

Construction Practices

NEWSLETTER

[Highlighting notable court decisions and trends]

SPRING 2008

Checklist for Asserting A Mechanic's Lien

One who is not compensated for providing labor, services, equipment and/or materials to the construction of any private work of improvement is entitled, under the California Constitution, to a lien upon the property for the value of the work.

Here is a basic checklist of procedural requirements for perfecting a mechanic's lien claim. *This list includes only the most basic information and is not intended to substitute the advice of counsel.*

Are You a Proper Mechanic's Lien Claimant?

You are entitled to assert a mechanic's lien if:

- You provided labor, services, equipment, and/or materials to a privately funded project to construct a work of improvement;
- Labor was performed on the subject project;
- Materials were intended for *and* used and/or consumed on the project;
- The work of improvement is permanent; and
- Your work was performed with the consent of the owner or his or her agent.

If your notice is served more than 20 days after the commencement of work, it is valid as regards work performed and materials furnished from 20 days prior to service.

Serving Your Preliminary 20-Day Notice

As a prerequisite to recording a mechanic's lien, certain claimants are

required to serve a "preliminary 20-day notice" shortly after beginning work.

Are You Required to Serve a Preliminary 20-Day Notice?

- If you are **not** an "original contractor" (in direct contract with the owner), you must serve a preliminary 20-day notice on the *owner, general contractor and construction lender.*
- If you are an original contractor, but not the general contractor, you must serve a preliminary 20-day notice on the *construction lender.*
- If you are the project's general contractor, you are not required to serve a preliminary 20-day notice.

How to Serve a Timely Preliminary 20-Day Notice

Timing

- You *may* serve a preliminary 20-day notice any time after you contract to provide labor, services, equipment and/or materials.
- You *must* serve a preliminary 20-day notice within 20 days of commencement of work. If your notice is served *more than 20 days* after the commencement of work, it is valid as regards work performed and materials furnished from 20 days prior to service.

Manner

- "Service" may be accomplished by:
 - Personal service;
 - Left at recipient's business or resi-

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dential address with a responsible person;

- Mailed by registered or certified mail to recipient's business or residence address, or to address listed on building permit. Service is complete upon deposit.

Contents of Preliminary 20-Day Notice

- A description of the labor, services, equipment and/or materials furnished and a price estimate;
- The name and address of the person furnishing labor, services, equipment and/or materials;
- The name of the person who contracted for purchase of labor, services, equipment and/or materials;
- A description of the jobsite sufficient for identification; and
- The full text of the "Notice To Property Owner," in boldface type.
- Special notice of past due wages and benefits (if any), including:

- The identity and address of any unpaid laborer; and
- The identity of any trust fund to which employer payments are due.

Recording Your Mechanic's Lien

How to Determine When to Record

- You *may* record a mechanic's lien claim after completion of your contract (recordation before completion is premature and void).
 - An original contractor's contract is "complete" when his obligation is fully performed, excused or otherwise discharged.
 - Other claimants' contracts are "complete" when the claimant has ceased furnishing labor, services, equipment and/or materials.
- The deadline to record a mechanic's lien depends upon whether the owner has filed a notice of completion or a notice of cessation of labor.
 - Where a notice of completion or cessation *has* been recorded:
 - An original contractor – other than a material supplier – must record a mechanic's lien within 60 days of the owner's recordation.
 - Other claimants and material suppliers with direct contractual relationships with the owner must record mechanic's liens within 30 days of the owner's recordation.
 - Where no notice of completion or cessation has been filed, claimants must record a mechanic's lien within 90 days of "completion":
 - Owner occupies premises or uses improvement *and* labor ceases;
 - Owner accepts improvement; or
 - Labor ceases for 60 continuous days.

Content of Mechanic's Lien

- A statement of the claimant's demand after deducting all just credits and offsets;
- The owner's name;
- A general statement of the kind of labor, services, equipment, and/or materials furnished;

- The claimant's employer's name (or the recipient of equipment or materials); and
- A description of the site sufficient for identification.
- The signature of the claimant or his agent (no certificate of acknowledgment is necessary).

Note: Record your mechanic's lien in the county in which the subject real property is situated. Include the names of against whom and by whom the claim is recorded, and the owner's address.

Timely Action to Foreclose Lien

The final requisite step to recover under a mechanic's lien claim is a timely action to foreclose the lien, filed in superior court in the county in which the subject property is located.

