

Construction Law Advisory

November 2, 2010

2011 Changes to California Lien Law

Two important recent changes to California's mechanic's lien laws will become effective on January 1, 2011, and should be carefully reviewed by owners as well as by contractors, subcontractors and suppliers.

First, as of January 1 next year, anyone recording a mechanic's lien must also serve notice of the lien to the owner or reputed owner of the affected property, or on the construction lender or the original contractor if the owner cannot be served. The language of the required notice is dictated by section 3084 of the Civil Code, as amended, and advises the owner that a lien, unless released, may lead to the foreclosure sale of the affected property and may affect the owner's ability to borrow against, refinance, or sell the property. County recorders will not accept a mechanic's lien for recording unless it is accompanied by a proof of service affidavit showing that the required notice has been served. Service must be made by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing.

Failure to serve the lien, including the new Notice, as prescribed by the new law shall cause the mechanic's lien to be unenforceable as a matter of law.

Thus, the new law establishes another legal hoop for contractors to jump through in liening a property, and makes available another defense to owners and lenders challenging the validity of a lien. The intention of the new law is to protect less sophisticated property owners, particularly homeowners, but it will benefit all owners. Under current California practice, owners often remain unaware of a lien on their property until they receive notice of the commencement of the foreclosure action.

Second, as of January 1 next year, claimants filing an action to enforce a lien must also record a lis pendens (notice of the pending lawsuit) against the property no later than 20 days after filing the action. To date, filing of the lis pendens has been permissible but not mandatory. Civil Code section 3146, as amended, goes on to state that purchasers and lenders for the property (and presumably title insurers) will be deemed to have notice of the lawsuit only from the time of recording. Consequently, it appears that a contractor who delays filing the lis pendens runs the risk of losing the security for his payment claim if the property is sold or encumbered after the owner is served with notice of the action to enforce the lien, but before the required lis pendens has been recorded.

To date, subsequent purchasers of a piece of property have had no notice of the cloud on title presented by an action to foreclose on a mechanic's lien. The intention of the new legislation is to provide clear notice to all parties who are interested in the property in question.

Practice tip: the new legislation renders currently available forms for filing California liens out of date as of January 1, 2011. Contractors should make sure the forms they use comply with applicable law; owners should examine lien notices received after January 1 to see if faulty wording renders the related lien unenforceable.

CONTACTS

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