **Background**

The following facts are undisputed and, where disputed, viewed in the light most favorable to the nonmoving party. See *Nelson v. Salem State College*, 446 Mass. 525, 535 (2006). CES supplied electrical materials for the construction of the Homewood Suites by Hilton at the property pursuant to a subcontract with Michael Franciosi. CES recorded a Notice of Contract pursuant to G. L. c. 254, § 4, with the Norfolk County Registry of Deeds on June 28, 2016, showing an outstanding balance due to CES of \$283,056.54 for materials provided to the property. Prior to CES filing a Statement of Account under G. L. c. 254, § 5, Arch issued and recorded a Mechanic's Lien - Bond for Discharge (lien bond) pursuant to G. L. c. 254, § 14. The lien bond specifically targeted and discharged CES's Notice of Contract.

On August 17, 2016, CES filed its Complaint against Arch under the lien bond. CES did not record an attested copy of the Complaint within 30 days of filing suit.

On January 26, 2017, counsel for Arch notified counsel for CES that because CES had failed to record an attested copy of the Complaint in the Norfolk County Registry of Deeds as required by G. L. c. 254, § 5, that CES's lien was dissolved as a matter of law. On January 27, 2017, CES recorded a certified copy of its Complaint in the Norfolk County Registry of Deeds.

### **ANALYSIS**

Summary judgment may be granted only where there remain no genuine issues of material fact, and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). The burden is on the moving party to establish both the absence of any triable issue and the moving party's entitlement to

judgment in his favor. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991); *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). This affirmative burden may be met by the submission of pleadings, depositions, answers to interrogatories, admissions on file, affidavits, or other competent documentary evidence that satisfies the requirements of Rule 56(e). Where, as here, the moving party would not bear the burden of proof at trial, the movant may satisfy its summary judgment burden by submitting evidence that negates an essential element of the opposing party's claim, or by demonstrating that "proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991).

The court must view the parties' evidentiary materials "in the light most favorable to the nonmoving party," *Gray v. Giroux*, 49 Mass. App. Ct. 436, 438 (2000), quoting Mass. R. Civ. P. 56(c), and must resolve in the non-moving party's favor any doubt as to the existence of factual issues. *Foley v. Matulewicz*, 17 Mass. App. Ct. 1004, 1005 (1984). The court may not assess the credibility of the evidence presented, consider the weight of that evidence, or make any findings of fact. *Riley v. Presnell*, 409 Mass. 239, 244 (1991).

The primary purpose of the mechanic's lien statute is to "provide security to contractors, subcontractors, laborers, and suppliers for the value of their services and goods provided for improving the owner's real estate" through perfection of a mechanic's lien on the owner's real estate. *NES Rentals v. Main Drilling & Blasting, Inc.*, 465 Mass. 856, 860 (2013), quoting *Hammill-McCormick Assocs., Inc. v. New England Tel. & Tel. Co.*, 399 Mass. 541, 542-543 (1987). "At the same time, the statute contains filing and notice requirements to protect the owner and others with an interest in the property." *National Lumber Co. v. United Cas. & Sur. Ins. Co.*, 440 Mass. 723, 726 (2004), quoting *Hammill-McCormick Assocs., Inc. v. New England Tel. & Tel. Co.*, 399 Mass. at 543. The statute provides explicit deadlines by which the

contractor must provide notice, address lien priority and identify steps necessary to maintain a lien once it is created and those steps necessary to enforce a lien once it is created. *Tremont Tower Condominium, LLC v. George B.H. Macomber Co.*, 436 Mass. 677, 680-681 (2002). In *Tremont Tower*, the Supreme Judicial Court provides a succinct guide to the operation of G. L. c. 254 and the creation, modification and dissolution of mechanic's liens.

The enforcement of the lien requires further steps, which must also be performed within time frames established by the statute. The contractor must record a statement of account, setting forth the amount due or to become due. G. L. c. 254, § 8. That statement of account must be filed within ninety days of the filing of a notice of substantial completion; within 120 days of the filing of a notice of termination; or within 120 days after the contractor last performed or furnished labor, materials, equipment, appliances, or tools for the project, whichever is earliest. *Id.* Failure to file a statement of account within these time frames results in the lien's being "dissolved." *Id.* After filing the statement of account, the contractor has a brief period of time in which to enforce the lien. A civil action must be filed within ninety days of the recording of the statement of account, and, within thirty days of filing that suit, the contractor must record an attested copy of the complaint. G. L. c. 254, §§ 5, 11. Again, the lien "shall be dissolved" if the contractor fails to meet either of those deadlines. *Id.*

436 Mass. at 680-681.

"Because a mechanic's lien is purely a creation of statute," the Supreme Judicial Court has "consistently required exact compliance with the statute in order to create, perfect, and enforce such a lien." *NES Rentals v. Main Drilling & Blasting, Inc.*, 465 Mass. at 862, quoting *Golden v. General Bldrs. Supply*, 441 Mass. 652, 654 (2004).

General Laws c. 254, § 14, sets forth procedures for execution and enforcement of bonds to dissolve mechanic's liens:

Any person in interest may dissolve a lien under this chapter by recording or causing to be recorded in the registry of deeds in the county or district where the land lies, a bond of a surety company authorized to do business in Massachusetts and in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum the claimant may recover on his claim for labor or labor and materials. Upon the recording of the bond, the lien shall be dissolved. Notice of the recording shall be given to the claimant by serving on the claimant a copy of the notice of recording together with a copy of the bond by an officer qualified to serve civil process or by delivering same to the claimant. The claimant may enforce the bond by a civil action commenced within 90

days after the later of the filing of the statement required by section 8 or receipt of notice of recording of the bond, but such bond shall not create any rights which the claimant would not have had, or impair any defense the obligors would have had, in an action to enforce a lien.

When a lien is recorded, “any person in interest” may procure a lien bond and record it, pursuant to G. L. c. 254, § 14, in order to remove the encumbrance from the leasehold or fee simple interest. Even when a lien bond is recorded and served, the lien claimant must still comply with the mechanic’s lien statute which includes filing an attested copy of the complaint in the registry of deeds within 30 days of the commencement of the action. Here, the plaintiff cannot show “strict compliance with [the] statute,” as required. *National Lumber Co. v. United Cas. & Sur. Ins. Co. Inc.*, 440 Mass. at 726.

Plaintiff argues that the plain language of G. L. c. 254, § 14, does not require an attested copy of the complaint to be recorded. Indeed, section 14 is silent on the issue. However, “[t]he statute is intended to ensure ‘that an enforcement action may readily be identified through routine title searching procedures,’ . . . and it accomplishes that objective by requiring that an attested copy of the enforcement complaint be recorded within thirty days of its filing with the court.” *Civic Ctr. Assocs. Ltd. Partnership v. P.C. Interiors, Ltd.*, 74 Mass. App. Ct. 1108 (2009) (unpublished), quoting *Golden v. General Bldrs. Supply*, 441 Mass. at 659-660.

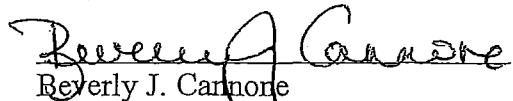
This court believes that G. L. c. 254 must be read in its entirety and that the detailed and precise requirements of section 5, which dictate the procedures for a lien enforcement action, require exact compliance. “We interpret the statute to best effectuate the legislative intent, viewing the statute as a whole.” *Tedford v. Massachusetts Hous. Fin. Agency*, 390 Mass. 688, 696 (1984), citing *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, 382 Mass. 580, 585 (1981). This court therefore rejects plaintiff’s claim that because G. L. c. 254, § 14, is silent with respect to filing an attested copy of the complaint, it was

excused from doing so within the thirty days of the commencement of the action as required by G. L. c. 254, § 5.

The defendant has also moved for attorney's fees and costs associated with preparing and arguing this motion for summary judgment. The court declines to award attorney's fees.

