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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF RIGANO,

Respondent,

(Proceeding No. 1)

-against-

No. 223

VIBAR CONSTRUCTION, INC.,

Appellant.

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VIBAR CONSTRUCTION CORP.,

Appellant,

(Proceeding No. 2)

-against-

No. 223

FAWN BUILDERS, INC.,

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
November 18, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

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1 CHIEF JUDGE LIPPMAN: 223, Matter of Rigano  
2 v. Vibar.

3 Counselor, you want any rebuttal time?

4 MR. RIZZO: Two minutes, please, Judge.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
6 ahead.

7 MR. RIZZO: Good afternoon. May it please  
8 the court, my name is Jeffrey Rizzo. I'm appearing  
9 on behalf of the Law Office of Michael Ryan for Vibar  
10 Construction Corp.

11 The mechanic's lien in this case, Your  
12 Honors, was improperly discharged for failure to  
13 state the true owner - - -

14 CHIEF JUDGE LIPPMAN: It wasn't artfully  
15 drawn, was it, the mechanic's lien?

16 MR. RIZZO: It was not, Judge, admittedly.

17 CHIEF JUDGE LIPPMAN: It had a lot of  
18 different errors, didn't - - - didn't it?

19 MR. RIZZO: There were a number of errors,  
20 yes.

21 CHIEF JUDGE LIPPMAN: So what point do you  
22 say this is - - - doesn't provide notice and doesn't  
23 meet the purposes of what you're supposed to be - - -

24 MR. RIZZO: Well, what the - - -

25 CHIEF JUDGE LIPPMAN: - - - moving when

1           you're filing a mechanic's lien?

2                   MR. RIZZO:  What the Supreme Court focused  
3           on at the trial level and what the Appellate Division  
4           focused on were the specific naming of Fawn Builders  
5           as the owner of the property as - - -

6                   CHIEF JUDGE LIPPMAN:  Yes, well, that's the  
7           - - - the - - -

8                   MR. RIZZO:  - - - as opposed to Mr. Rigano.

9                   CHIEF JUDGE LIPPMAN:  - - - the main fault,  
10          but there were - - -

11                  MR. RIZZO:  The - - - the - - -

12                  CHIEF JUDGE LIPPMAN:  - - - four or five  
13          other - - -

14                  MR. RIZZO:  There were, Judge.  The other  
15          errors, I believe, at least two or three of them,  
16          were blatantly obviously typo - - -

17                  CHIEF JUDGE LIPPMAN:  So you think - - -

18                  MR. RIZZO:  - - - typographical error - - -

19                  CHIEF JUDGE LIPPMAN:  - - - those are  
20          inconsequential.

21                  MR. RIZZO:  I do.

22                  CHIEF JUDGE LIPPMAN:  - - - and we should  
23          focus on the - - - the one - - -

24                  MR. RIZZO:  Yes.

25                  CHIEF JUDGE LIPPMAN:  - - - so-called major

1 error?

2 MR. RIZZO: Yes, the other errors were  
3 typographical errors. One of them was a date which  
4 was in the future, which obviously, anybody reading  
5 it on its face would not - - -

6 CHIEF JUDGE LIPPMAN: So let's say we do -  
7 - -

8 MR. RIZZO: - - - seek to say we actually  
9 moved the date in the future.

10 CHIEF JUDGE LIPPMAN: Let's say we do that.

11 MR. RIZZO: Yes.

12 CHIEF JUDGE LIPPMAN: Why can't you get the  
13 main piece right? Isn't that important as to who the  
14 mechanic's lien - - -

15 MR. RIZZO: It is - - -

16 CHIEF JUDGE LIPPMAN: - - - is filed  
17 against?

18 MR. RIZZO: It is important, Judge, and I -  
19 - - I think what is important in this case, however,  
20 though, is that Fawn Builders and Nick Rigano are  
21 essentially the same thing. The - - -

22 JUDGE PIGOTT: But the problem with that  
23 reasoning - - - and I - - - and I know there's - - -  
24 there's case laws that - - - that seem to im - - - im  
25 - - - imply it, is that if you're going to a house

1 closing or any type or real property closing, you run  
2 a search and survey and - - - and it will tell you  
3 what all the liens are on the property. And if  
4 there's a lien on the property that's improperly  
5 designated, it's not going to show up, and you - - -  
6 and you lose your lien, it seemed to me. So if you  
7 list Fawn Builders and - - - and you really want to  
8 get Rigano or Rigano and you really want to get Fawn  
9 Builders, I think you have to be accurate, right?  
10 Otherwise you may be liening something that shouldn't  
11 be liened.

