

DEFENDING A MECHANIC'S LIEN: WHO CAN GIVE THE AFFIDAVIT?

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Most contracts for construction between an Owner and a Contractor provide that the Contractor shall defend and indemnify the Owner against mechanic's liens filed against the Project by the Contractor's subcontractors and suppliers and others down the chain of privity. Typically, if a dispute arises between a Contractor and one of its subcontractors or suppliers and a mechanic's lien is filed, the Owner generally will tender the defense of the mechanic's lien to the Contractor, and the Contractor will accept that obligation. The only exception to this practice generally is a situation in which the Contractor and its subcontractor or supplier have a dispute with the Owner, and the filing of the mechanic's lien is the result of the Owner's failure to make payment.

To meet its obligation to the Owner to defend a mechanic's lien, the Contractor generally will ask its attorney to prepare an Answer to the Petition to Establish a Mechanic's Lien on behalf of the Owner. Under the applicable statute and rules of procedure, however, the Answer must be "verified," meaning that it must be supported by an Affidavit, attesting to the truth of the matters that are being contested in the Answer. Representatives of the Owner, however, may not have personal knowledge of the dispute between the Contractor and its subcontractor or supplier. Consequently, the Affidavit submitted with the Owner's Answer often is made by a representative of the Contractor who is familiar with the facts and circumstances of the dispute.

The practice of having an Affidavit in support of the Answer be made by someone other than a representative of the Owner was challenged recently in a case that made its way to the Court of Special Appeals of Maryland. At the Show Cause Hearing on the mechanic's lien, the lien claimant argued that the Answer to the Petition to Establish a Mechanic's Lien was defective because the supporting Affidavit was signed by someone other than a manager or other representative of the Owner. The Circuit Court judge agreed, decided that the Affidavit in support of the Answer was not valid, and entered a final mechanic's lien against the Owner's property for the amount claimed.

The Owner appealed that decision to the Court of Special Appeals of Maryland. The Court of Special Appeals reversed the trial court's decision, holding that the Affidavit in support of the Owner's Answer was sufficient even though it was executed by someone other than a manager or representative of the Owner. In its opinion, the Court noted that, in a mechanic's lien proceeding, both the statute and applicable rules require that the Owner's Answer be "under oath," which is generally accomplished by a supporting affidavit. Apart from that, however, the Court ruled that there is nothing in either the statute or the rules requiring that the Affidavit be made by the Owner or one of its managers or representatives.

Based on its review of the law and the practical considerations in these cases, the Court of Special Appeals concluded that the Affidavit submitted in support of the Owner's Answer need not be executed by a manager or other representative of the Owner. In doing so, the Court also rejected the argument that a manager of the Owner, a North Carolina limited liability company, was required to execute the Affidavit under North Carolina corporate law.

Because this case provides useful practical guidance, this Firm asked the Court of Special Appeals to publish its opinion so that it will serve as precedent in future cases. The reported decision is *T.W. Herring Investments, LLC v. Atlantic Builders Group, Inc.*, Appeal No. 440, September Term 2008, 186 Md. App. 673.

Applying the guidance provided by the Court of Special Appeals, attorneys for a Contractor that has agreed to defend the Owner in a mechanic's lien case filed by one of the Contractor's subcontractors or suppliers should be able to submit an Affidavit from an employee of the Contractor in support of the Owner's Answer to the Petition to Establish a Mechanic's Lien. This is particularly helpful when the Owner is not privy to the subject matter of the dispute between the Contractor and one of its subcontractors or suppliers and cannot truthfully sign an Affidavit based upon actual personal knowledge. Thus, the guidance provided by the Court of Special Appeals in this case should eliminate one potential pitfall in the often difficult process of defending mechanic's lien cases.