- An action to foreclose a mechanic's lien *may* be filed as soon as the mechanic's lien claim is recorded.
- An action to foreclose a mechanic's lien *must* be filed by no later than 90 days after recordation of the mechanic's lien.

*Submitted by Jennifer R. Lucas
jennifer.lucas@sdma.com*

Contract, Project Abandonment: Separate Legal Concepts

Abandonment is a well-known concept on construction projects in California. It generally arises in different situations.

A subcontractor on a public works project is entitled to recover against the general or prime contractor for contract abandonment.

One example is when the project's design is so deficient that the contractor performs a massive amount of change orders and extra work. This may qualify as contract abandonment, resulting in the contractor or subcontractor recovering damages against the owner or prime contractor on a quantum

meruit theory (with the exception set forth below).

Another example is when a contractor wrongfully ceases working and leaves the project. This is project abandonment.

Several judicial decisions have established the principle of contract abandonment, giving rise to its use in construction litigation. In *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, the court held that when owner imposed changes (or prime contractor imposed changes vis-à-vis a subcontractor) are of such a magnitude as to change the scope of the work originally contemplated, it would not be fair to limit the prime contractor (or subcontractor) to the original contract amount. The court pointed out that "although the *contract* may be abandoned, the *work* is not." Thus, the court noted that contract abandonment is distinct from project abandonment.

The California Supreme Court's seminal decision, *Amelco v. City of Thousand Oaks* (2002) 27 Cal.4th 228, held that the concept of the owner's contract abandonment does not apply against a public entity. The court held that "such a theory is fundamentally inconsistent with the purpose of the competitive bidding statutes." Further, the court held that allowing a party in direct privity of contract with the public entity to throw out the contract and

recover on a quantum meruit theory raised serious public policy concerns.

Notwithstanding *Amelco*, a subcontractor on a public works project **is** entitled to recover against the general or prime contractor for contract abandonment. In *Sehulster/Tunnels PreCon v. Traylor*

Bros. (2003) 111 Cal.App.4th 1328, the court allowed a subcontractor to recover against the general contractor on a public works project based on the abandonment theory because the subcontractor and the general contractor were private contracting parties with a separate contract. The appellate court cited *Amelco* as recognizing the difference between contracts with public entities (where competitive bidding applies) against contracts between two private parties (where competitive bidding does not apply).

Project abandonment, unlike contract abandonment, is more straightforward and involves the abandonment of the work. It is a basic rule in construction law that a contractor's or subcontractor's wrongful abandonment of its work is a material breach of contract, giving rise to a breach of contract claim for damages sustained in completing or correcting the abandoning contractor's scope of work. Project abandonment can occur on both public and private works, although the parties' rights and obligations will vary depending on the contract's terms and conditions and/or applicable statutes.

*Submitted by Matthew Hicks
matthew.hicks@sdma.com*

Homeowner Allowed to Recover Attorney's Fees as Third-Party Beneficiary

In *Loduca v. Polyzos* (2007) 153 Cal. App.4th 334, the court held that a homeowner who was not a party to a subcontract between the general contractor and the subcontractor could take advantage of the subcontract's attorney's fees provision.

Homeowner Vincent Loduca retained a general contractor to build a custom home. The general contractor entered into a subcontract with George Polyzos to provide custom cabinetry. The subcontract included an attorney's fees provision.

The subcontractor failed to deliver all of the materials and complete its work on time. The homeowner and subcontractor subsequently entered into a separate agreement that extended the completion date and established payment terms. The subcontractor delivered the remaining goods and the homeowner paid for them directly. The homeowner noticed the goods were defective, so he stopped payment on the check.

The homeowner sued the subcontractor and sought attorney's fees, as provided in the original subcontract with the general contractor. At trial, the parties stipulated that the subcontractor breached the subcontract and that the homeowner was entitled to \$65,000 in damages. The trial court awarded the homeowner \$190,350 in attorney's fees.

The subcontractor appealed the attorney's fees award, arguing that the homeowner was not a party to the subcontract. The court disagreed, holding that as an intended third-party beneficiary of the original subcontract, the homeowner was entitled to enforce the subcontract that was made expressly for his benefit.

The court concluded that the homeowner was a third-party beneficiary because the contract named him in the "reference" line and indicated that the cabinetry was to be built according to plans developed for his home. In addition, the court cited the close relationship between the homeowner and subcontractor, noting that the homeowner made some payments directly to the subcontractor and entered into the separate agreement.