12 MR. RIZZO: That may be correct, Judge, but  
13 in this case the - - - as I said, Fawn Builders and  
14 Nick Rigano are the same thing. If you take a look  
15 at the deed that was actually the - - -

16 JUDGE PIGOTT: Yeah, but the - - - no, do -  
17 - - do you understand my point, though? Like if - -  
18 - if you - - - if - - - if somebody wants to search  
19 property and find out if there's liens out there - -  
20 -

21 MR. RIZZO: Right.

22 JUDGE PIGOTT: - - - and you've got a lien  
23 that really doesn't belong to one or the other, does  
24 he - - - he - - - or the corporation have to  
25 discharge it or hold money in escrow because they've

1 got to do something about this lien that shouldn't be  
2 there?

3 MR. RIZZO: Our position is that the lien  
4 should be there, though.

5 JUDGE PIGOTT: And that affects - - - and  
6 that - - - and that affects the order of liens. That  
7 - - - that - - - that can affect the mortgage, that  
8 can affect a number of things if the - - - if the  
9 lien isn't properly identified.

10 MR. RIZZO: It could, Judge, but if anybody  
11 was doing a title search on this property, they would  
12 see that the deed that was recorded with the county  
13 clerk's office was a deed from Fawn Builders to Nick  
14 Rigano for which - - -

15 JUDGE SMITH: But if - - - but if - - - but  
16 if you had a third party who had placed a - - - an  
17 encumbrance on the property while the wrong name was  
18 on there, wouldn't this be a different case? Some -  
19 - - I mean - - - I mean is - - - isn't the - - - the  
20 court had to allow your amendment. Didn't the court  
21 have to find that there was no prejudice?

22 MR. RIZZO: Well, I believe the court did  
23 find - - - withdrawn, sorry.

24 The First Department does focus on no  
25 prejudice. And that's - - - the difference between

1 the First Department rulings and the Second  
2 Department rulings is the First Department - - -

3 JUDGE SMITH: And I - - - I mean this is -  
4 - - this is not an unfriendly question. It's not - -  
5 - not - - - not the cross - - - the cross - - -  
6 cross-examiners say not a trick question.

7 MR. RIZZO: Sure.

8 JUDGE SMITH: You - - - if you had a case  
9 where there was prejudice to some innocent third  
10 party who had come in and filed a lien against Nick  
11 Rigano not knowing that - - - that your lien, which  
12 said Fawn - - - Fawn Builders, should - - - had  
13 previously been filed, you're not - - - that guy  
14 would get priority over you, wouldn't he?

15 MR. RIZZO: Yes, Judge, in Lien Law Section  
16 12, which allows for amendments, which is what Vibar  
17 Construction moved for an amendment to the mechanic's  
18 lien in this case, does specifically mention  
19 prejudice; and if there would be prejudice to another  
20 party, then the amendment should not be allowed.  
21 You're correct. But that's not the case here, and  
22 that's not the case in the cases that we've cited  
23 from the First Department. And what seems to be  
24 ignored by the Second Department - - - the Second  
25 Department, in their decisions, does not make any

1 mention of prejudice with regards to whether the  
2 amendment should be allowed in those cases.

3 JUDGE PIGOTT: But I - - - I think because  
4 the argument can be made the other way. In other  
5 words, if you misidentify the - - - the - - - the - -  
6 - the - - - the lien, there could be - - - there  
7 could be factors that - - - that never see the light  
8 of day. In other words, you've got a - - - you've  
9 got a lien on somebody's property. They got a  
10 mortgage or they're trying to get a - - - a student  
11 loan or trying to get something and - - - and - - -  
12 and this pops up, and they - - - and - - - and so  
13 they can't get it. But they - - - what are they  
14 supposed to do? They're not - - - they're not going  
15 to - - - they're not going to run off to a court and  
16 try - - - and try to discharge the lien. They're not  
17 going to - - - they're not going to give you the  
18 opportunity to amend it, because you'll never know.

