

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DSL HOSPITALITY, LLC,

Plaintiff,

v.

RONCO CONSTRUCTION COMPANY,
INC.

Defendant.

CASE NO: CI 19-_____

COMPLAINT

Plaintiff DSL Hospitality, LLC ("DSL") states and allege the following for its claims for relief against Defendant Ronco Construction, Inc. ("Ronco"):

PARTIES

1. DSL is a Nebraska limited liability company which owns real estate in Douglas County, Nebraska.

2. Ronco is a Nebraska corporation with its principal place of business in Omaha, Douglas County, Nebraska.

JURISDICTION AND VENUE

3. Jurisdiction is proper in this Court pursuant to Neb. Rev. Stat. §§ 24-302 and 25-536.

4. Venue is proper in this Court pursuant to Neb. Rev. Stat. § 25-403.01.

BACKGROUND

5. DSL and general contractor Ronco entered into a contract on July 2, 2018 (the "Contract"), for the construction of the Home2 Suites Hotel at 4440 Douglas Street, Omaha, NE 68131 (the "Project"). Ronco began work on the Project shortly after, with a scheduled completion date 310 days after commencement of the component wall framing. The Project was not completed on time, and Ronco became obligated to pay liquidate damages per the Contract. Thus, DSL therefore refused payment on certain payment application(s) from Ronco for these reasons and for uncured defective work. As a result, Ronco sent a written notice to DSL that as of September 26, 2019, Ronco

was suspending work on the Project. DSL then terminated the Contract on September 30, 2019.

6. Also, on September 30, 2019, Ronco recorded a construction lien with the Douglas County Register of Deeds, encumbering DSL's Project real estate. The Construction Lien stated an amount of \$3,235,780.29 was unpaid, whether due or not (the "Construction Lien"), a true and correct copy of which is attached as Exhibit A.

7. A month before the filing of the Construction Lien, on August 31, 2019, Ronco signed under oath and notary seal and delivered to DSL an Application and Certificate for Payment (the "Fee Application") listing the original Contract amount of \$7,912,651.00, that \$6,692,311.11 had been paid by DSL to Ronco (including Retainage), that \$660,050.10 was due and owing, and that \$1,554,955.50 worth of work under the Contract that has yet to be completed, roughly 20% of the total Contract amount.

8. There have been no further Applications and Certificates for Payment or Change Orders issued and delivered by Ronco to DSL or to the Project Architect from and after August 31, 2019.

9. The Project Architect confirms under oath that the Project has never achieved substantial completion.

FIRST CLAIM FOR RELIEF
Set Cash Deposit under Neb. Rev. Stat. § 52-142(2).

10. DSL incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

11. In its Construction Lien, Ronco fails to identify what amounts are due or whether the Project achieved substantial completion, though because Ronco claims in the Construction Lien that the Contract amount is \$7,912,651.00 and that \$3,235,780.29 is unpaid, whether due or not to Ronco, Ronco thus has in effect conceded that substantial completion has not been achieved. As such, there is no statement of the amount due to Ronco in the Construction Lien that would allow the Owner (DSL) to deposit 115% of that amount to transfer the Construction Lien off of the real estate and on to the cash deposit, as is the Owner's right under Neb. Rev. Stat. § 52-142(2).

12. Ronco's Construction Lien only states that \$3,235,780.29 remains unpaid, **whether due or not**. Under Nebraska law, a lien claimant can only claim the full contract amount in a construction lien *when that contract has been substantially performed*. *Tilt Up Concrete, Inc. v. Star City/Federal, Inc.* 255 Neb. 138, 154 (1998).

13. By Ronco's own admissions in the Fee Application and its Construction Lien, the Project has not achieved substantial completion. Therefore, Ronco can only claim in its Construction Lien the amounts due and owing for work that has already been completed on the Project. *Id.*

14. In its Fee Application, Ronco swore that only \$660,050.10 was due and owing for all completed work on the Project. There have been no further Applications and Certificates for Payment or Change Orders issued and delivered by Ronco to Owner (DSL) or to the Project Architect from and after August 31, 2019. Thus, the most the Construction Lien amount could be is the amount due and owing for work that has already been completed on the Project, namely \$660,050.10.

15. Next, DSL is entitled to certain credits against the \$660,050.10 claimed due, because subsequent to the Construction Lien being recorded, DSL paid and secured lien waivers from several of Ronco's subcontractors who Ronco failed to pay and whose amounts are contained in the \$660,050.10 which Ronco claims due and owing, as follows:

Subcontractors	Payments Made
Freedom Specialty Contracting	\$14,302.59
Freedom Specialty Contracting	\$13,353.00
Standard Heating and Air Conditioning	\$90,607.50
Standard Heating and Air Conditioning	\$100,000.00
TSI Mechanical LLC	\$55,839.60
Mack Electric	\$42,617.00
Katelman Steel Fabrication	\$11,021.00
Keystone Glass Company	\$120,000.00
Grand Total	\$447,740.69

16. As Ronco is the general contractor under the Contract (Articles 5, 7 and 10, in particular), a substantial amount of the funds DSL pays or may owe to Ronco will enable Ronco to in turn pay its subcontractors and suppliers on the Project.