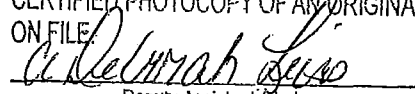
### ORDER

For reasons outlined above, Arch Insurance Company's Motion for Summary Judgment is ALLOWED. Judgment shall enter for Arch Insurance Company dismissing the claims against it. Arch's motion for attorney's fees is DENIED.

  
Beverly J. Cannone  
Justice of the Superior Court

DATE: August 16, 2017

I ATTEST THAT THIS DOCUMENT IS A  
CERTIFIED PHOTOCOPY OF AN ORIGINAL  
ON FILE.

  
Deborah L. Laro  
Deputy Assistant Clerk  
8/18/17

Commonwealth of Massachusetts  
County of Norfolk  
The Superior Court

20.4

CIVIL ACTION NO. 16-1061

CITY ELECTRIC SUPPLY COMPANY, d/b/a  
CONCORD ELECTRIC SUPPLY, LTD.,  
Plaintiff

vs.

ARCH INSURANCE COMPANY,  
Defendant


JUDGMENT OF DISMISSAL RE: ARCH INSURANCE COMPANY


This action came on for hearing on Defendant Arch Insurance Company's Motion For Summary Judgment before the court, Beverly Cannone, J., Associate Justice presiding, and the Motion having been heard and allowed,

**IT IS ORDERED and ADJUDGED:**

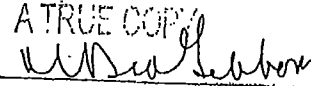
that the complaint of plaintiff City Electric Supply Company d/b/a Concord Electric Supply, Ltd. against defendant Arch Insurance Company be dismissed.

Dated at Dedham, Massachusetts this 14<sup>th</sup> day of November 2017.

  
Assistant Clerk

  
RECEIVED & FILED  
CLERK OF THE COURT'S  
NORFOLK COUNTY

Judgment: 15-543.wpd 1396676 jntptm gibbonsd

A TRUE COPY  
Attest:   
Assistant Clerk 11/14/17



COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO.

CITY ELECTRIC SUPPLY COMPANY,  
d/b/a CONCORD ELECTRIC SUPPLY,  
LTD.,

Plaintiff

V.

MICHAEL FRANCIOSI, d/b/a ELECTRICAL  
PROFESSIONALS, and ARCH INSURANCE  
COMPANY,

Defendants.

COMPLAINT

INTRODUCTION

This is an action for breach of contract in connection with electrical materials provided by City Electric Supply Company, d/b/a Concord Electric Supply, Ltd., for improvements to real property located at 111 Boylston Street, Brookline, Massachusetts (the "Project"), described in a quitclaim deed recorded in the Norfolk County Registry of Deeds in Book 32208, Page 396 (the "Property"), and to recover under a mechanic's lien bond posted on the Property.

PARTIES

1. The plaintiff, City Electric Supply Company, d/b/a Concord Electric Supply, Ltd. ("CES"), is a corporation duly established under the laws of the countries of England and Wales and is registered to do business in the Commonwealth of Massachusetts, with a usual place of business at 2701 Boston Road, 2<sup>nd</sup> Floor, Wilbraham, Massachusetts
2. The defendant, Michael Franciosi ("Mr. Franciosi") is an individual doing business as Electrical Professionals and residing at 24 Castle Street, Leominster, Massachusetts.

3. The defendant, Arch Insurance Company ("Arch Insurance"), is an insurance business corporation with a usual place of business located at 10 Waterside Drive, Farmington, Connecticut, formed under the laws of the State of Missouri and duly organized to transact business as a surety in Massachusetts, which as surety, issued a mechanic's lien bond whereby it bound itself to CES in the amounts of \$283,056.54.

#### COUNT I

4. Mr. Franciosi entered into an agreement with CES on or about August 4, 2014 to supply electrical materials to the Project.

5. CES timely provided the requested materials under the agreement to the Project, which were used therein. Mr. Franciosi accepted the materials provided by CES without objection but failed to make payment in beach of the parties' agreement.

6. As a result of Mr. Franciosi's failure to make payment, CES has suffered damages, including but not limited to the outstanding balance due for the materials furnished for the Project in the principal amount of \$283,056.54, plus interest and costs.

7. Despite seeking payment from Mr. Franciosi, he has filed to pay the outstanding balance due to CES without justification or excuse.

#### COUNT II

8. CES restates and realleges the allegations contained in the above paragraphs.

9. Mr. Franciosi owes CES the fair value of the materials furnished to the Project in quantum meruit.

#### COUNT III

10. CES restates and realleges the allegations contained in the above paragraphs.

11. On June 28, 2016, within 90 days after the last materials were furnished for the Project, CES recorded a Notice of Contract under M.G.L. c. 254 against the Property with the Norfolk County Registry of Deeds. A true copy of the Notice of Contract is attached as Exhibit A. Notice of the recorded Notice of Contract was provided to the owner of the Property.

12. On or about July 14, 2016, pursuant to M.G.L. c. 254, §14, Tocci Building Corp. (as principal) and Arch Insurance (as surety) issued and recorded a Mechanic's Lien-Bond for Discharge, Bond No. SU1137323 (the "Lien Bond") with the Norfolk County Registry of Deeds. A copy of the Lien Bond is attached as Exhibit B.

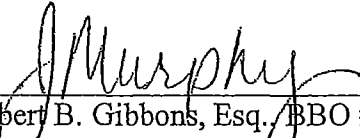
13. CES has not been paid for materials provided for the benefit of the Project, and having satisfied all conditions precedent to payment under the Lien Bond, it is owed a balance of \$283,056.54 under the Lien Bond.

WHEREFORE, the plaintiff, City Electric Supply Company, d/b/a Concord Electric Supply, Ltd., requests that this Court:

- a. Enter judgment against Michael Franciosi, d/b/a Electrical Professionals, in the amount of City Electric Supply Company's damages, plus interest and costs;
- b. Enter judgment against Arch Insurance Company in the amount of City Electric Supply Company's damages, plus interest and costs; and
- c. Grant such further relief as this Court deems appropriate.

**CITY ELECTRIC SUPPLY COMPANY, d/b/a  
CONCORD ELECTRIC SUPPLY, LTD.,**

By its attorney,

  
\_\_\_\_\_  
Robert B. Gibbons, Esq., BBO #631049  
Jessica E. Murphy, Esq., BBO #664361  
Mirick, O'Connell, DeMallie & Lougee, LLP  
1800 West Park Drive, Suite 400  
Westborough, MA 01581  
Phone: (508) 898-1501  
Fax: (508) 898-1502  
Email: jmurphy@mirickoconnell.com

Dated: August 16, 2016

Property Address: 111 Boylston Street, Brookline, Massachusetts

Record and Return To:

Jessica E. Murphy, Esq.  
Mirick O'Connell  
1800 West Park Drive, Suite 400  
Westborough, MA 01581

lk 34213 Pg528 #60982  
06-28-2016 @ 11:28a

*This space reserved for Recorder's use only*

**NOTICE OF CONTRACT**

**M.G.L. c. 254, §4**

Notice is hereby given that by virtue of a written contract dated August 4, 2014, between CITY ELECTRIC SUPPLY COMPANY, d/b/a CONCORD ELECTRIC SUPPLY ("CES"), supplier, and MICHAEL FRANCIOSI, d/b/a ELECTRICAL PROFESSIONALS ("ELECTRICAL PROFESSIONALS"), said CES has furnished labor and/or materials and/or rental equipment in the erection, alteration, repair or removal of a building, structure or other improvement of real property by ELECTRICAL PROFESSIONALS for CLAREMONT BROOKLINE SUITES LLC, owner, on a lot of land or other interest in real property located at 111 Boylston Street, Brookline, Massachusetts, more particularly described in a Quitclaim Deed recorded with the Norfolk County Registry of Deeds in Book 32208, Page 396.