19 MR. RIZZO: But - - -

20 JUDGE PIGOTT: And - - - and I think that's  
21 why it's - - - it's a strict statute in that regard.  
22 You got to name the right lienor - - - or - - - or  
23 the person that you're liening, or it's not valid.

24 MR. RIZZO: Well, that's not actually what  
25 the statute says, Judge, and that's where I would

1 disagree. The statute states that you don't have to  
2 name the specific owner, the true owner, that a  
3 misdescription of the owner is allowed, so - - -

4 JUDGE PIGOTT: Misdescription or  
5 misidentification?

6 MR. RIZZO: Misdescription.

7 JUDGE PIGOTT: If - - -

8 JUDGE SMITH: But it also says fail - - -  
9 or failure to name.

10 MR. RIZZO: Or - - - or - - -

11 JUDGE SMITH: Doesn't it say failure - - -

12 MR. RIZZO: - - - failure to name outright,  
13 yes.

14 JUDGE READ: What about substantial  
15 compliance; does it say anything about that?

16 MR. RIZZO: Well, that was my next point.  
17 Judge Pigott just mentioned, you know, that it was a  
18 strict statute here. It's not. The statute is  
19 specifically supposed to be interpreted liberally.  
20 And it's mentioned - - - I mean, very often we have  
21 statutes where they don't give the courts any guidance  
22 on how they are to be interpreted. In this case,  
23 they give very specific guidance on how this entire  
24 article should be interpreted, and that is liberally  
25 and with substantial compliance. It's not strict.

1 CHIEF JUDGE LIPPMAN: Is the Second - - -  
2 are the Second Department cases distinguishable or  
3 just wrong?

4 MR. RIZZO: It's difficult for me to tell,  
5 to be honest, Judge, because many of the Second  
6 Department cases don't go into the details of the  
7 relationship between the two owners - - -

8 CHIEF JUDGE LIPPMAN: Um-hum.

9 MR. RIZZO: - - - where there was a  
10 transfer. I will - - - I would note there may be  
11 cases where they are distinguishable, and there may  
12 be cases where they're wrong. And it's hard for me  
13 to say without having more detail than what's  
14 included in those decisions. What I would say in  
15 response to that, though, is that the First  
16 Department cases, I think, are distinguishable from  
17 the Second Department cases. And you don't  
18 necessarily have to say that the Second Department  
19 rule is wrong. The First Department looks at things  
20 like whether there was consideration paid, whether it  
21 was an arm's-length transaction, or whether it was  
22 just a change in name only, as it was here.

23 CHIEF JUDGE LIPPMAN: Yeah, but your - - -  
24 your argument is that the Second Department cases are  
25 not consistent with a - - - with - - - with the tenor

1 of - - - of cases that we've had, of our precedents,  
2 right?

3 MR. RIZZO: My argument is that the Second  
4 Department cases are not consistent with the statute,  
5 that they're not consistent with the First Department  
6 cases. And there actually is - - - which we failed  
7 to cite in our brief, but there actually is a Third  
8 Department case that's in line with our position and  
9 with the First Department's.

10 CHIEF JUDGE LIPPMAN: But what about Court  
11 of Appeals precedents?

12 MR. RIZZO: The only Court of Appeals case  
13 was the Gates case, which deals with a lot of  
14 different liens against various parties. And that  
15 case - - - I believe it was 1918, 1919, thereabouts,  
16 where it was decided - - - and that case does not  
17 give specific guidance in terms of how to identify a  
18 misdescription versus a misidentification. It seems  
19 to have left it up to the Appellate Division.

20 JUDGE PIGOTT: Do you - - - do you see a  
21 difference between misdescription and  
22 misidentification, or are they just synonymous in  
23 your view?