17. DSL's direct payments to Ronco's subcontractors after the recording of the Construction Lien relieved Ronco's obligation to make payments to those subcontractors, thus reducing the \$660,050.10 claimed due and owing to Ronco.

18. According to the lien waivers, a total of \$447,740.69 has been paid to various Ronco subcontractors, and DSL should therefore be given payment credits against the \$660,050.10 that is claimed due and owing by Ronco. *Ritchie Const. Co. v. Hoffman*, 8 A.D.2d 633 (1959) (Supreme Court of New York held that an owner is entitled to credits under a construction lien for payments made to sub-contractors).

19. Taking into account (i) Ronco's Construction Lien defectively fails to identify the amount due and owing to Ronco, (ii) the actual amount that Ronco claimed under oath was due and owing of \$660,050.10 in its most recent Fee Application, and (iii) DSL's post-lien payments to Ronco's subcontractors, the most that could be due and owing to Ronco under its Construction Lien is \$212,309.41 (\$660,050.10 - \$447,740.69). Thus, this Court should set that amount that is due and owing to Ronco under its Construction Lien at \$212,309.41, and if Owner (DSL) wishes to deposit 115% of that amount to transfer the Construction Lien off of the real estate and on to the cash deposit, as is the Owner's right under Neb. Rev. Stat. § 52-142(2), the cash deposit must be \$244,155.82.

20. Alternatively, even assuming that Ronco is entitled to claim in its Construction Lien the entire Contract amount, ***whether due or not***, less payments made to Ronco, the amount claimed in Ronco's Construction Lien is in direct conflict with the amount stated under oath in Ronco's Fee Application. In its Fee Application, Ronco states a current amount due of \$660,050.10 for work already completed, and a balance \$1,554,955.50 to complete all the work left under the Contract. The most the remaining Contract amount could be, ***whether due or not***, is \$2,215,005.60, not \$3,235,780.29, as incorrectly noted in the Construction Lien.

21. As described above, after the Contract was terminated and the Construction Lien was recorded, DSL paid and secured lien waivers from several of Ronco's subcontractors who Ronco failed to pay and whose amounts are contained in the \$660,050.10 claimed due by Ronco.

Subcontractors	Payments Made
Freedom Specialty Contracting	\$14,302.59
Freedom Specialty Contracting	\$13,353.00
Standard Heating and Air Conditioning	\$90,607.50
Standard Heating and Air Conditioning	\$100,000.00
TSI Mechanical LLC	\$55,839.60
Mack Electric	\$42,617.00
Katelman Steel Fabrication	\$11,021.00
Keystone Glass Company	\$120,000.00
Grand Total	\$447,740.69

22. Moreover, after the Contract was terminated and the Construction Lien was recorded, DSL assumed the remaining balance of certain subcontracts of Ronco, including the following:

Subcontractors	Amounts Assumed
Freedom Specialty Contracting, Inc.	\$233,476.08
Freedom Specialty Contracting, Inc.	\$36,666.10
TSI Mechanical LLC	\$30,380.60
TSI Mechanical LLC	\$431,443.88
Standard Heating and Air Conditioning	\$289,313.00
Titanium Fire	\$13,411.60
Titanium Fire	\$73,675.00
Katelman Steel Fabrication, Inc.	\$112,549.88
Keystone Glass (after payment of \$120k)	\$75,900.00
Grand Total	\$1,296,816.14

23. Under these Assumption Contracts, Ronco no longer has the obligation under the subcontracts to pay those Ronco subcontractors, per the consent of those subcontractors and the assumption of DSL. Thus, in addition to payments already made to the various Ronco subcontractors, DSL is entitled to have these assumed amounts credited against the Construction Lien.

24. Therefore, assuming that Ronco is entitled to claim under its Construction Lien the maximum amount of the remaining Contract amount, whether due or not, of \$2,215,005.60, that amount must be reduced by DSL's payments to Ronco's subcontractors (\$447,740.69) and DSL's assumed amounts that will become due to Ronco's subcontractors (\$1,296,816.14). Thus, under this alternative approach, the most that could be claimed on the Construction Lien is \$470,448.77, and 115% of this amount is \$541,016.09.

25. The Clerk of this Court will, if directed by the Court, place any cash deposit in an interest bearing account. So, DSL requests that this Court so direct the Clerk.

WHEREFORE, DSL requests that this Court enter an Order setting the "claimed" amount that is due and owing to Ronco under its Construction Lien is \$212,309.41 (\$660,050.10 (Ronco's sworn stated amount due) - \$447,740.69 (Owner's payments to subs)), and if Owner (DSL) wishes to deposit 115% of that amount to transfer the Construction Lien off of the real estate and on to the cash deposit, as is the Owner's right under Neb. Rev. Stat. § 52-142(2), that cash deposit must be \$244,155.82.