As of the date of this notice, an account of said contract is as follows:

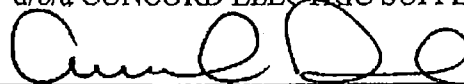
1.	Contract price	\$1,012,874.38
2.	Change orders	\$0.00
3.	Less incomplete work	\$0.00
4.	Disputed claims	\$0.00
5.	Payments received	\$729,817.84

TOTAL AMOUNT DUE \$283,056.54

The regular mailing address of the party recording this notice is 2701 Boston Rd, Second Floor, Wilbraham, Massachusetts 01095.

Supplier:

CITY ELECTRIC SUPPLY COMPANY,  
d/b/a CONCORD ELECTRIC SUPPLY



By: Amanda Dupre

Its: Credit Manager

Dated: June 27<sup>th</sup>, 2016

Marginal Reference:

Book 32208, Page 396

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On June 27<sup>th</sup>, 2016, Amanda Dupre on behalf of City Electric Supply Company, d/b/a Concord Electric Supply (the "Principal") personally appeared before me and acknowledged to me that the Principal signed the preceding or attached document voluntarily for its stated purpose. The Principal proved to me through satisfactory evidence of identification that the Principal is the person whose name is signed on the preceding or attached document. The satisfactory evidence of identification provided to me was:

- ☐ A current document issued by a federal or state government agency bearing the photographic image of the Principal's face and signature; or
- ☐ On the oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to the notary public and who personally knows the Principal; or
- ☒ Identification of the Principal based on the notary public's personal knowledge of the identity of the Principal; or
- ☐ The following evidence of identification: \_\_\_\_\_

Megan C Dupre  
Notary Public

Printed Name: Megan C Dupre

My Commission Expires: June 10, 2022



MEGAN C. DUPRE  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
June 10, 2022

[Seal]

MECHANICS LIEN - BOND FOR DISCHARGE  
BOND NUMBER: SU1127323

KNOW ALL MEN BY THESE PRESENTS, That we Tecol Building Corp. of 660 Main Street, Woburn, MA 01801, as principal (hereinafter called "Principal") and Arch Insurance Company of 10 Waterside Drive, Farmington CT 06032 a corporation of the state of Missouri and duly organized to transact surety business within the State of Massachusetts, as surety, are holder and stand firmly bound and obliged unto City Electric Supply Company, d/b/a Concord Electric Supply ("CES") (hereinafter called "Obligee") in the penal sum of Two Hundred Eighty-Three Thousand Fifty-Six and 54/100 (\$283,056.54) Dollars to the payment of which we bind ourselves, our heirs, successors and assigns, jointly and severally by these presents.

Whereas, on or about the 16th day of June, 2016, the said obligee recorded a Notice of Contract M.G.L. c. 254 S. 4, in the Norfolk County Registry of Deeds, Book 34213, Page 528, upon real property located at 111 Boylston Street, Brookline, Massachusetts, more particularly described in a Quitclaim Deed recorded with the Norfolk County Registry of Deeds in Book 32208, Page 396.

Whereas, the principal desires to dissolve said lien in accordance with the provisions of Section Fourteen of Chapter Two Hundred and Fifty-Four of the General Laws.

Now, therefore, the condition of this obligation is such that if the said principal shall pay to the said obligee all sums which shall be adjudged in favor of the said obligee in an action brought under the provisions of said section fourteen, this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the aforesaid principal and surety have executed this instrument under seal this 11th day of July, 2016.

RECEIVED AND RECORDED  
NORFOLK COUNTY  
REGISTRY OF DEEDS  
DEDHAM, MA

CERTIFY

William P. O'Donnell  
WILLIAM P. O'DONNELL, REGISTER

Tecol Building Corp.

Principal

BY:

Arch Insurance Company

Surety

BY:

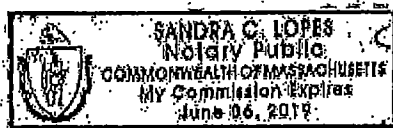
Nicole Roy, Attorney-in-Fact

ACKNOWLEDGEMENT OF SURETY

COMMONWEALTH OF MASSACHUSETTS  
COUNTY OF SUFFOLK

On this 11th day of July, 2016, before me the undersigned, a Notary Public in and for the Commonwealth of Massachusetts, personally appeared Nicole Roy, personally known to me to be the person described in and who executed this Bond as Attorney-in-Fact, and acknowledged to me that she signed the same freely and voluntarily for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last written above.



Sandra C. Lopes

Commission Expires: June 6, 2019

**THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON BLUE BACKGROUND.**

*This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated. Not valid for Mortgage, Note, Loan, Letter of Credit, Bank Deposit, Currency Rate, Interest Rate or Residential Value Guarantees.*

## POWER OF ATTORNEY

Know All Persons By These Presents:

That the Arch Insurance Company, a corporation organized and existing under the laws of the State of Missouri, having its principal administrative office in Jersey City, New Jersey (hereinafter referred to as the "Company") does hereby appoint:

Donald H. McGarier, Jean M. Reaney, John DeChiaro, John J. Gambino, Kathleen M. Flanagan, Laurie Rothwell, Michael J. Cusack, Natalie Conely, Nicholas Labbe, Nicole Roy, Richard A. Leveroni and Sandra C. Lopez of Boston, MA (EACH)

Its true and lawful Attorney(s) in Fact, to make, execute, seal, and deliver from the date of issuance of this power for and on its behalf as surety, and as its act and deed:

Any and all bonds, undertakings, recognizances and other surety obligations, in the penal sum not exceeding Ninety Million Dollars (\$90,000,000.00)

This authority does not permit the same obligation to be split into two or more bonds in order to bring each such bond within the dollar limit of authority as set forth herein.

The execution of such bonds, undertakings, recognizances and other surety obligations in pursuance of these presents shall be as binding upon the said Company as fully and amply to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal administrative office in Jersey City, New Jersey.

This Power of Attorney is executed by authority of resolutions adopted by unanimous consent of the Board of Directors of the Company on September 15, 2011, true and accurate copies of which are hereinafter set forth and are hereby certified to by the undersigned Secretary as being in full force and effect:

**VOTED**, That the Chairman of the Board, the President, or the Executive Vice President, or any Senior Vice President, of the Surety Business Division, or their appointees designated in writing and filed with the Secretary, or the Secretary shall have the power and authority to appoint agents and attorneys-in-fact, and to authorize them subject to the limitations set forth in their respective powers of attorney, to execute on behalf of the Company, and under the seal of the Company, therefor, bonds, undertakings, recognizances and other surety obligations obligatory in the nature thereof, and any such officers of the Company may appoint agents for acceptance of process.

This Power of Attorney is signed, sealed and certified by facsimile under and by authority of the following resolution adopted by the unanimous consent of the Board of Directors of the Company on September 15, 2011:

**VOTED**, That the signature of the Chairman of the Board, the President, or the Executive Vice President, or any Senior Vice President, of the Surety Business Division, or their appointees designated in writing and filed with the Secretary, and the signature of the Secretary, the seal of the Company, and certifications by the Secretary, may be affixed by facsimile on any power of attorney or bond executed pursuant to the resolution adopted by the Board of Directors on September 15, 2011, and any such power so executed, sealed and certified with respect to any bond or undertaking to which it is attached, shall continue to be valid and binding upon the Company.

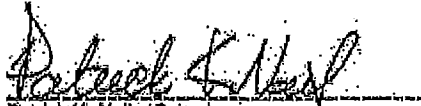


AIC 0000108390

In Testimony Whereof, the Company has caused this instrument to be signed and its corporate seal to be affixed by their authorized officer, this 2<sup>nd</sup> day of June, 2016.

Attested and Certified

Arch Insurance Company

  
Patrick K. Nalls, Secretary



  
David M. Finkelstein, Executive Vice President

STATE OF PENNSYLVANIA:SS

COUNTY OF PHILADELPHIA:SS

I, Helen Szafren, a Notary Public, do hereby certify that Patrick K. Nalls and David M. Finkelstein personally known to me to be the same persons whose names are respectively as Secretary and Executive Vice President of the Arch Insurance Company, a Corporation organized and existing under the laws of the State of Missouri, subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they being thereunto duly authorized signed, sealed with the corporate seal and delivered the said instrument as the free and voluntary act of said corporation and as their own free and voluntary acts for the uses and purposes therein set forth.