24 MR. RIZZO: I see a difference.

25 JUDGE PIGOTT: What's the difference?

1 MR. RIZZO: A misidentification - - - my  
2 position would be that it's a entirely different  
3 party with no relationship to the person that's name  
4 or to the entity that's named in the mechanic's lien,  
5 whereas a misdescription would be - - - the First  
6 Department case is exactly on point for this, as well  
7 as the Third Department case - - - where you have  
8 owners of a corporation that are named, their  
9 personal names are used as opposed to the name of the  
10 corporation, that - - - essentially, in this case,  
11 for example, Nick Rigano is Fawn Builders. Fawn  
12 Builders is Nick Rigano. My client did business with  
13 Mr. Rigano as Fawn Builders for twenty, thirty years.  
14 That - - - and for all intents and purposes, there  
15 was no misidentification of who owned the property.  
16 It was just a mis - - - misidentification of the name  
17 used - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. RIZZO: - - - to purchase that  
20 property.

21 JUDGE SMITH: I'm - - - I'm just - - - I -  
22 - -

23 CHIEF JUDGE LIPPMAN: Oh, sure, Judge  
24 Smith.

25 JUDGE SMITH: I'm just - - - well, just - -

1 - can you give us, either now or later, the - - - the  
2 name and the citation of that Third Department case?

3 MR. RIZZO: I can give it to you right now,  
4 if you'd like.

5 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

6 MR. RIZZO: It's Matter of Carboline,  
7 C-A-R-B-O-L-I-N-E, and it's 94 A.D.2d 921.

8 CHIEF JUDGE LIPPMAN: Okay, thanks,  
9 counsel.

10 MR. RIZZO: Thank you.

11 CHIEF JUDGE LIPPMAN: Counsel.

12 MR. MACREERY: Good afternoon. My name is  
13 Brian Macreery from the firm Deren, Genett &  
14 Macreery. I represent the respondents, and - - -

15 CHIEF JUDGE LIPPMAN: Counsel, what's the -  
16 - - what's the harm done here? Why - - - why  
17 shouldn't we, as the statute apparently contemplates,  
18 be liberal in terms of - - - of amendments? As long  
19 as there's no prejudice to anybody, why - - - why  
20 would we - - -

21 MR. MACREERY: In - - -

22 CHIEF JUDGE LIPPMAN: - - - stick to a very  
23 narrow rule that seems, at least, to be somewhat in -  
24 - - contravene what the statute anticipates?

25 MR. MACREERY: For several reasons. First,

1 to uphold this particular mechanic's lien you would  
2 have to completely ignore the requirement of  
3 substantial compliance. I cannot think of a  
4 mechanic's lien that could be more defective than  
5 this one.

6 CHIEF JUDGE LIPPMAN: Because of all the  
7 different defects in it, not just the one then?

8 MR. MACREERY: Because it has six separate  
9 defects and - - -

10 JUDGE PIGOTT: You need them all or you - -  
11 - are you just - - -

12 MR. MACREERY: Three of them are material -  
13 - -

14 JUDGE PIGOTT: Okay, what - - -

15 MR. MACREERY: - - - and fatal defects.

16 JUDGE PIGOTT: - - - what are the other  
17 two? Obviously Fawn and Rigano is one, right?

18 MR. MACREERY: Yes, the - - - the second  
19 one, I would submit, is the failure to accurately set  
20 forth the amount of the lien - - -

21 JUDGE PIGOTT: Okay.

22 MR. MACREERY: - - - the difference between  
23 301,000 and 260-, but even more important, including  
24 in - - - in that 260,000, two mechanic's liens which  
25 were filed on totally separate property and which

1           pertain to two totally separate pieces of property.