The court found that "a formal assignment is not required before an intended third-party beneficiary can recover attorney fees on the underlying contract." The court also rejected the subcontractor's argument that the homeowner was not entitled to recover his attorney's fees because the hom-

owner and subcontractor's subsequent agreement lacked an attorney's fees provision. The court indicated that, in effect, the subsequent agreement made the homeowner a party to the original subcontract and, therefore, subject to its benefits and burdens. Moreover, the agreement did not indicate that it superseded the subcontract; it simply changed some of the terms.

This case is a warning that owners, developers, general contractors, subcontractors and suppliers should ensure that prevailing party attorney's fees provisions specify who is entitled to enforce them to avoid potential exposure to third-party beneficiary claims.

*Submitted by Karen I. Shanbrom
karen.shanbrom@sdma.com*

Killer Bond Forms and Contract Provisions—A Series

This is the fourth in a series setting forth examples of new bond and contract provisions and providing commentary as to their meaning and impact. Last edition, we discussed the following bond term:

Penal Sum Increases With Change Orders

Any increase in the contract amount shall automatically result in a corresponding increase in the penal amount of the bond without notice to or consent from surety, such notice and consent being hereby waived.

Add to that a waiver of all changes provisions such as the following:

Waiver of All Changes

The surety hereby waives notice of any change, including changes of time, to the construction contract or to related subcontracts, purchase orders and other obligations.

The potential result of these two provisions is an unlimited bond amount for the surety. At least one trial court has read these two provisions together to conclude that the court has combined the provision that says that the bond amount increases with each change order with the provision that the surety waives notice of any change. Thus, even if the change order is many times larger than the original contract price, the surety arguably waived notice and agreed that the penal sum would increase accordingly.

Waiver of All Changes — Another Version

Surety is familiar with all of the terms and conditions of the contract documents and waives the right of special notification of any changes or modifications to the contract, or of extensions of time, or of decreased or increased work, or of cancellation of the contract, or of any other act or acts by the obligee or any of its authorized agents.

The key portion is “of any other act or acts by the obligee or any of its authorized agents.” Obligees could argue that the surety has waived all defenses such as wrongful termination, overpayment or failure to mitigate damages. Accordingly, there is a question of whether the provision would constitute a waiver of an undefined future occurrence. Nonetheless, it is a problematic clause that could cause a surety pause if not to reject the provision.

*Submitted by Marilyn Klinger
marilyn.klinger@sdma.com*



A partner in Sedgwick’s Construction Practices Group, **Jonathan Rodriguez** specializes in complex construction claims and dispute resolution, including payment and performance disputes, impact and extra work claims, and lien claims. He also drafts and negotiates contracts on behalf of his clients to ensure proper risk and benefit allocation. He has successfully represented his clients in all forums, including mediation, arbitration and trial. His latest passion is counseling clients on high-performance green construction, including those certified under the U.S. Green Building Council’s Leadership in Energy and Environmental Design program.

In his spare time, Jon swims, bikes and runs. Having participated in two Escape From Alcatraz Triathlons and planning his third, he likes to prove that those prisoners probably made it alive off of Alcatraz Island.

For more information about Sedgwick’s Construction Practices Group or this publication, please contact:

San Francisco
Stephen Schram
Editor
 stephen.schram@sdma.com

Paul Lahaderne, Partner
 paul.lahademe@sdma.com

James Diwik, Partner
 james.diwik@sdma.com

Los Angeles
Marilyn Klinger, Partner
 marilyn.klinger@sdma.com

Orange County
Jonathan Dunn, Partner
 jonathan.dunn@sdma.com

Dallas
Mike Pipkin, Partner
 mike.pipkin@sdma.com

Construction Practices Group

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We handle various aspects related to construction – from the contracting, bonding, insuring and development phase; construction disputes, including terminations for default and convenience, takeovers and completion, litigation, arbitration, DRB hearings, and mediation; and post-construction issues, including impact claims, mechanic’s liens and stop notice enforcement and defense, compliance with regulatory authorities, product malfunction, construction site injuries, and construction defects. We work with specialized consultants with design and construction expertise.

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Sedgwick, Detert, Moran & Arnold LLP
 One Market Plaza, Steuart Tower, 8th Flr.
 San Francisco, CA 94105
 415.781.7900

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*Affiliated office