STATE OF VERMONT

ESSEX COUNTY, SS

LARRABEE'S BUILDING SUPPLY INC.

V.

TOWN OF LUNENBURG,
LUNENBURG SCHOOL DISTRICT, &
CONTRACTORS CONSTRUCTION CO.

ESSEX SUPERIOR COURT
DOCKET # S6-94EC

Decision
Motion for Writ of Attachment

This matter came before the court for hearing on March 4, 1994. Plaintiff was represented by Gregory M. Eaton, Esq. The District was represented by Robert R. Bent, Esq. Additional time until March 16, 1994 was allowed for the filing of affidavits and supplemental memoranda.

Based on the evidence, arguments, and memoranda, the court concludes that Plaintiff has established a reasonable likelihood of recovery in the amount of $19,123.63, as well as the additional statutory requirements. The legal issue before the court is whether that is the amount of the recovery likely, or whether, as the District argues, any likely recovery is in a lesser amount.

The District argues that while it still owes Contractors $30,200 under the construction contract, and while the contract is still in effect and has not been terminated, if it chooses to terminate the contract and complete the job itself, it would be entitled to a set-off against the contract amount owed Contractors of sums needed to complete the work. It submitted evidence that at least $25,000 still needs to be spent in materials and subcontracts to complete the work. Thus, the District argues, in the end Plaintiff may only be able to recover $5,200 at a hearing under the law as set forth in Cote v. Bloomfield,

128 Vt. 306 (1970), and thus should be limited to that amount as its reasonable likelihood of recovery.

While that may eventually be the way the matter evolves, the District has not yet terminated the contract, and there may be a variety of factors that will influence its decision about whether or not to do so. The court will not presume that the District will make that choice just because that choice may be available to it.

The District further argues that if the mechanic's lien is perfected through the attachment, it may wind up paying the full $30,200 remaining under the contract, and still have its property subject to a lien of over $19,000. That may be the case, but only if the District selects the option of paying Contractors (or other suppliers) with its remaining $30,200 rather than paying Plaintiff, who has already supplied materials and followed all the rules in protecting its right to payment for those materials. The District wishes to preserve its options, which is understandable, but among those options is one that will allow Plaintiff to be protected. Plaintiff has done the maximum that it could do to be protected and has no other options.

The situation would be different if the District had already terminated its contract, because then it would be clear that there would be a set-off right, and the question would be the amount of it. In the present state of affairs, it is not clear that the District will choose the course that would result in a set-off right; there may be countervailing reasons against doing so. At this point that prospect is nothing more than a possibility.

For the reasons set forth in Plaintiff's Reply Memorandum of Law filed with the court on March 18, 1994 and those set forth above, the court concludes that it would be premature to find that Plaintiff's reasonable recovery is likely to be any less than $19,123.63, since at this point the circumstances

that would give rise to a set-off under Cote v. Bloomfield have not yet occurred. If they do, that may provide a basis for an eventual recovery in a different amount.

Dated this 25th day of March, 1994.

Mary Miles Teachout
Superior Judge