2                   JUDGE PIGOTT: But that wouldn't - - - that  
3 wouldn't - - - that wouldn't make the lien defective.  
4 I mean that - - - I mean I - - - I - - - I get your  
5 point, but it - - -

6                   MR. MACREERY: It would make it willfully -  
7 - - willfully - - -

8                   JUDGE PIGOTT: That's different. This - -  
9 - this thing reads like a bad matrimonial.

10                  MR. MACREERY: It - - - but - - - but - - -

11                  JUDGE PIGOTT: But - - - but the fact of  
12 the matter is that there's a lien on your property  
13 and - - - and if it properly names who - - - the  
14 owner, you can fight over this, you know. I - - -  
15 and I don't disagree. I mean when you got a - - -  
16 when it says for goods and services that are not yet  
17 delivered or whatever - - - you know, going into  
18 December and it's filed in October. But those are  
19 issues you can fight. But whether the lien is there  
20 and valid really comes down to that one issue; does  
21 it not? I shouldn't say valid, but that - - - I mean  
22 that - - - that it's - - - that it's proper notice of  
23 something, that somebody owes somebody some money.

24                  MR. MACREERY: I don't think so. I believe  
25 that it's - - - it's - - - it - - - that in this

1 case, because - - -

2 JUDGE PIGOTT: If they named Rigano - - -

3 MR. MACREERY: - - - because on its face  
4 it's wrong.

5 JUDGE PIGOTT: If they named Rigano and had  
6 the - - - had the amount wrong, you think the lien is  
7 - - - is invalid?

8 MR. MACREERY: I'm sorry, sir?

9 JUDGE PIGOTT: If they named Rigano and had  
10 the amount wrong, in your view that lien would be  
11 invalid?

12 MR. MACREERY: Yes, under the facts of this  
13 case.

14 JUDGE PIGOTT: And if they named Rigano and  
15 they had that December date instead of what the last  
16 date of service was, you would say that lien is  
17 invalid?

18 MR. MACREERY: Yes, for a separate reason  
19 because I believe that - - - in this case, that the -  
20 - - well, I believe that the Second Department is  
21 following the decision of Gates & Company against  
22 National Fair & Exposition Association, and I believe  
23 that the First Department is not following that.

24 JUDGE SMITH: Well, suppose you're right  
25 about substantial compliance. I guess that - - -

1 that Church (ph.), whatever it is, case was a  
2 substantial compliance case. Isn't amendment  
3 separate from substantial compliance? Isn't the  
4 point of amendment to - - -

5 MR. MACREERY: Well, the amendment - - -

6 JUDGE SMITH: - - - take - - - isn't the  
7 point of an amendment to take a - - - a lien that  
8 doesn't substantially comply and amend it so it does?

9 MR. MACREERY: But not if the defect is  
10 jurisdictional, and the court - - - and I believe  
11 that both Gates and the Second Department ca - - -  
12 cases say that when there is not merely a  
13 misdescription but a misidentification - - -

14 JUDGE PIGOTT: How do you distinguish those  
15 two?

16 MR. MACREERY: - - - it is jurisdictional.

17 JUDGE PIGOTT: How do you distinguish those  
18 two?

19 MR. MACREERY: Well - - -

20 JUDGE PIGOTT: Do you agree with your  
21 opponent? I mean he said, you know, if you named a -  
22 - - named the members of the corporation and not the  
23 corporation, you got them.

24 MR. MACREERY: No, because in - - - well,  
25 in Gates the lien was filed again - - - against an

1 individual named James Butler, who was an individual  
2 shareholder and officer of the corporation, and he  
3 was actively connected to the management of - - -

4 JUDGE SMITH: We don't - - - we don't know,  
5 though - - -

6 MR. MACREERY: - - - the company.

7 JUDGE SMITH: - - - that it was the - - -  
8 that he was the sole shareholder.

9 MR. MACREERY: I'm sorry, what?

10 JUDGE SMITH: We don't know from that - - -  
11 from Gates that he was the sole shareholder. And if  
12 he'd been the sole shareholder, might Gates have come  
13 out differently?

14 MR. MACREERY: That would be for you to  
15 decide. I - - - I don't - - - I don't read that into  
16 the case.

17 JUDGE PIGOTT: Well, let's take a  
18 misdescription. You - - - you make a - - -

19 MR. MACREERY: Well - - -

20 JUDGE PIGOTT: - - - you make an argument  
21 in your papers - - - I guess it doesn't exist  
22 anymore, but you said that Vibar Construction, Inc.,  
23 does not exist, and you had - - - you had papers from  
24 the Secretary of State.