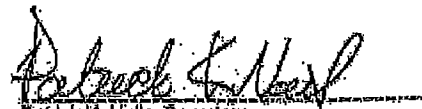


  
Helen Szafren, Notary Public  
My commission expires 10/03/2017

## CERTIFICATION

I, Patrick K. Nalls, Secretary of the Arch Insurance Company, do hereby certify that the attached Power of Attorney dated June 8, 2016 on behalf of the person(s) as listed above is a true and correct copy and that the same has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate; and I do further certify that the said David M. Finkelstein, who executed the Power of Attorney as Executive Vice President, was on the date of execution of the attached Power of Attorney the duly elected Executive Vice President of the Arch Insurance Company.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the Arch Insurance Company on this 11<sup>th</sup> day of July, 2016.

  
Patrick K. Nalls, Secretary

This Power of Attorney limits the acts of those named therein to the bonds and undertakings specifically named therein and they have no authority to bind the Company except in the manner and to the extent herein stated.

PLEASE SEND ALL CLAIM INQUIRIES RELATING TO THIS BOND TO THE FOLLOWING ADDRESS:

Arch Insurance - Surety Division  
3 Parkway, Suite 1500  
Philadelphia, PA 19102



00ML0013 00 03 03

Printed in U.S.A.

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN  
CIVIL CASES

**Title IV** CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

**Chapter 254** LIENS ON BUILDINGS AND LAND

**Section 5** ENFORCEMENT OF LIEN; PROCEDURE

Section 5. A lien upon land for the erection, alteration, repair or removal of a building or other structure or other improvement of real property or for professional services relating thereto or a lien established under section seventy-six of chapter sixty-three, or section 6 of chapter 183A shall be enforced by a civil action brought in the superior court for the county where such land lies or in the district court in the judicial district where such land lies. The plaintiff shall bring his action in his own behalf and in behalf of all other persons in interest who shall become parties. An attested copy of the complaint, which shall contain a brief description of the property sufficient to identify it, and a statement of the amount due, shall be filed in the registry of deeds and recorded as provided in section nine within thirty days of the commencement of the action, or such lien shall be dissolved. All

other parties in interest may appear and have their rights determined in such action, and at any time before entry of final judgment, upon the suggestion of any party in interest that any other person is or may be interested in the action, or of its own motion, the court may summon such person to appear in such cause on or before a day certain or be forever barred from any rights thereunder. The court may in its discretion provide for notice to absent parties in interest. The terms "party in interest" and "person in interest", as used in this chapter, shall include mortgages and attaching creditors.

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN  
CIVIL CASES

**Title IV** CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

**Chapter 254** LIENS ON BUILDINGS AND LAND

**Section 12** WRITTEN CONTRACT; RECORDING OF BOND; FORM;  
ENFORCEMENT

Section 12. Any person, including the owner, in interest in connection with a written contract covered by section two or section four may cause to be recorded in the registry of deeds in the county or district where the land lies a bond of a surety company authorized to do a surety business in Massachusetts and in a penal sum equal to the contract sum or, if the contract does not contain a contract sum, in a penal sum equal to that person's fair estimate of the contract sum, all as set forth in the certificate on the bond. The bond shall describe the land in such detail as is required in a common conveyance of land, and shall be in the following form:?

*Know All Men By These Presents:*

That we . . . . .<\y> of . . . . .<\y> in the County  
of . . . . . and Commonwealth of Massachusetts, as principal,  
and . . . . . a surety company organized under the laws of . . . . .  
. . . and authorized to do business in the Commonwealth as a  
surety company, are holden and stand firmly bound and obliged  
unto . . . . . Register of Deeds for the . . . . . District,  
County of . . . . .<\y>, in the principal sum of . . . . .  
. Dollars (\$ ) to be paid unto said Register and his successors in  
said office, to which payment, well and truly to be made, we bind  
ourselves, our heirs, executors, administrators, successors and  
assigns, jointly and severally, firmly by these presents.

*Whereas*, said principal is interested in the erection, alteration,  
repair or removal of a building or structure on a certain lot of land  
situated within the . . . Registry District in the Commonwealth,  
bounded and described as follows:

(Insert description)

and desires to free said land from liens for all labor and all labor  
and materials entitled to lien protection under chapter 254 and  
amendments thereto;

NOW, THEREFORE, the condition of this obligation is such that  
if the Principal shall pay for all labor and for all labor and  
materials entitled to lien protection under chapter 254 and  
amendments thereto under the contract referred to in the  
Certificate in this bond, irrespective of any agreement made  
between him and the owner or any other persons now interested or

who may hereinafter be interested therein, then the above written obligation shall be null and void, otherwise to remain in full force and effect.

This bond is made for the use and benefit of all persons entitled to file the documents for lien protection as provided in Massachusetts General Laws, chapter 254 and they and each of them are hereby made Obligees hereunder, and in case of the failure of the principal to carry out the provisions of this bond made for their use and benefit they and each of them may sue hereon in their own name.

Signed, sealed and delivered this . . . . . day of . . . . ., (insert year).

*Principal*

*By*

*Surety*

*By*

*Certificate*

. . . . ., principal on the above bond, hereby certify that the (estimated) contract price for the proposed work to be performed on the land described in the above bond under a written contract between . . . . . and . . . . . dated . . . . ., . . . . . (insert year), is . . . . . Dollars (\$ ).

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*(Signed)*

After the recording of any such bond no lien under this chapter shall thereafter attach in favor of any person entitled to the benefit of such bond and not named as a principal thereon for labor or for labor and materials performed under the contract in respect to which such bond is given.

The register of deeds shall refuse to record the said bond if it be defective in form or substance, but no party to any such bond shall be discharged by any defect therein as against any party who has in good faith allowed his lien to be dissolved by lapse of time in reliance on the bond. The bond may be enforced by a civil action in the superior court or district court brought by any party in interest. An attested copy of the complaint shall be filed and recorded in the registry of deeds. No suit or action on the bond shall be commenced after the expiration of ninety days after the claimant filed the statement required by section 8. Such bond shall not create any rights which the claimant would not have had, or impair any defense which the obligors would have had, in an action to enforce a lien.

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN  
CIVIL CASES

**Title IV** CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

**Chapter 254** LIENS ON BUILDINGS AND LAND

**Section 14** DISSOLUTION BY BOND RECORDING; LABOR AND  
MATERIALS; FORM OF BOND

Section 14. Any person in interest may dissolve a lien under this chapter by recording or causing to be recorded in the registry of deeds in the county or district where the land lies, a bond of a surety company authorized to do business in Massachusetts and in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim for labor or labor and materials. Upon the recording of the bond, the lien shall be dissolved. Notice of the recording shall be given to the claimant by serving on the claimant a copy of the notice of recording together with a copy of the bond by an officer qualified to serve civil process or by delivering same to the claimant. The claimant may enforce the bond by a civil action commenced within ninety days after the later of the filing



of the statement required by section 8 or receipt of notice of recording of the bond, but such bond shall not create any rights which the claimant would not have had, or impair any defense which the obligors would have had, in an action to enforce a lien.

The bond shall be in the following form:

Know All Men By These Presents:

That we, \_\_\_ as principal and \_\_\_ duly organized to transact business as a surety within the Commonwealth of Massachusetts, as surety, are holden and stand firmly bound and obliged unto \_\_\_ in the penal sum of \_\_\_ Dollars (\$\_\_\_), to the payment of which we bind ourselves, our heirs, successors and assigns, jointly and severally by these presents.

Whereas, under date of , the said obligee recorded a notice of contract in the registry of deeds, as Instrument #, in Book \_\_\_ at Page \_\_\_ upon premises more fully described in said notice, and

Whereas, the principal desires to dissolve said lien in accordance with the provisions of section fourteen of chapter two hundred and fifty-four of the General Laws.

