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Contractor's Lien Waiver For Progress Payment Waived Date Of First Furnishing

05.19.2010

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A decision of the Business Court in *Wachovia Bank National Association, et al. v. Superior Construction Corporation, et al.*, Case No. 07 CVS 21256, Mecklenburg County, (2010 NCBC 9) has ruled that a General Contractor who signed an interim lien waiver captioned "Partial Waiver of Lien" containing language that waived lien rights up to and including the date of a progress payment, constituted a waiver of the date of first furnishing under the Mechanic's Lien Statute. The result was that there was a change in the date of first furnishing from April 22, 2005 to the date specified in the lien waiver of May 31, 2005.

The interim lien waiver signed by the Contractor provided that the Contractor does hereby:

Waive, relinquish, surrender and release any and all lien, claim, or right to lien on the above-described project and premises arising under and by virtue of the Mechanic's Lien laws of the State of North Carolina on account of any labor performed or the furnishing of any material to the above-described project and premises up to and including the 31st day of May 2005.

The Contractor contended that it should not be deemed to have waived any claim of lien it had against the property or the project as a whole. In other words, its lien waiver only waived its right to receive monies due from its contract during the time period of the waiver, but not waiver or a change of the date of first furnishing of labor and materials.

However, the Court agreed with the construction Lender's contention that by signing and submitting the lien waiver, the Contractor waived the priority of its lien rights relative to the construction Lender's deed of trust up to and including May 31, 2005. Therefore, the Bank's Deed of Trust on the subject property recorded May 19, 2005, had priority over the lien rights of the Contractor for obligations of the Project up to May 31, 2005.

Prior to this decision, many construction and real estate lawyers understood that such lien waiver language merely prohibited the Contractor from seeking to recover additional compensation for work during the time period of the waiver, but not a waiver of the first work date. In other words, many attorneys believed that a Contractor could sign such a waiver and later seek recovery for retainage and extra work occurring in a future time period with a relation back date of its first work on a Project. This opinion also runs counter to the trend of the cases previously decided by the North Carolina Courts on the grounds that the Mechanic's Lien statute should be liberally construed in favor of labor and materialmen as a matter of public policy.

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It is not clear from the opinion, but the Court may have been influenced by the fact that for each pay period, the Contractor also signed a second type of lien waiver, the latter being a document entitled “Affidavit in Partial Release of Lien Waiver” (Lien Affidavit(s)). This affidavit purported to waive any claim of lien against the subject property with regard to the amount of funds actually paid to and received by the Contractor under a particular application for payment. In other words, this second form of lien waiver waived only the right to assert a lien for the amount of funds for which it had been paid, but not the waiver of the date of first work.

Although the Court recited the rule that the Mechanic’s Lien statute should be liberally construed in favor of persons furnishing labor and materials, it probably did not help the Contractor’s case that the lien waiver language in the affidavit appears to state exactly what the Contractor contended be the result of its signing the other form of lien waiver.

It is also not clear from the opinion why the Contractor was signing two types of lien waiver or whether under the Construction Contract, the Contractor was obligated to sign any particular form of lien waiver. The standard forms of construction contracts do not even address the form of the lien waiver. If the contract in this case did not specify the form of the lien waivers required, did the Contractor receive any additional consideration for the waiver of the date of its first work? In addition, under the Court’s ruling the Contractor also has waived its right to recover its retainage by the assertion of a lien with a relation back date of its first work.

Finally, title searches may be affected because one will not be able to determine the priority date of mechanic’s liens without seeking out and reviewing any lien waivers signed by the Contractor or Subcontractors.

In any event, it is anticipated that this case will be appealed and the banking, title insurance, construction, and surety industries will certainly be interested in the outcome.

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