25 MR. MACREERY: Did not ex - - - it does not

1 exist.

2 JUDGE PIGOTT: They said you - - -

3 MR. MACREERY: It's Vibar Construction  
4 Corp. That defect alone, I don't believe - - - I'll  
5 be honest. I don't believe that that defect standing  
6 alone would be a material defect. I believe that  
7 that is a - - - a defect which would be changeable by  
8 amendment because if it - - -

9 JUDGE SMITH: That, in your view, is a  
10 misdescription?

11 MR. MACREERY: That is a misdescription.  
12 It is.

13 JUDGE PIGOTT: Okay.

14 MR. MACREERY: Vibar Construction Corp. or  
15 Vibar - - -

16 JUDGE SMITH: Well, what - - - what would  
17 be a misdescription of the owner?

18 MR. MACREERY: Of which owner?

19 JUDGE SMITH: The true own - - - the true  
20 owner of the property.

21 MR. MACREERY: Oh. Well, in - - - there  
22 are all of the Second Department cases which show  
23 that if the name has no bearing and no similarity to  
24 the name of the actual owner, that is a  
25 misidentification.

1 JUDGE SMITH: And I asked you for an  
2 example of a misdescription.

3 MR. MACREERY: All right, it's in Gates.  
4 The - - - the description where it was the - - -  
5 where they name - - - where the - - - the name was  
6 Empire City Racing Association, and it was filed  
7 under the name Empire City Trotting Club.

8 JUDGE SMITH: And one was - - - and one was  
9 the former name. It was the same corporation. One  
10 was the former name of the other.

11 MR. MACREERY: I - - -

12 JUDGE SMITH: I think so.

13 MR. MACREERY: I'm - - - I'm not sure I  
14 follow, but that is a misdescription.

15 JUDGE SMITH: Yeah, okay.

16 MR. MACREERY: What - - - but the - - - the  
17 most important part of this, which I - - - which Your  
18 Honor had asked was - - -

19 JUDGE SMITH: So but I mean - - - are you -  
20 - - are you saying - - - are you saying the key is  
21 the similarity of the names? If in - - - if in - - -  
22 if instead of being Fawn Builders it'd been Rigano  
23 Builders it would just be a misdescription.

24 MR. MACREERY: No, not necessarily. What  
25 I'm saying is, as well, and I'd like to - - - I'd

1           like to get to the - - - to the third point that you  
2           said as to the - - - Gates says that one of the  
3           important - - - you've - - - you have already pointed  
4           out that it's necessary to have - - - to know about  
5           lienholders and whether it's filed. But another  
6           important thing which is set forth in Gates is that  
7           for a lien to be valid, it's got to be filed against  
8           someone - - - the person who has consented to the  
9           work being done. That's the sine qua non for any  
10          mechanic's lien. And - - -

11                    JUDGE PIGOTT: But that's a fight you have  
12          later.

13                    MR. MACREERY: Well - - -

14                    JUDGE PIGOTT: Because if - - - if you file  
15          - - - if you file it prop - - - properly - - - let's  
16          assume you filed it against Rigano. And he said  
17          well, this - - - this work wasn't done for me. It  
18          was done for - - - I'm a - - - I'm a - - - I'm a - -  
19          - a person; it was done for Fawn Builders; get this  
20          lien of my property. You'd win, right? Right?

21                    MR. MACREERY: I believe.

22                    JUDGE PIGOTT: Yeah?

23                    MR. MACREERY: But - - - but a point I'd  
24          like to make is that no consent for any construction  
25          was given by Fawn Builders or Nick Rigano after April

1 of 2008. This lien was filed in 2010 in the middle  
2 of litigation when - - - when the appellant had  
3 already, by his own acknowledgement in the lawsuit,  
4 completed the construction for which he has now filed  
5 the mechanic's lien.

6 JUDGE PIGOTT: But - - - but that doesn't  
7 come up in - - - in your - - - in your motion to  
8 extinguish the lien on the merits?