Now, therefore, the condition of this obligation is such that if the said principal shall pay to the said obligee all sums which shall be adjudged in favor of the said obligee in an action brought under the provisions of said section fourteen, this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the aforesaid principal and surety have executed this instrument under seal this \_\_\_\_ day of \_\_\_\_ (insert year).

Principal

by \_\_\_\_\_

Surety

by \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_.

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# GENERAL ACTS

OF

## MASSACHUSETTS.

### 1915.

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**Chap. 292** AN ACT RELATIVE TO LIENS FOR LABOR AND MATERIALS ON BUILDINGS AND LAND.

*Be it enacted, etc., as follows:*

Lien for labor  
on buildings  
and land.

**SECTION 1.** A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement with, or by consent of, the owner of such building or structure, or of a person having authority from or rightfully acting for such owner in procuring or furnishing such labor, shall, subject to the provisions of this act, other than in section three, have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated, for not more than eighteen days' work actually performed during the forty days next prior to his filing a statement as provided in section seven.

Repair  
material, etc.

**SECTION 2.** A person who enters into a written contract with the owner of land for the whole or any part of the erection, alteration, repair or removal of a building or structure upon land, or for furnishing material therefor, shall have a lien upon said building or structure and upon the interest of the owner in said lot of land as appears of record at the date when notice of said contract is filed or recorded in the registry of deeds for the county or district wherein such land lies, to secure the payment of all labor and material which he shall thereafter furnish by virtue of said contract. Said notice shall be in substantially the following form:—

Form of  
notice.

Notice is hereby given that by virtue of a written contract, dated \_\_\_\_\_ 191\_\_\_\_, between \_\_\_\_\_ owner, and \_\_\_\_\_ contractor, said contractor is to furnish labor and material for the erection, alteration, repair or removal of a building on a lot of land described as follows: \_\_\_\_\_ Said contract is to be completed on or before \_\_\_\_\_ 191\_\_\_\_.

Contractor.

Notice to be  
filed.

No written contract for the erection, alteration, repair or removal of a building or structure upon land shall be enforceable unless notice thereof is filed or recorded as above provided before any work is begun or materials are furnished thereunder.

Extension  
of notice.

A notice of any extension of such contract, stating the date to which it is extended, shall also be filed or recorded in

the registry prior to the date stated in the notice of a contract for the completion thereof.

Such notices, and all other instruments hereinafter required to be filed or recorded in the registry of deeds, affecting registered land shall be filed and registered in the manner prescribed by section seventy of chapter one hundred and twenty-eight of the Revised Laws and acts in amendment thereof and in addition thereto. Such notices, and all other instruments hereinafter required to be filed or recorded in the registry of deeds, affecting unregistered land shall be indexed in a separate book to be kept for that purpose.

Record in  
registry of  
deeds.

SECTION 3. If the notice aforesaid shall have been filed or recorded in the registry of deeds, as hereinbefore provided, any person who shall, subsequent to the date of filing or recording notice of said contract, furnish labor or material, or perform labor, under a contract with a contractor or with any sub-contractor of said contractor shall be entitled to enforce a lien on the premises therein described for any labor performed, or labor or material furnished, subsequent to the filing or recording of said notice and prior to the date of the termination of said contract as stated in said notice or notices. The rights of any person who shall perform or furnish labor, or furnish material subsequent to the filing or recording of notice of said contract shall not be affected by the fact that the notice was not filed or recorded prior to the beginning of the work.

Enforcement  
of lien.

SECTION 4. All proceedings to enforce a lien upon land for the erection, alteration, repair or removal of a building or other structure, shall be begun by bill in equity filed in the superior court for the county in which the land lies. The petitioner shall bring his bill in his own behalf and in behalf of all other persons in interest who shall become parties. The subpoena shall be returnable not more than sixty days subsequent to the entry of the bill and shall contain a brief description of the property, sufficient to identify it, and a statement of the amount alleged to be due. An attested copy thereof shall be filed in the registry of deeds and recorded as provided in section eight of chapter one hundred and ninety-seven of the Revised Laws. The fees of the officer shall be fifty cents for each person upon whom service is made, and for filing at the registry, and thirty cents for each copy, with fees for travel as in the service of other civil process. All other parties in interest may appear and have their rights determined in such bill,

Bill in equity  
to be filed to  
enforce lien.

Fee.

and at any time before a final decree, upon the suggestion of any party in interest that any other person is or may be interested in the suit, or of its own motion, the court may issue a subpoena to such person, or a precept directing him to appear in said cause on or before a day certain or be forever barred from any rights thereunder. The fees of the officer for service of any such additional process shall be as above provided. The court may in its discretion provide for notice to absent parties in interest. The terms "party in interest" and "person in interest", as used in this act, shall include mortgagees and attaching creditors.

SECTION 5. No lien shall attach to any land, building or structure thereon owned by the commonwealth, or by a county, city, town, water district or fire district.

SECTION 6. No lien, except under the provisions of section one, shall avail as against a mortgage actually existing and duly registered or recorded prior to the filing or recording in the registry of deeds of the notice required by the provisions of this act, and no lien under section one shall avail as against such a mortgage unless the work or labor performed is in the erection, alteration, repair or removal of a building or structure which erection, alteration, repair or removal was actually begun prior to the recording of the mortgage.

SECTION 7. The lien provided for by section two and the lien provided for by section three shall be dissolved unless the contractor, or some person claiming by, through or under him, shall, within thirty days after the date on which the principal contract is to be performed, file in the registry of deeds in the county or district in which the land is situated a statement, signed and sworn to by him, or by some person in his behalf, giving a just and true account of the amount due him, with all just credits, a brief description of the property, and the name of the owner or owners as set forth in the notice of contract. The lien for labor provided for by section one shall be dissolved unless such certificate is filed within the forty days provided in said section.

SECTION 8. The lien shall be dissolved unless a bill in equity to enforce it is filed within sixty days after the filing of the statement required by section seven. The validity of the lien shall not be affected by an inaccuracy in the description of the property to which it attaches, if the description is sufficient to identify the property, or by an inaccuracy in stating the amount due for labor or materials.

Fees.

Certain terms defined.

Certain property exempted.

Restrictions.

Dissolution of liens.

Time limit.

unless it is shown that the person filing the statement has wilfully and knowingly claimed more than is due to him.

SECTION 9. Any person in interest may cause to be recorded in the registry of deeds in the district in which the land lies, a bond having as surety therein a corporation organized to do a surety business in this commonwealth, or individual sureties as hereafter provided, in which bond the register of deeds for the district and his successor or successors in office shall be obligee, in such penal sum as shall be fixed by the building commissioner or other officer performing like duties under any statute, ordinance or by-law of a city or town in which the land in question lies, or, in case there is no such officer, then by a justice or clerk of a court having jurisdiction in the locality where the land lies. The bond shall describe the land in such detail as is required in a common conveyance of land, and shall be in form substantially as follows: —

Recording  
of bond.

Form of bond.

Know all Men by these Presents:

That we  
of \_\_\_\_\_ in the County of \_\_\_\_\_  
and Commonwealth of Massachusetts, as principal, and  
in the Commonwealth, as surety or sureties, are holden and stand  
firmly bound and obliged unto  
Register of Deeds for the  
County of \_\_\_\_\_

in the full and just sum of  
Dollars

to be paid unto said Register and his successors in said office, to  
which payment, well and truly to be made, we bind ourselves, our  
heirs, executors, administrators, successors and assigns, jointly and  
severally, firmly by these presents.

