

Several interesting construction cases that came down recently in the Commonwealth of Virginia.

The first of these another warning to contractors that arbitration provisions can be waived by conduct. In *[Shoosmith Bros., Inc. v. Hopewell Nursing Home](#)*, the Hopewell Circuit Court of Virginia found that Kenbridge Construction Company's waived its right to arbitration by its use of the Courts for a substantial period of time and its use of the discovery "machinery" of the Court. In short, if you want to enforce an arbitration clause, do it early to avoid an argument that you have waived arbitration.

The second case is in relation to mechanic's liens. I find this one interesting because the Court actually refused to invalidate a lien for a minor inaccuracy in the description of the work performed. In *[B.P. Realty LP v. Urban Eng'g Associates, Inc. et. al.](#)*, the Fairfax, Virginia Circuit Court refused to invalidate a lien because the engineering firm and defendant in the case failed to include the word "surveying" in its description of the work. The court held that this is an excusable inaccuracy.

This is significant because, as I have discussed on numerous occasions [here](#) at Musings, Virginia mechanic's liens are extremely picky in their enforcement. While I would not take this case to allow any inaccuracy that is more significant than that described here, it needs to be pointed out that you are not without arguments against claims that your lien is invalid due to a minor inaccuracy.

The third case I felt needed a mention is *[S. B. Ballard Construction Co. v. LGS Group, LLC, et. al.](#)*. In this case, the Court give a quick reminder that, in Virginia, it is very hard to make a contract claim into one for fraud, negligence or conspiracy. The economic loss rule in Virginia prohibits any claim that could arise from the contract from being prosecuted as a tort claim instead of a contract claim.

In a fourth set of [consolidated cases](#), the Norfolk Circuit Court held that the language found in Va. Code Sections [43-11](#) and [43-7](#) invalidated a subcontractor's mechanic's lien, despite non-payment to the general contractor, where an owner expressly conditioned payment to the general contractor upon its obtaining financing, diligently sought financing and was unable to obtain that financing. The Norfolk Circuit Court also discussed estoppel and waiver and I commend reading this case to all who are interested in construction contracts and liens.

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.