9 MR. MACREERY: I'm sorry?

10 JUDGE PIGOTT: That - - - that - - - you do  
11 that when you want to extinguish the lien on the - -  
12 - on the merits.

13 MR. MACREERY: Well, I think that it's - -  
14 - I think it's a defect on its face, because it  
15 states that - - - that the date of last filing was in  
16 December, a date that had not yet occurred. And if -  
17 - - if the lienholder had been truthful - - -

18 JUDGE SMITH: Can - - - can we - - - is  
19 that issue - - -

20 MR. MACREERY: - - - he would have had to  
21 have acknowledged that the date of last work was in  
22 2008.

23 JUDGE SMITH: Is that - - - is that issue -  
24 - - is that issue before us? I mean can we - - - can  
25 we make that determination on this record? He - - -

1 he says - - - he says the date of last work was one  
2 thing; you say it's the other. How are we supposed  
3 to know?

4 MR. MACREERY: In the record on appeal on  
5 pages 128 through 135 where he is listing the work  
6 that he had performed, it shows that no work was  
7 performed which is lienable after April 4th, 2008.

8 JUDGE PIGOTT: This is the road?

9 MR. MACREERY: Yes, this is on the road.  
10 What was done was - - - yeah. The - - -

11 JUDGE PIGOTT: But - - -

12 MR. MACREERY: He mowed the lawn.

13 JUDGE PIGOTT: But - - -

14 MR. MACREERY: He - - - he swept up - - -  
15 he swept up leaves. That's not lienable to begin  
16 with, and it wasn't consented to. And there can be  
17 no consent by my client after the lawsuit against him  
18 was commenced.

19 JUDGE SMITH: You - - - you did not get  
20 judg - - - that - - - that was not the issue that was  
21 decided in your favor below.

22 MR. MACREERY: The Appellate Division did  
23 not decide that issue. I - - - it had been - - - it  
24 was one of the - - -

25 JUDGE SMITH: You - - - you - - - you - - -

1           you're - - -

2                       MR. MACREERY: - - - grounds on which - - -

3                       JUDGE SMITH: You're saying it's clear as a  
4 matter of law from this record and that document you  
5 just referred us to, that - - - that you're  
6 essentially entitled to summary judgment, that the -  
7 - - that the lien was just too late because the date  
8 of work was - - - was out of time.

9                       MR. MACREERY: Not just that, because there  
10 was no consent to that work.

11                      JUDGE SMITH: And how - - - and - - - and -  
12 - -

13                      MR. MACREERY: There was no consent after  
14 the lawsuit against my client was filed, and consent  
15 is a con - - -

16                      JUDGE SMITH: And - - - and - - - and - - -  
17 and - - - and that's - - -

18                      MR. MACREERY: Can I just say this - - -

19                      JUDGE SMITH: That's - - - that's - - -  
20 that was - - - that's undisputed that there was no  
21 consent?

22                      MR. MACREERY: The lawsuit was - - - was -  
23 - -

24                      JUDGE SMITH: Is it undisputed that there  
25 was no consent?

1 MR. MACREERY: I don't think it can be  
2 reasonably disputed. There's - - - there's been no  
3 allegation that it wasn't in content - - - that the  
4 consent was given afterwards.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.  
6 Thanks, counsel.

7 MR. MACREERY: Thank you.

8 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

9 MR. RIZZO: Yes, just briefly, Judge.

10 Judge, one point that I did not get a  
11 chance to make initially that I did want to make is  
12 that I'm going to ask the court to keep in mind that  
13 very often these mechanic's liens are filed by people  
14 that are not represented by counsel. And that is why  
15 the statute states what it does, that it's to be  
16 construed liberally, that it's - - - was to have  
17 substantial compliance and not strict compliance.

18 The mechanic's lien in this case was filed  
19 - - - on its face it states without an attorney, but  
20 - - -

21 JUDGE PIGOTT: I think that's true, but - -  
22 - but - - - but the - - - the flipside of that is the  
23 reason why I think misdescription and  
24 misidentification are so important. You can be  
25 really mean with liens. You can - - - you can file

1           them, you know, just - - - just to aggravate people  
2           and - - - and frankly, it's not too uncommon these  
3           days.