Sealed with our seals and dated the \_\_\_\_\_ day  
of \_\_\_\_\_ in the year of our Lord  
one thousand nine hundred and \_\_\_\_\_

The condition of this obligation is such,

That whereas said \_\_\_\_\_  
is interested in the erection, alteration, repair or removal of a  
building on a certain lot of land situated within the  
Registry District in the Commonwealth, bounded and described as  
follows:

and desires under the provisions of chapter one hundred and ninety-  
seven of the Revised Laws and acts in amendment thereof and in  
addition thereto to free said land from claims for personal labor in  
accordance with the provisions of said statute and amendments  
thereto;

Now, therefore, if the above bounden  
shall pay or cause to be paid for any and all personal labor performed  
in the erection, alteration, repair or removal of said building on said  
land, under the contract stated in the certificate on the back hereof,

irrespective of any agreement made between him and the owner or any other persons now interested or who may hereafter be interested therein, then the above written obligation shall be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

(Seal)

(Seal)

(Seal)

Place of  
execution on  
back of bond.

(CERTIFICATE ON BACK OF BOND.)

Date

191

I, \_\_\_\_\_ principal in the within bond, hereby certify that the proposed work on the lot of land described in said bond is the erection — alteration — repair — removal of a building, that a fair estimate of the cost of the labor on said building will not exceed \_\_\_\_\_ Dollars. The work is to

be done under a contract made

191

the parties thereto being \_\_\_\_\_

of

and \_\_\_\_\_

of

Said work is to be completed on or before \_\_\_\_\_

(Signed.)

Individual  
sureties, num-  
ber, etc.

If individual sureties are given on said bond, the sureties shall be not less than three in number, each of whom shall have owned real estate for at least one year next prior to the date of the bond, of a value not less than the penal sum of the bond, and said bond shall not be recorded unless the bond and sureties shall have been approved by a justice or clerk of a court having jurisdiction in the locality where the land lies, after an examination under oath, of all the sureties by said justice or clerk.

Recording of  
bond to show  
attachment of  
other bonds.

After the recording of said bond no lien shall thereafter attach for personal labor performed under the contract in respect to which the bond is given.

Defective  
bonds, etc.

The register of deeds may refuse to record the said bond if it be defective in form or substance, but no party to any such bond shall be discharged by any defect therein as against any party who has in good faith allowed his lien to be dissolved by lapse of time, in reliance on the bond. The bond may be enforced by a bill in equity in the superior court brought by any party in interest. The petitioner shall bring his bill in his own behalf and in behalf of all other persons in interest who shall become parties. A copy of the subpoena shall be filed and recorded in the registry of deeds, and the fees of the officer shall be as provided in section four.

Enforcement.

Liens for  
personal labor,  
etc., to be  
perfected.

SECTION 10. The rights of an attaching creditor shall not prevail as against the lien for personal labor provided



for in section one, nor against the claim of a lienor where notice or notices of contract have been filed or recorded in the registry of deeds as provided in section two.

SECTION 11. In a bill in equity under the provisions of section four, the court may, in its discretion, accept a bond, with sufficient surety or sureties, to dissolve the lien of any creditor or all liens, as to the whole or any part of the property, or any interest therein. Such bond shall be filed by the obligor in the registry of deeds within ten days after its approval, and shall not dissolve the lien unless so filed. It shall be recorded, and may then be taken from the registry by the obligee. Court may accept bond, etc.

SECTION 12. If it appears to the court that no person is entitled to a lien, or that every lien has been discharged by payment of the lien, the court shall forthwith cause a decree to be entered to the effect that the lien is dissolved, and a certificate to that effect shall be sent forthwith by the clerk to the register of deeds. Such certificate shall be filed and recorded in the manner provided in section eight of chapter one hundred and ninety-seven of the Revised Laws. Decree, etc., to be entered.

SECTION 13. Sections one, two, three, four, five, six, seven, nine, ten, eleven, twelve, thirteen, fourteen, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty and thirty-one of chapter one hundred and ninety-seven of the Revised Laws are hereby repealed. All other provisions of said chapter shall apply to proceedings under this act. Repealed.

SECTION 14. This act shall take effect on the first day of January, nineteen hundred and sixteen. Time of taking effect.

*Approved May 28, 1915.*

AN ACT RELATIVE TO THE QUALIFICATIONS FOR REGISTRATION OF PHYSICIANS. Chap. 293

*Be it enacted, etc., as follows:*

SECTION 1. Section three of chapter seventy-six of the Revised Laws, as amended by chapter three hundred and forty-six of the acts of the year nineteen hundred and thirteen, is hereby further amended by striking out all after the word "applicants", in the third line, down to and including the word "secretary", in the eleventh line, and inserting in place thereof the words: — Applicants for registration under R. L. 76, § 1, etc., amended.

lot 10 on a plan hereinafter referred to, ninety feet; NORTHEASTERLY by lot 18 on said plan, forty feet; SOUTHEASTERLY by lot 12 on said plan, ninety feet.

Said parcel is shown as lot 11 on a plan by H. C. Mildram, Surveyor, dated January 15, 1898, and recorded with Suffolk Deeds, Book 2504, end, and contains according to said plan, 3,600 square feet of land.

Or however otherwise said premises may be bounded or described and be all or any of said measurements and contents more or less; and the trustees of the Massachusetts Mental Health Center, acting for and on behalf of the commonwealth, are hereby authorized, to convey to the President and Fellows of Harvard College, by a deed approved as to form by the attorney general, all of the right, title and interest of the commonwealth in and to a certain parcel of land located in the city of Boston, county of Suffolk, bounded and described as follows: — the land in said Boston with the buildings thereon now known as and numbered 69 on Fenwood Road and bounded SOUTHWESTERLY by Fenwood Road formerly called Kenwood Road, forty (40.00) feet; SOUTHEASTERLY by land now or formerly of N. M. Dwyer, ninety (90.00) feet; NORTHEASTERLY by land now or formerly of N. & T. Flaherty and by land now or formerly of Joseph H. Touhy, forty (40.00) feet; and NORTHWESTERLY by land of Kathrine U. O'Hare, ninety (90.00) feet.

Containing 3,600 square feet of land and being lot 15 on a plan dated January 15, 1898, by H. C. Mildram, Surveyor, recorded with Suffolk Deeds at the end of Record Book 2504.

Or however otherwise said premises may be bounded or described and be all or any of said measurements and contents more or less.

SECTION 2. In consideration of such conveyance, the President and Fellows of Harvard College shall convey to the commonwealth a certain parcel of land containing a minimum of seventy-two hundred square feet of land adjoining an unnamed street in land owned by the commonwealth bounded by the Riverway, Brookline avenue, Fenwood road, Vining street and said unnamed private street running from Vining street to the Riverway.

*Approved July 17, 1972.*

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**Chap. 774.** AN ACT EXPEDITING PAYMENTS TO GENERAL CONTRACTORS AND TO SUBCONTRACTORS AND IMPROVING THE FLOW OF FUNDS IN THE CONSTRUCTION INDUSTRY.

*Be it enacted, etc., as follows:*

SECTION 1. Section 20A of chapter 29 of the General Laws is hereby amended by striking out the last paragraph, inserted by chapter 868 of the acts of 1969.

SECTION 2. Chapter 30 of the General Laws is hereby amended by striking out section 39F and inserting in place thereof the following section: —

*Section 39F.* (1) Every contract awarded pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine shall contain the following subparagraphs (a) through (i) and every contract awarded pursuant to section thirty-nine M of chapter thirty shall contain the following subparagraphs (a) through (h) and in each case those

subparagraphs shall be binding between the general contractor and each subcontractor.

(a) Forthwith after the general contractor receives payment on account of a periodic estimate, the general contractor shall pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor, less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.

(b) Not later than the sixty-fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor. The general contractor shall forthwith pay to the subcontractor the full amount received from the awarding authority less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.

(c) Each payment made by the awarding authority to the general contractor pursuant to subparagraphs (a) and (b) of this paragraph for the labor performed and the materials furnished by a subcontractor shall be made to the general contractor for the account of that subcontractor; and the awarding authority shall take reasonable steps to compel the general contractor to make each such payment to each such subcontractor. If the awarding authority has received a demand for direct payment from a subcontractor for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor as provided in subparagraphs (a) and (b), the awarding authority shall act upon the demand as provided in this section.

