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Construction Liens: Safe Harbors & Good Practices

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Texas Mechanic's Lien Update

While the 2013 Legislature took a pass on revising Texas mechanics lien law, the changes made in the 2011 Legislature are still working their way into the marketplace. The most significant of these changes are modifications to the notice requirements for retainage liens and the introduction of new mandatory lien release forms. The new provisions for retainage notices apply for any contracts entered into after September 1, 2011. The new provisions for lien releases were effective January 1, 2012. But, before we get to the recent changes, a short re-cap of the Basics.

The Basics

The mechanics' lien laws in Texas are complex. The applicable law is determined by whether the project on which the claim is made is a public project (State or Federal) or a private project (residential or commercial), and what type of payment bond, if any, has been provided. In the case of private ownership, the Texas Property Code is applicable. Where the Owner is the State of Texas, a local state governmental entity, subdivision or agency, the former McGregor Act, now Texas Government Code Chapter 2253 is applicable. Federal government projects are governed by the Miller Act, 40 U.S.C.A. beginning at Section 3131, formerly Section 270a. This paper deals with private projects. Public works bond claims, state and federal, are not covered in this paper.

The procedure for filing mechanics' and materialmans' liens on private property in Texas is governed by the Texas Property Code Chapter 53 and, to a limited extent, Property Code Chapter 41 and the Texas Constitution. For homestead property, Property Code Chapter 53, Chapter 41 and the Texas Constitution are all applicable. Contracts for homestead renovation and remodel work are controlled by all three. If the claim is on a homestead property specific additional procedures must be followed.

For those having a contract directly with the owner (original or prime contractor) on a non-residential¹ property, procedures for securing a mechanics' and materialmans' lien are relatively simple. The lien must contain the information as outlined below, be timely filed, and the owner must be timely provided with a copy of the lien. For those not having a contract directly with the owner, such as subcontractors, sub-subcontractors and suppliers, notices containing specific information and language must be sent within a specific time frame to "perfect" the lien. A lien that is "perfected" is simply one in which the claimant (person or entity owed money) has complied with the statutory requirements for filing and notice. Although Texas courts have held that Chapter 53 of the Texas Property Code is to be "liberally construed" "in order to protect the claims of laborers and materialmen, this liberal construction is generally

¹ "Residential Construction" is now defined in the Texas Property Code at Section 53.001(9) and (10).

applied only to specific wording and general content issues and not to deadlines.² There is apparently no prohibition to filing a lien affidavit *before* the indebtedness accrues.³

But First, the Constitutional Lien

Original contractors benefit from a lien provided under the Constitution of the State of Texas. Texas Constitution Article XVI, §37 allows original contractors a lien for construction or repair of “buildings and articles.” This constitutional lien does not require compliance with the requirements of the Texas Property Code to enforce the lien. The Constitutional Lien is only available to original contractors and, for construction purposes, is generally limited to “buildings.” As an example, site improvements such as sidewalks and landscaping would not likely be lienable on a constitutional basis.

Because of the limitations of a constitutional lien, claimants are not advised to rely on it to protect their rights. A statutory (Property Code) lien is the most effective method to preserve claims and the constitutional lien is relied on only as a last resort for an original contractor who fails to timely perfect a statutory lien. Public property, both state and federal, is not subject to constitutional lien, or any lien, for that matter. Although the constitutional lien exists without the necessity of filing a lien affidavit (it is self-executing) it would be doubtful that such a lien could be enforced against a good faith purchaser without knowledge of the lien claim. Therefore, it is recommended that, even if a constitutional lien claim is all that remains for the claimant, an affidavit should be prepared and filed to preserve the claim.

The Statutory (Property Code) Lien

The Texas Property Code provides a statutory mechanism for both contractors and subcontractors of any tier to perfect a Mechanic’s and Materialmans’ Lien on private property in Texas. Lien claimants must file an affidavit of lien with the Deed Records for the county in which the property on which the labor or material was provided is located. The following section sets out the particular requirements of the affidavit of lien.

² See *Van Horn Trading Company v. Day* 148 S.W.2d 1129 (Tex. Civ. App.-San Antonio 1912, no writ) and *Hunt Developers, Inc. v. Western Steel Company* 409 S.W.2d 443 (Tex. Civ. App.-Corpus Christi 1966, no writ).

³See *L & N Consultants, Inc. v. Sikes* 648 S.W.2d 368 (Tex. Civ. App.-Dallas 1983, writ ref’d n.r.e.).

The Lien Affidavit Contents - Claimants of All Tiers

The Lien Content Requirements

For all types of private construction, whether commercial or residential in nature, the content of the lien affidavit has changed from the pre-1997 requirements. The new law requires that the lien affidavit contain substantially the following (with the new material underlined):

- (1) *a sworn statement of the amount of the claim;*
- (2) *the name and last known address of the owner or reputed owner;*
- (3) *a general statement of the kind of work done and materials furnished by the claimant and for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;*
- (4) *the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;*
- (5) *the name and last known address of the original contractor;*
- (6) *a description, legally sufficient for identification, of the property sought to be charged with the lien; ~~and~~*
- (7) *the claimant's name, mailing address, and, if different, physical [business] address; and*
- (8) *for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.*

The affidavit is not required to state individual items of work done or material furnished and specifically allows the use of abbreviations or symbols customarily used in the trade. However, claimants are advised to be careful to provide a meaningful description of the general type of work or material supplied and to not use abbreviations and symbols that are not commonly recognized in the trade and, preferably, by a judge that may be reviewing your lien affidavit if its adequacy is contested.

Of critical importance to the affidavit is the requirement of a “sworn statement.” See §53.054 (a)(1). The signature line on the affidavit must represent that the affidavit was “subscribed and sworn to” not just “acknowledged” to be true and correct.⁴

Notice of Lien

As noted above, if the claimant's contract is directly with the owner, they only need to file the lien affidavit with the County Clerk in the county where the property is located by the fifteenth day of the fourth calendar month after the “indebtedness accrues.” Indebtedness to an original contractor accrues either on the last day of the month in which either party terminates

⁴See *Sugarland Business Center, Ltd v. Norman* 624 S.W.2d 639 (Tex. Civ. App.-Houston [14th Dist] 1981, no writ).

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