



## Fighting an Overstated Mechanic's Lien: A Simpler Solution

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In a depressed economy wrought with defaulting developers, a lender in California facing a lien priority challenge should evaluate whether it would be worthwhile to secure a first priority position for its deed of trust through law and motion practice.

California's case law provides the legal authority that allows a lender to require a mechanic's lien claimant to establish the validity of a lien by demonstrating that the lien only includes amounts for labor, services and/or materials that were actually used in the construction of the improvement on the parcel upon which the lien was recorded.

Take, for example, the case where a mechanic's lien claimant constructs improvements for a large-scale commercial development of 10 buildings on separate parcels. The developer, initially well-funded by its construction lender, paid for the necessary improvements to construct and sell off the first four buildings in the commercial project. Buildings five through eight were in various stages of production when the developer ceased to pay all of the mechanic's bills. The mechanic, usually on a pay schedule that runs 30 days behind work performed, completed the work necessary to complete buildings five through eight before ceasing operations at the site. At the time the mechanic realizes it won't be paid, the mechanic is owed \$1,000,000. The developer sells buildings five through eight, and the construction lender's deed of trust is partially reconveyed based on a pay-down, through escrow, of the construction loan. The developer goes belly up and the mechanic records its \$1,000,000 lien on each and every lot (i.e., one through ten) underlying the commercial buildings for the full value of all unpaid bills. The construction lender, no longer receiving payments on its loan, forecloses on its remaining security (i.e., the partially constructed buildings numbering nine and ten), and the mechanic's lien is wiped out as to those two parcels. The mechanic is left with a \$1,000,000 lien on the lots underlying buildings one through eight, each of which is owned by a third party, and each of which has a purchase money deed of trust recorded against the parcel.

In this instance, a purchase money lender with a deed of trust recorded after construction commenced at the project may utilize the California Civil Code to either eliminate the mechanic's lien entirely, or have that lien apportioned and subordinated to the purchase money deed of trust through a relatively simple motion, despite the mechanic's claim of priority. When a mechanic's lien claim is asserted for work that benefited multiple properties, failure to apportion allows the claimant to burden property inequitably with a claim for labor and materials that were not actually used for that property. (*Cook v. Cappellino* (1929) 101 Cal.App. 77, 79.)

Civil Code section 3118 addresses this inequity, and provides as follows:



**§3118. Forfeiture of Lien.** [¶] Any person who shall willfully include in his claim of lien labor, services, equipment, or materials not furnished for the property described in such claim shall thereby forfeit his lien.

A lien is therefore statutorily forfeited if a mechanic includes the costs for labor or materials provided to separate parcels in its recorded lien. In simple terms, the California Civil Code requires a mechanic to apportion its lien based upon the actual labor and materials provided to each separate parcel. (See Cal. Civ. Code, §3130.)

When a lien is overstated, the trial court has the authority to order the lien forfeit, or to reduce the excessive lien to its proper amount. (See, e.g., *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485.) The actual amount due on the lien presents a question of fact for the trial court (see, e.g., *Howard A. Deason & Co. v. Costa Tierra Ltd.* (1969) 2 Cal.App.3d 742, 754-757), which question may be resolved by way of motion (*Basic Modular Facilities, Inc. v. Ehsanipour*, *supra*, 70 Cal.App.4th at 1485).

Once the moving party (the purchase money lender) has questioned the validity of the lien, the lien claimant has the burden of establishing the validity of the lien, including that the labor, services and/or materials were actually used in the construction, the reasonable value of the work and/or materials, and the date of completion of cessation of work. (1 Marsh, Cal. Mechanic's Lien Law and Construction Industry Practice (6th ed. 2007) § 4.124, p. 4-126.) A lien is, by definition, limited to the reasonable value of the labor or furnished materials for which a mechanic or contractor (among others) has not been paid. (See, e.g., Civil Code §§ 3110, 3118, 3123.) The lien claimant must therefore establish the probable validity of its claim by a preponderance of the evidence. (Cal. Code Civ. Proc., §405.32.) "Unlike other motions, the burden is on the party opposing the motion to expunge – i.e., the claimant-plaintiff – to establish the probably validity of the underlying claim." (*Howard S. Wright Const. Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 318.)

This simple remedy is time tested. In the case of *Hendrickson v. Bertelson*, after waiving their lien rights to three of the six lots that made up a project, several contractors recorded mechanic's liens against the remaining three lots for the full amount they were owed. The California Supreme Court upheld the trial court's jurisdiction to allocate the debt across all six lots and allow the claimants a lien for one-half the total amount, allocated equally across the three liened lots. (*Hendrickson v. Bertelson* (1934) 1 Cal.2d 430, 432-433.) "It was ... properly within the jurisdiction of the court as a court of equity, and in line with the spirit of the mechanic's lien law and constitutional provision, to apportion the amounts of the respective liens...." (*Id.* at 434.) Similarly, in *A.J. Raisch Paving Co. v. Mountain View Savings & Loan Assoc.*, a contractor recorded a mechanic's lien against only one tract of land after installing sewer lines that benefited two tracts. (*A.J. Raisch Paving Co. v. Mountain View Savings & Loan Assoc.* (1972) 28 Cal.App.3d 832, 834-835.) The appellate court ordered the lien be apportioned between the two tracts, even though it meant that the claimant would only recover on its single lien on one tract, having failed to timely record a lien on the other. (*Id.* at 834, 839.)



Other jurisdictions follow California's approach: "[t]he general rule is that a single mechanic's lien [claim] against more than one lot ... cannot be enforced against less than the entire property liened, without first showing what part of the entire lien may be properly allocated to the lot ... against which enforcement is sought." (*Assoc. Sand & Gravel Co., Inc. v. DiPietro* (Wash.App. 1973) 509 P.2d 1020, 1023, citing *Hendrickson, supra*, 1 Cal.2d 430; see also *Compass Bank v. Brickman Group, Ltd.* (Colo. 2005) 107 P.3d 955, 961, citing *CS&W Contractors v. Southwest Savings & Loan Association* (Ariz. 1994) 883 P.2d 404, 406.)

Two simple lessons result.

First, purchase money lenders can utilize law and motion practice to have a court deem forfeit, or, at the very least, apportioned, an overstated lien that threatens the priority of a purchase money deed of trust where a mechanic fails to properly prove up the reasonable basis for the lien claim on the burdened lot. This expedited process reduces the time and cost associated with litigation of priority, and has the added benefit of shifting the burden of proof to the mechanic, who must then demonstrate compliance with California's statutory scheme.

Second, mechanics should resist the temptation to record multiple full-value liens for work done on a divisible project. When recording a lien for work performed on a project that involves numerous parcels, apportionment of that lien is critical. If a mechanic fails to properly apportion, the mechanic risks forfeiture of the entire lien, or, at the very least, court apportionment and subordination to a purchase money deed of trust that post-dates the start of construction.