(d) If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work. Any demand made after substantial completion of the subcontract work shall be valid even if delivered or mailed prior to the seventieth day after the subcontractor has substantially completed the subcontract work. Within ten days after the subcontractor has delivered or so mailed the demand to the awarding authority and delivered or so mailed a copy to the general contractor, the general contractor may reply to the demand. The reply shall be by a sworn statement delivered to or sent by certified mail to the awarding authority and a copy shall be delivered to or sent by certified mail to the subcontractor at the same time. The

reply shall contain a detailed breakdown of the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor and of the amount due for each claim made by the general contractor against the subcontractor.

(e) Within fifteen days after receipt of the demand by the awarding authority, but in no event prior to the seventieth day after substantial completion of the subcontract work, the awarding authority shall make direct payment to the subcontractor of the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount (i) retained by the awarding authority as the estimated cost of completing the incomplete or unsatisfactory items of work, (ii) specified in any court proceedings barring such payment, or (iii) disputed by the general contractor in the sworn reply; provided, that the awarding authority shall not deduct from a direct payment any amount as provided in part (iii) if the reply is not sworn to, or for which the sworn reply does not contain the detailed breakdown required by subparagraph (d). The awarding authority shall make further direct payments to the subcontractor forthwith after the removal of the basis for deductions from direct payments made as provided in parts (i) and (ii) of this subparagraph.

(f) The awarding authority shall forthwith deposit the amount deducted from a direct payment as provided in part (iii) of subparagraph (e) in an interest-bearing joint account in the names of the general contractor and the subcontractor in a bank in Massachusetts selected by the awarding authority or agreed upon by the general contractor and the subcontractor and shall notify the general contractor and the subcontractor of the date of the deposit and the bank receiving the deposit. The bank shall pay the amount in the account, including accrued interest, as provided in an agreement between the general contractor and the subcontractor or as determined by decree of a court of competent jurisdiction.

(g) All direct payments and all deductions from demands for direct payments deposited in an interest-bearing account or accounts in a bank pursuant to subparagraph (f) shall be made out of amounts payable to the general contractor at the time of receipt of a demand for direct payment from a subcontractor and out of amounts which later become payable to the general contractor and in the order of receipt of such demands from subcontractors. All direct payments shall discharge the obligation of the awarding authority to the general contractor to the extent of the such payment.

(h) The awarding authority shall deduct from payments to a general contractor amounts which, together with the deposits in interest-bearing accounts pursuant to subparagraph (f), are sufficient to satisfy all unpaid balances of demands for direct payment received from subcontractors. All such amounts shall be earmarked for such direct payments, and the subcontractors shall have a right in such deductions prior to any claims against such amounts by creditors of the general contractor.

(i) If the subcontractor does not receive payment as provided in subparagraph (a) or if the general contractor does not submit a periodic estimate for the value of the labor or materials performed or furnished by the subcontractor and the subcontractor does not receive payment for same when due less the deductions provided for in subparagraph (a), the

subcontractor may demand direct payment by following the procedure in subparagraph (d) and the general contractor may file a sworn reply as provided in that same subparagraph. A demand made after the first day of the month following that for which the subcontractor performed or furnished the labor and materials for which the subcontractor seeks payment shall be valid even if delivered or mailed prior to the time payment was due on a periodic estimate from the general contractor. Thereafter the awarding authority shall proceed as provided in subparagraph (e), (f), (g) and (h).

(2) Any assignment by a subcontractor of the rights under this section to a surety company furnishing a bond under the provisions of section twenty-nine of chapter one hundred forty-nine shall be invalid. The assignment and subrogation rights of the surety to amounts included in a demand for direct payment which are in the possession of the awarding authority or which are on deposit pursuant to subparagraph (f) of paragraph (1) shall be subordinate to the rights of all subcontractors who are entitled to be paid under this section and who have not been paid in full.

(3) "Subcontractor" as used in this section (i) for contracts awarded as provided in sections forty-four A to forty-four L, inclusive, of chapter one hundred forty-nine shall mean a person who files a sub-bid and receives a subcontract as a result of that filed sub-bid or who is approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, (ii) for contracts awarded as provided in paragraph (a) of section thirty-nine M of chapter thirty shall mean a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, and (iii) for contracts with the commonwealth not awarded as provided in sections forty-four A to forty-four L, inclusive, of chapter one hundred forty-nine shall also mean a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.

(4) A general contractor or a subcontractor shall enforce a claim to any portion of the amount of a demand for direct payment deposited as provided in subparagraph (f) of paragraph 1 by a petition in equity in the superior court against the other and the bank shall not be a necessary party. A subcontractor shall enforce a claim for direct payment or a right to require a deposit as provided in subparagraph (f) of paragraph 1 by a petition in equity in the superior court against the awarding authority and the general contractor shall not be a necessary party. Upon motion of any party the court shall advance for speedy trial any petition filed as provided in this paragraph. Sections fifty-nine and fifty-nine B of chapter two hundred thirty-one shall apply to such petitions. The court shall enter an interlocutory decree upon which execution shall issue for any part of a claim found due pursuant to sections fifty-nine and fifty-nine B and, upon motion of any party, shall advance for speedy trial the petition to collect the remainder of the claim. Any party aggrieved by such interlocutory decree shall have the right to appeal therefrom as from a final decree. The court shall not consolidate for trial the petition of any subcontractor with the petition of one or more subcontractors or the same general contract unless the court finds that a

substantial portion of the evidence of the same events during the course of construction (other than the fact that the claims sought to be consolidated arise under the same general contract) is applicable to the petitions sought to be consolidated and that such consolidation will prevent unnecessary duplication of evidence. A decree in any such proceeding shall not include interest on the disputed amount deposited in excess of the interest earned for the period of any such deposit. No person except a subcontractor filing a demand for direct payment for which no funds due the general contractor are available for direct payment shall have a right to file a petition in court of equity against the awarding authority claiming a demand for direct payment is premature and such subcontractor must file the petition before the awarding authority has made a direct payment to the subcontractor and has made a deposit of the disputed portion as provided in part (iii) of subparagraph (e) and in subparagraph (f) of paragraph (1).

(5). In any petition to collect any claim for which a subcontractor has filed a demand for direct payment the court shall, upon motion of the general contractor, reduce by the amount of any deposit of a disputed amount by the awarding authority as provided in part (iii) of subparagraph (e) and in subparagraph (f) of paragraph (1) any amount held under a trustee writ or pursuant to a restraining order or injunction.

SECTION 3. The first paragraph of section 39G of chapter 30 of the General Laws, as most recently amended by section 1 of chapter 461 of the acts of 1972, is hereby further amended by striking out the last sentence and by inserting in place thereof the following sentence: — The contracting authority shall deduct and retain from payment of said final estimate a sum sufficient to satisfy all demands for direct payment filed by subcontractors under the provisions of section thirty-nine F of this chapter but no contract subject to the provisions of section thirty-nine F shall contain any other provision authorizing the awarding authority to deduct or retain any sums by virtue of claims asserted against the contractor by subcontractors, material suppliers or others.

SECTION 4. Said chapter 30 is hereby amended by adding after section 39M the following section: —

*Section 39N.* Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:

If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents

or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.

SECTION 5. Section 29 of chapter 149 of the General Laws is hereby amended by striking out the second, third and fourth paragraphs and inserting in place thereof the following five paragraphs: —

In order to obtain the benefit of such bond for any amount claimed due and unpaid at any time, any claimant having a contractual relationship with the contractor principal furnishing the bond, who has not been paid in full for any amount claimed due for the labor, materials, equipment, appliances or transportation included in the paragraph (1) coverage within sixty-five days after the due date for same, shall have the right to enforce any such claim (a) by filing a petition in equity within one year after the day on which such claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in the claim and (b) by prosecuting the claim thereafter by trial in the superior court to final adjudication and execution for the sums justly due the claimant as provided in this section.

