

CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION, INC.



912 Silas Deane Highway
Wethersfield, CT 06109

Tel: 860.529.6855

Fax: 860.563.0616

ccia-info@ctconstruction.org

www.ctconstruction.org

House Bill 5381, An Act Concerning Costs and Attorney's Fees in an Action of Foreclosure or Upon a Bond Substituted for a Mechanic's Lien

Judiciary Committee

March 26, 2010

CCIA Position: Support with amendment

The Connecticut Construction Industries Association, Inc. is the most diverse commercial construction industry trade association in Connecticut. Formed over 40 years ago, CCIA is an organization of associations, where all sectors of the commercial construction industry work together to advance and promote their shared interests. CCIA members have a long history of providing quality work for the public benefit.

CCIA is comprised of nine divisions, including the Associated General Contractors of Connecticut, Inc.; The Connecticut Road Builders Association, Inc.; Utility Contractors Association of Connecticut, Inc.; The Connecticut Ready Mixed Concrete Association, Inc.; and Connecticut Asphalt and Aggregate Producers Association. CCIA has more than 350 members statewide, including contractors, subcontractors, suppliers, and professional organizations that service the construction industry.

House Bill 5381, An Act Concerning Costs and Attorney's Fees in an Action of Foreclosure or Upon a Bond Substituted for a Mechanic's Lien would clarify Conn. Gen. Stat. §52-249(a) to make it mandatory that a plaintiff in a foreclosure of a mortgage or lien would be allowed costs and reasonable attorney's fees upon obtaining a judgment of foreclosure for determination of the debt secured by the mechanic's lien and the subsequent foreclosure proceeding. Additionally, a plaintiff who prevails in an action upon a bond substituted for a mechanic's lien must be allowed costs and reasonable attorney's fees. The bill also repeals Conn. Gen. Stat. §52-249a.

CCIA supports House Bill 5381 but seeks a minor, clarifying amendment as indicated at the end of this written testimony.

Courts have had difficulty applying attorney's fees to bonds not because of the bond substitution language, but rather because of the language that provides for attorneys fees in a foreclosure action of a mechanics lien or mortgage.

In a mortgage foreclosure, the debt is already liquidated so only a single proceeding is required to determine the form of judgment (either a strict foreclosure or a foreclosure by sale) and the attorneys' fees are easily derived. In a mechanic's lien, however, two phases of litigation are typically required. The first phase determines the amount and validity of the lien. Once the lien amount has been determined, the lien is thereafter foreclosed in the



same manner as a mortgage (strict foreclosure or foreclosure by sale) in the second phase of the case.

Judges have struggled with determining the application of attorney's fees to the foreclosure of a mechanic's lien. That is, whether attorneys' fees for both phases apply, just the foreclosure phase, or none at all since the debt was disputed. Notwithstanding the attorney's fees requirement in the bond substitution language, judges have refused to award fees because "there is no foreclosure aspect in an action on a bond." Accordingly, if the language for attorney's fees under a mechanic's lien is clarified, the attorney's fees allowed when a bond is substituted will take care of itself.

A recent state Appellate Court decision illustrates the challenge confronting courts and the need for the legislation. In Dubalbo Electric, LLC v. Montagno Construction, Inc., 119 Conn.App. 423 (February 23, 2010), the Appellate Court could not determine whether Conn. Gen. Stat. §52-249a applied retrospectively or whether it was enacted in response to judicial decision, thereby entitling the plaintiff to attorney's fees. The court noted that, although the legislative history is "murky", state courts "consistently have found that §52-249a(a) does not allow recovery for attorney's fees when a bond is substituted for a mechanic's lien." *Dubalbo* at 451-53. The court concluded that the legislature intended only prospective application of the statute.

While House Bill 5381 removes the archaic language in the mechanic's lien statute, the bill still only references the "foreclosure" aspect of the case and judges will still likely struggle with what fees, if any, to award. If it is the intent of the legislature to allow attorney's fees for the "entire" mechanics lien action it should state so. That would remove the ambiguity that has plagued the courts thus far.

The addition of the phrase "for the determination of the debt secured by the mechanic's lien and the subsequent foreclosure proceeding" after the word "fees" in line 10 of House Bill 5381 would eliminate the confusion for both a mechanic's lien action and an action upon a bond that is substituted for a mechanic's lien.

If this were done, the legislature would be allowing all reasonable fees to prosecute the mechanic's lien or an action upon a bond substituted for a lien.

Please contact Matthew Hallisey, Director of Government Relations and Legislative Counsel for CCIA, at 860-529-6855, if you have any questions or if you need additional information.