

Mechanic's Lien Basics

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As a property manager, you are dealing with construction issues caused by construction initiated not only by the owner

of the real property but also caused by construction initiated by tenants of the property. If the tenant fails to pay the general contractor or the general contractor fails to pay its subcontractors or suppliers, you will then be dealing with the Texas mechanic's lien laws. Liens are governed by both the Texas Property Code and the Texas Constitution.

Liens created under the Property Code are statutory mechanic's liens and they must be properly and timely perfected in order to be valid. To perfect a lien under the Property Code, a contractor or supplier must satisfy requirements of both written notice and must timely record a lien affidavit. On the other hand, an original contractor (i.e. one who has a direct contract with the owner or its agent) may secure a constitutional lien, without satisfying these notice

requirements or the public recording requirements.

A constitutional lien may be enforced up to an amount equal to the value of the labor done and/or the value of the material furnished. A statutory lien can be filed to collect payment for labor done or material furnished for the construction or repair of improvements, material specially fabricated for the project, even if that material was never delivered or incorporated into the construction project, less the fair salvage value of the material; or for the preparation of plans provided such was done under a written contract with the owner. Attorney's fees may be recovered in an action to enforce a mechanic's lien and are also recoverable if you sue to remove an invalid lien.

The timetable for perfecting a statutory lien has been simplified over the past few years. Notices must be given by the prime contractor to the owner, and by subcontractors and material suppliers to both the contractor and the owner. Both original contractors and subcontractors must file their lien affidavits within the

same period of time, which is by the fifteenth (15th) day of the fourth (4th) calendar month following the day the claimant's indebtedness accrues. Accrual of the indebtedness

occurs at different times depending on whether the claimant is an original contractor or a subcontractor. An original contractor's debt accrues either on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party stating that the contract has been terminated or on the last day of the month in which the original contract has been completed, finally settled, or abandoned. Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or the material furnished. A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and contractor has been completed, finally settled, or abandoned.

A copy of the affidavit claiming the lien must be sent by registered or certified mail to the owner, at the owner's last known business address, not later than one business day after the date the affidavit is filed with the county clerk, and if the lien claimant is not an original contractor, a copy must also be sent to the original contractor, again at its last known business or residence address, within the same time period.

If the lien claimant is not an original contractor, then it must send notice of its unpaid debt to the owner and to the original contractor, if it is a subcontractor, not later than the fifteenth (15th) day of the second (2nd) month following each month in which all or part of the claimant's labor was performed or its material delivered, and to the owner



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not later than the fifteenth (15th) day of the third (3rd) month following each month in which all or part of the labor was performed or material delivered.

These notices are typically referred to as fund trapping notices. Once received, the owner should withhold from the contractor any amounts necessary to pay the lien amount. To be effective to cause the owner to withhold the monies, the notice must be sent to the owner by registered or certified mail, and it must state that, if the claim remains unpaid, the owner may be personally liable and the owner's property subject to a lien unless the owner withholds payments from the contractor. One of the more ignored provisions of the statutory scheme is the requirement for the owner to retain ten percent (10%) of the original contract price a period of thirty (30) days after completion. If a lien claimant sends the notices required by the statute and files its affidavit not later than the thirtieth (30th) day after the work is completed, it has a lien on the retained funds.

Care should be taken when it is the tenant who has engaged the original contractor. Typically, the lease provides that the tenant must keep the property free from all mechanic's liens and indemnify the owner in the event a lien is filed. In these cases, the lien should property attach only to the tenant's leasehold interest and not to the owner's fee interest in the property. If that is the case, once the lease is terminated, then the lien terminates as well. However, clever contractors have urged that an owner's involvement in the construction, such as plan approval and inspections together with its funding of tenant improvements, makes the tenant the agent of the owner and therefore extends the reach of the lien to the fee interest of the owner. In such a case, termination of the lease will not terminate the lien. If you have lien or other construction issues, call your attorneys promptly since getting them involved at the beginning of a lien issue can make your lives much easier.



IREM CALENDAR



FEBRUARY 8, 2011

Joint Luncheon with Apartment Association of Greater Dallas
Renaissance Hotel – Dallas
Speaker: Dallas Police Chief David Brown

FEBRUARY 17-19, 2011

FEBRUARY 24-26, 2011

RES201 – Residential Management
Spectrum Center

DATE CHANGE:

MARCH 22, 2011

Joint Luncheon with IREM® Fort Worth

OMNI Mandaly Hotel – Las Colinas
Speaker: Kendall Shiffer, Pegasus Ablon –Social Media
Special Guest: IREM® Headquarters President-Elect Jim Evans, CPM®

MARCH 24, 2011

ETH800 – Ethics for the Real Estate Manager
Spectrum Center

MARCH 24, 2011

Casino Night
RESTORx
6:00 - 9:00 p.m.

APRIL 6, 2011

1/2 Day Seminar
Emerging Trends
8:30 am - Noon
Spectrum Center

APRIL 9-13, 2011

IREM® Leadership and Legislative Summit
Washington, DC

COMING IN APRIL

IREM® Dallas Signature Event
Celebrating "Earth Day"
In the Wide World of IREM®
Details, Date & Location TBA

MAY 10, 2011

Membership Luncheon
Maggiano's NorthPark

JUNE 14, 2011

Membership Luncheon
Location TBA