Any claimant having a contractual relationship with a subcontractor performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor but no contractual relationship with the contractor principal furnishing the bond shall have the right to enforce any such claim as provided in subparagraphs (a) and (b) of paragraph (2) only if such claimant gives written notice to the contractor principal within sixty-five days after the day on which the claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in the paragraphs (1) coverage, stating with substantial accuracy the amount claimed, the name of the party for whom such labor was performed or such labor, materials, equipment, appliances or transportation were furnished; provided, that any such claimant shall have the right to enforce any part of a claim covering specially fabricated material included in the paragraph (1) coverage only if such claimant has given the contractor principal written notice of the placement of the order and the amount thereof not later than twenty days after receiving the final approval in writing for the use of the material. The notices provided for in this paragraph (3) shall be served by mailing the same by registered or certified mail postage prepaid in an envelope addressed to the contractor principal at any place at which the contractor principal maintains an office or conducts his business, or at the contractor principal's residence, or in any manner in which civil process may be served.

Upon motion of any party, the court shall advance for speedy trial a petition to enforce a claim pursuant to this section. Sections fifty-nine and fifty-nine B of chapter two hundred thirty-one shall apply to petitions to enforce claims pursuant to this section. The court shall enter an interlocutory decree upon which execution shall issue for any part of a claim found due pursuant to said sections fifty-nine or fifty-nine B and shall, upon motion of any party, advance for speedy trial the



petition to enforce the remainder of the claim. Any party aggrieved by such interlocutory decree shall have the right to appeal therefrom as from a final decree. The court shall not consolidate for trial the petition of any claimant under this section with the petition of one or more other claimants on the same bond, unless the court finds that a substantial portion of the evidence of the same events during the course of construction (other than the fact that the claims sought to be consolidated arise under the same general contract) is applicable to the petitions sought to be consolidated, and that such consolidation will prevent unnecessary duplication of evidence.

The court shall not dismiss any petition on the ground that it was filed before the sixty-fifth day after the day the claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in the claim, nor shall the court dismiss any petition on the ground that a claim involves more than one contract with the same party and that the one year period has elapsed as to any one contract; provided, that the court shall not enter a decree upon any claim or part thereof prior to the seventieth day after the day the claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in the claim.

A decree in favor of any claimant under this section shall include reasonable legal fees based upon the time spent and the results accomplished as approved by the court and such legal fees shall not in any event be less than published rate of any recommended fee schedule of a state-wide bar association or of a bar association in which the office of counsel for claimant is located, whichever is higher.

SECTION 6. Section 2 of chapter 254 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out, in line 8, the word "thereafter", — and by inserting after the word "furnish", in line 3 of the notice, as appearing in the Tercentenary Edition, the words: — or has furnished.

SECTION 7. Said chapter 254 is hereby further amended by striking out section 3 and inserting in place thereof the following section 3: —

*Section 3.* If the notice described in section two shall have been filed or recorded in the registry of deeds, any person who shall furnish, or who has furnished labor or materials or both labor and material or who performs or has performed labor, under a contract with the contractor or with any subcontractor of said contractor shall be entitled to enforce a lien on the premises therein described for labor or material furnished prior to the date of completion of said contract as stated in said notice.

SECTION 8. Section 4 of said chapter 254, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "furnish", in line 3 of the notice, as appearing in the Tercentenary Edition, the words: — or has furnished.

SECTION 9. Said chapter 254 is hereby further amended by striking out section 12, as appearing in the Tercentenary Edition, and inserting in place thereof the following section: —

*Section 12.* Any person in interest in connection with a written contract covered by section two or section four may cause to be recorded in the registry of deeds in the county or district where the land lies a bond of a surety company authorized to do a surety business in Massachusetts and in a penal sum equal to the contract sum or, if the contract does not contain a contract sum, in a penal sum equal to that person's



fair estimate of the contract sum, all as set forth in the certificate on the bond. The bond shall describe the land in such detail as is required in a common conveyance of land, and shall be in the following form: —

*Known All Men By These Presents:*

That we ..... of ..... in the County of ..... and Commonwealth of Massachusetts, as principal, and ..... a surety company organized under the laws of ..... and authorized to do business in the Commonwealth as a surety company, are holden and stand firmly bound and obliged unto ..... Register of Deeds for the ..... District, County of ..... in the principal sum of ..... Dollars (\$ ) to be paid unto said Register and his successors in said office, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

*Whereas*, said principal is interested in the erection, alteration, repair or removal of a building or structure on a certain lot of land situated within the ..... Registry District in the Commonwealth, bounded and described as follows:

(Insert description)

and desires to free said land from liens for all labor and all labor and materials entitled to lien protection under chapter 254 and amendments thereto;

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall pay for all labor and for all labor and materials entitled to lien protection under chapter 254 and amendments thereto under the contract referred to in the Certificate in this bond, irrespective of any agreement made between him and the owner or any other persons now interested or who may hereinafter be interested therein, then the above written obligation shall be null and void, otherwise to remain in full force and effect.

This bond is made for the use and benefit of all persons entitled to file the documents for lien protection as provided in Massachusetts General Laws, chapter 254 and they and each of them are hereby made Obligees hereunder, and in case of the failure of the principal to carry out the provisions of this bond made for their use and benefit they and each of them may sue hereon in their own name.

Signed, sealed and delivered this ..... day of ....., 19 .....

*Principal*

*By* .....

*Surety*

*By* .....

*Certificate.*

....., principal on the above bond, hereby certify that the (estimated) contract price for the proposed work to be performed on the land described in the above bond under a written contract between ..... and ..... dated ..... 19 .., is ..... Dollars (\$ ).

(Signed)

After the recording of said bond no lien under this chapter shall thereafter attach for labor or for labor and materials performed under the contract in respect to which the bond is given.

The register of deeds may refuse to record the said bond if it be defective in form of substance, but no party to any such bond shall be discharged by any defect therein as against any party who has in good faith allowed his lien to be dissolved by lapse of time in reliance on the bond. The bond may be enforced by a bill in equity in the superior court brought by any party in interest. A copy of the subpoena shall be filed and recorded in the registry of deeds. No suit or action on the bond shall be commenced after the expiration of ninety days after the claimant last performed or furnished labor or labor and materials.

SECTION 10. Said chapter 254 is hereby further amended by striking out section 14, as so appearing, and inserting in place thereof the following section: —

*Section 14.* Any person in interest may dissolve a lien under this chapter by recording or causing to be recorded in the registry of deeds in the county or district where the land lies, a bond of a surety company authorized to do business in Massachusetts and in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim for labor or labor and materials. Upon the recording of the bond, the lien shall be dissolved. Notice of the recording shall be given to the claimant by serving on the claimant a copy of the notice of recording together with a copy of the bond by an officer qualified to serve civil process or by delivering same to the claimant. The claimant may enforce the bond by a petition in equity filed within ninety days after receipt of notice of recording of the bond.

SECTION 11. Said chapter 254 is hereby further amended by adding the following section: —

*Section 32.* A covenant, promise, agreement of understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to bar the filing of a notice of contract or the taking of any steps to enforce a lien as set forth in this chapter is against public policy and is void and unenforceable.

SECTION 12. Sections one, two, three, four and five of this act shall apply to contracts entered into pursuant to an invitation for bids issued subsequent to the effective date of this act. Sections six, seven, eight, nine, ten and eleven shall apply to all contracts entered into subsequent to the effective date of this act.

*Approved July 17, 1972.*

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**Chap. 775.** AN ACT PROVIDING FOR THE FINANCING OF POLLUTION CONTROL FACILITIES WITH INDUSTRIAL REVENUE BONDS.

*Be it enacted, etc., as follows:*

SECTION 1. Section 1 of Chapter 40D of the General Laws is hereby amended by inserting after (c) the following clause: —

(c $\frac{1}{2}$ ) "Pollution control facilities", facilities for the prevention, avoidance, reduction, control, abatement or elimination of pollution by any means of air or of waters by industrial establishments.