In the alternative and over DSL's objection, if this Court determines that Ronco is entitled to claim in its Construction Lien the entire Contract amount, whether due or not, less payments made to Ronco, that "claimed" amount is \$470,448.77 (\$2,215,005.60 (Ronco's sworn stated amount due or to become due) - \$447,740.69 (Owner's payments to subs) - \$1,296,816.14 (Owner's assumption of remaining amounts to become due to subs), and if Owner (DSL) wishes, in the alternative, to deposit 115% of that amount to transfer the Construction Lien off of the real estate and on to the cash deposit, as is the Owner's right under Neb. Rev. Stat. § 52-142(2), that cash deposit must be \$541,016.09.

Directing the Clerk to place any cash deposit in an interest bearing account, until further order of the Court.

SECOND CLAIM FOR RELIEF Declaratory Judgment

26. DSL incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

27. As set forth above, an actual, live, and justiciable controversy exists between DSL and Ronco concerning, among other things, the amount Ronco can properly claim due on its Construction Lien and other construction liens that Ronco has or will file, as well as the nature and extent of construction defects and delays and the resulting damages.

WHEREFORE, Plaintiff DSL respectfully prays for a declaratory judgment in its favor and against Defendant Ronco, as follows:

a. Declaring that 1) Ronco is only entitled to claim the amount due for work already completed on the Project, not the remaining contract amount, 2) DSL is entitled to credits for amounts it paid to subcontractors on the project, 3) the proper amount due in the Construction Lien is \$212,309.41, which is the amount due on work already completed on the project minus amounts paid to subcontractors, and 4) that DSL can deposit \$244,155.82, 115% of that amount, with the Clerk of this Court to transfer the Construction Lien from the real property to the cash deposit;

b. In the alternative, DSL prays that this Court declare that 1) if Ronco is entitled to the amounts remaining due on the full contract amount, that DSL is entitled to credits for amounts it paid to subcontractors and for every subcontract DSL assumed where it agreed to pay the subcontractors all remaining amounts due on each respective subcontract, 2) the proper amount due in the Construction Lien is \$470,448.77, which is the amount due on the full contract amount minus amounts paid to subcontractors, minus amounts DSL agreed to pay to subcontractors pursuant to each assumed subcontract, 3) that DSL can deposit \$541,016.09, 115% of that amount, with the Clerk of this Court to transfer the Construction Lien from the real property to the cash deposit;

c. Directing the Clerk to place any cash deposit in an interest bearing account, until further order of the Court;

d. Resolve other lien filings consistent with the requests herein and for an award of general damages;


e. Awarding DSL its attorney fees and costs; and

f. Awarding DSL such other, further and different relief as this Court deems just and equitable.

DATED this 28 day of October 2019.

DSL HOSPITALITY, LLC, Plaintiff,

By: _____


Gregory C. Scaglione, #19368

Brady H. Godbout #26753

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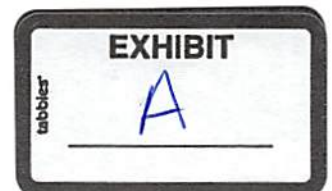


CONSTRUCTION LIEN

1. The real estate subject to this lien is located at 4440 Douglas Street, Omaha, Nebraska 68131, and legally described as follows:

SADDLE CREEK MIDTOWN LOT 1 BLOCK 0 LT 1 0.88 AC --EXCESS VALUE--

2. The person against whose interest in the real estate the lien is claimed is DSL Hospitality, LLC located at 306 Delaware, Kansas City, Missouri 64105.
3. The name and address of the claimant is Ronco Construction Company, Inc., located at 1717 North 74th Street, Omaha, Nebraska 68114.
4. The name and address of the person with whom the claimant contracted is DSL Hospitality, LLC located at 306 Delaware, Kansas City, Missouri 64105.
5. A general description of the claimants services performed or to be performed or materials furnished or to be furnished for the construction of a hotel. The contract price for the services and materials is \$7,912,651.00.
6. The amount unpaid, whether due or not, to the claimant for the services or materials is \$3,235,780.29.
7. The time the last service or materials were furnished was September 24, 2019.
8. Claimant is entitled to record this lien.



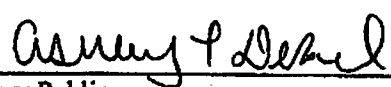
Return: Brad Key, Cuddigan, et al 10855 W. Dodge Rd, Suite 100, Omaha, NE 68154


Zak Olsen, President

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

On this 27 day of September, 2019, before me the undersigned, notary public in for said county, personally came Zak Olsen, President of Ronco Construction Company, Inc., a domestic corporation duly registered in the State of Nebraska, to me personally known to be the President and identical person and whose name is affixed to the above Construction Lien, and acknowledged the execution thereof to be his voluntary act and deed as such officer, and the voluntary act and deed of said Ronco Construction Company, Inc.

WITNESS MY HAND and notarial seal at Omaha in said county on the date first above written.


Notary Public

