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Construction Lending: Mechanic's Liens and How They Work

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CONSTRUCTION LENDING: MECHANIC'S LIENS AND HOW THEY WORK

I. INTRODUCTION

This paper will provide a general overview of the Texas mechanic's and materialman's lien (i.e., "mechanic's lien") laws as they relate to commercial private projects and tips on how to protect title to the property.

II. BACKGROUND

Since the days of the Republic of Texas, persons furnishing labor or materials for the construction or repair of improvements to real property have been granted the right to claim a lien on the real property and the improvements thereon to secure payment for their work. Currently, a wide range of persons performing work in connection with improvements to real property can secure lien rights against the real property and improvements thereon.

Article XVI, Section 37 of the Texas Constitution provides that "mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor . . .". While the constitutional lien appears to extend only to the building itself case law has made it clear that the lien extends to the land necessary for the enjoyment of the building or necessarily connected therewith. *Strang v. Pray*, 35 S.W. 1054 (Tex. 1896); *Farmers' & Mechanics' Nat'l Bank v. Taylor*, 40 S.W. 876 (Tex. Civ. App.—Ft. Worth 1897), *aff'd*, 40 S.W. 966 (Tex. 1897). The constitution further directs the legislature to "provide by law for the speedy and efficient enforcement of said liens." TEX. CONST. art. XVI, § 37. The Texas Legislature's response to this constitutional mandate is Chapter 53 of the Texas Property Code.

While mechanic's lien rights are significant, they are also somewhat limited. For example, mechanic's liens can only be enforced through judicial foreclosure. Because of the time and expense of litigation and the adverse consequences for the owner when the mechanic's lien is foreclosed, judicial foreclosures of mechanic's liens rarely occur. However, the perfection of a mechanic's lien claim against an owner's property often gives the claimant significant leverage in negotiating and resolving payment disputes. In fact, this leverage is the primary benefit of a mechanic's lien to a claimant; however, the leverage exists only when the mechanic's lien claim is properly perfected.

A. WHO IS ENTITLED TO A LIEN

Generally, anyone who furnishes labor or material for the construction or repair of a house, building or improvements to privately owned real property in Texas is entitled to perfect a mechanic's lien. TEX. PROP. CODE § 53.001, et seq.

1. Persons Furnishing Labor

The labor must be used in the "direct prosecution" of the work.¹ *Id.* at § 53.001(3). Consequently, "indirect" work such as providing legal services in connection with a project or furnishing meals to

¹ Temporary labor providers and employee leasing companies frequently furnish labor to construction projects. Provided that the temporary or leased workers are employees of the temporary labor provider or employee leasing company (i.e., the temporary labor provider or employee leasing company is the party responsible for the workers' pay and related benefits), then the temporary labor provider or employee leasing company is entitled to perfect a lien claim for the unpaid value of the "labor" it furnished through its employees to the project. *Reliance Nat'l Indem. v. Advance'd Temps.*, 227 S.W.3d 46 (Tex. 2007).

workers is not covered. *Am. Sur. Co. v. Stuart*, 151 S.W.2d 886, 887 (Tex. Civ. App.—Fort Worth 1941, no writ); *Van Horn Trading Co. v. Day*, 148 S.W. 1129 (Tex. Civ. App.—San Antonio 1912, no writ).

Under the statute, architects, engineers, and surveyors are entitled to a lien for the preparation of plans or drawings in connection with the actual or proposed design, construction, or repair of improvements to real property. The work must be "under or by virtue of a written contract with the owner or the owner's agent." TEX. PROP. CODE § 53.021(c). The lien for design services has its inception from the date the lien affidavit is recorded (i.e., it does not "relate back" to the commencement of construction).

2. Persons Furnishing Materials

Additionally, persons (individuals, partnerships, and corporations) who furnish materials for the construction or repair of improvements are entitled to file and perfect a lien under the Property Code. TEX. PROP. CODE § 53.021. "Materials" is defined to include materials, machinery, fixtures, and tools which are consumed in the construction or which are ordered and delivered for incorporation or consumption. The definition also includes reasonable rent for equipment used or reasonably required and delivered for use in the direct prosecution of the work at the construction site. *Id.* at § 53.001(4). "Plant materials" and "landscaping supplies" are covered as well. *Id.* at § 53.021(d).

The materials must be "furnished" to the project. This does not necessarily mean delivery to the project site. A claimant is entitled to secure a mechanic's lien even if the claimant is unable to prove that the materials in question ever made it to the project site, so long as the materials were delivered to the owner or the general contractor for the specific project. *See Trammell v. Mount*, 4 S.W. 377, 378-79 (Tex. 1887); *Lexcon Inc. v. Gray*, 740 S.W.2d 83 (Tex. App.—Dallas 1987, no writ); *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co.*, 437 S.W.3d 597 (Tex. App.—Dallas 2014, no pet.). Similarly, a claimant does not have to prove that the materials were actually incorporated into the work so long as the claimant can prove delivery to the owner or contractor for the project. *See W. L. MacAtee & Sons, Inc. v. House*, 153 S.W.2d 460 (Tex. 1941); *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 846--47 (Tex. App.—Dallas 1989, writ denied). As one court has noted, "[i]t appears . . . that the fact that material is furnished to a builder for the purpose of use on a particular job is as a general rule the controlling consideration in determining the materialman's right to a lien." *Houston Fire and Cas. Ins. Co. v. Hales*, 279 S.W.2d 389, 392 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).

3. Nature of the Improvements

The labor or materials must be furnished for the repair or construction of a house, building or "improvements." Improvements include: (i) abutting sidewalks and streets, as well as utilities in or on those sidewalks and streets; (ii) wells, cisterns, tanks or reservoirs for storing water; (iii) pumps, windmills and other machinery for raising water; and (iv) orchard trees (planting, grubbing, replacing, and pruning). TEX. PROP. CODE § 53.001(2)(A)-(E).

The definition of "improvement" for which a lien may be secured expressly includes clearing, grubbing, draining, or fencing of land and planting, grubbing, replacing, and pruning orchard trees. *Id.* at § 53.001(2)(B), (E). This definition includes some but not all types of landscaping services that are commonly performed on construction projects. Under section 53.021(d) of the Property Code, persons who perform labor or furnish plant materials and other supplies for the installation of landscaping—including the construction of retention ponds, retaining walls, berms, irrigation systems, and fountains—may file a mechanic's lien. As with the lien for design services, the landscaping work must be furnished "under or by virtue of a written contract with the owner or the owner's agent." *Id.* at § 53.021(d). Further, a lien for landscaping services has its inception from the date the mechanic's lien affidavit is recorded (i.e., it does not "relate back" to the commencement of construction).

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