4                         But when you - - - when you have a lien, as  
5           your opponent is saying, where you got the wrong per  
6           - - - you've got the wrong party; you say that you  
7           did work through December of 2010 when, in fact, the  
8           lien was filed - - - forget - - - forget - - - you  
9           know, in March, so there's seven months there that  
10          you claim work was done that was not done, at some  
11          point the thing becomes a little bit unsteady,  
12          wouldn't you agree?

13                        MR. RIZZO: The December 2010, Judge, I  
14          believe is - - - like I said, very obvious on its  
15          face. I - - - I think it should have been December  
16          2009. The person who was typing it up just was in  
17          the habit of putting 2010 and put it as December  
18          2010, where it should have been 2009. I think it's a  
19          typographical error, which are always allowed to be  
20          amended.

21                        The - - - in terms of the lien itself, the  
22          difference between a misdescription and a  
23          misidentification - - - and, Judge Smith, you were  
24          mentioning this in Gates. In Gates there were a  
25          number of different liens, and the lien that they

1 actually did allow to go forward was the original  
2 name of the racing association was Empire Trotting  
3 Club, which then changed their name to Empire Racing  
4 Association. In ess - - - in essence, it was the  
5 same owner, same as Nick Rigano was the same owner as  
6 Fawn Builders.

7 JUDGE SMITH: Well, but in - - - in - - -  
8 in - - - in Gates it was the same entity. Rigano and  
9 - - - and Fawn Builders aren't the same legal entity.

10 MR. RIZZO: That's where I would bring in  
11 the Third Department case, Judge, where it actually  
12 is - - - there was a corporation that was named as  
13 the owner in that case, and the mechanic's lien  
14 listed - - - I'm sorry, the mechanic's lien listed  
15 the corporation, when it turned out, in fact, it was  
16 two individuals who owned a different cooperation and  
17 one individual who was named personally.

18 JUDGE PIGOTT: But if - - - if Fawn  
19 Builders had - - - had conveyed this to another party  
20 - - - forget Rigano for a minute - - - and you filed  
21 it as Fawn Builders, the - - - the - - - the person  
22 who bought it could get that lien taken off, right?

23 MR. RIZZO: Yes, then I think we would be  
24 out of luck. I would agree with that, assuming that  
25 there - - -

1                   JUDGE PIGOTT: All right, so what's the  
2 difference if - - - if - - - what's the difference if  
3 - - - if - - - if Rigano says, you know, Fawn  
4 Builders owned it one time, but, you know, it's my  
5 house. And I - - - you know, it was conveyed to me.  
6 I got - - - I'm paying the taxes?

7                   MR. RIZZO: Well, Judge, that's what I was  
8 going to point out earlier in the record. If you  
9 look at the record page 43, the deed of the transfer  
10 from Rigano - - - or from Fawn Builders to Rigano,  
11 it's - - - there's no consideration.

12                   JUDGE PIGOTT: Right there.

13                   MR. RIZZO: Therefore, it's ten dollars,  
14 and if you look at the deed itself it actually says  
15 by Fawn Builders, Nick Rigano's signature, president  
16 of Fawn Builders. The address that's listed for Fawn  
17 Builders is Nick Rigano's house. You know, if you  
18 went looking for Fawn Builders, you would find Nick  
19 Rigano at his house.

20                   JUDGE PIGOTT: Yeah, but so - - - that - -  
21 - you'd find that with Vibar, too, wouldn't you? I  
22 mean in - - - in - - -

23                   MR. RIZZO: I believe that's probably true,  
24 yes. I - - - I - - - I don't know that for sure, but  
25 yes.

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CHIEF JUDGE LIPPMAN: Okay, counsel.

Thanks.

MR. RIZZO: Thank you.

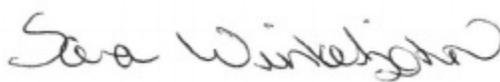
CHIEF JUDGE LIPPMAN: Thank you both,  
appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Rigano v. Vibar Construction, No. 223, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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