



CONSTRUCTION ALERT

A NEWSLETTER TO THE CONSTRUCTION INDUSTRY

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CHANGES IN MECHANIC'S LIENS: MUST NOW SERVE LIEN

By Darryl J. Horowitz

A big change has been made for lien claimants. As of January 1, 2011, the procedure for the handling of mechanic's liens has changed; in addition to recording the lien, the lien claimant is now required to give notice that the lien has been recorded. In addition, once a suit is filed to enforce the lien, a Notice of Pendency of Action must be recorded. This article will discuss these changes.

Previous Lien Requirements

Prior to 2011, once a claimant recorded the mechanic's lien, the next step was to wait to see if it was paid. If not paid within 90 days of the date it was recorded, the claimant was required to file suit. There was no requirement to mail a copy of the lien to the owner, general contractor, or banker. This has now changed.

Liens have always been required by Civil Code § 3084 to include:

1. A statement of the claimant's demand after deducting all just credits and offsets.
2. The name of the owner or reputed owner, if known.
3. A general statement of the kind of labor, services, equipment, or materials furnished by the claimant.
4. The name of the person by whom the claimant was employed or to whom the claimant furnished the labor, services, equipment, or materials.

5. A description of the site sufficient for identification."

New Requirements for the Lien

A new requirement was added that now requires that a new "Notice of Mechanic' Lien" be served on the property owner certified, registered or first class mail, postage prepaid, at the owner's residence or business address as shown on the building permit. (Civil Code § 3084(c).) The language of the Notice of Mechanic's Lien is specified in Civil Code § 3084(a)(6). Specifically, the Notice must include the following statutory language in bold face type no smaller than 10 point:

"NOTICE OF MECHANIC'S LIEN ATTENTION!

Upon the recording of the enclosed MECHANIC'S LIEN with the county recorder's office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. That legal action must be filed with the court no later than 90 days after the date the mechanic's lien is recorded.

The party identified in the mechanic's lien may have provided labor or materials for

improvements to your property and may not have been paid for these items. You are receiving this notice because it is a required step in filing a mechanic's lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property. This may affect your ability to borrow against, refinance, or sell the property until the mechanic's lien is released.

BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANIC'S LIENS GO TO THE CONTRACTORS' STATE LICENSE BOARD WEB SITE AT www.cslb.ca.gov. (Ibid.)

The "proof of service affidavit" is to be signed by the person serving the Notice of Mechanic's Lien. It must include "the date, place, and manner of service and facts showing that the service was made in accordance with" Civil Code § 3084(a)(6). (Ibid.) To accomplish this, the affidavit is to include "the name and address of the person or persons upon whom a copy of the mechanic's lien and the Notice of Mechanic's Lien was served, and, if appropriate, the title or capacity in which he or she was served." (Ibid.)

There are some instances in which the owner or reputed owner cannot be served with the Notice. If that is the case, Civil Code § 3084(c)(2) permits the Notice to be served on either the construction lender or general contractor.

The penalty for failing to serve the Notice of Mechanic's Lien is drastic: The lien is unenforceable. (Civil Code § 3084(d).)

New Enforcement Requirements

Including the Notice and serving it is not the only new requirement. Civil Code § 3146 previously

allowed a lien claimant to record a Notice of Pendency of Action after suit was filed to enforce a mechanic's lien. The notice gives notice to all concerned that there is a lawsuit on file that affects title to the real property. Thus, anyone who might buy the property before the lien claim was adjudicated took subject to the lien.

Civil Code § 3146 was amended to make it mandatory for a lien claimant to record a Notice of Pendency of Action within 20 days after suit is filed to enforce the mechanic's lien. In addition, Civil Code § 3146 provides that it is only *after* the Notice is recorded that any potential purchaser or encumbrancer will be deemed to have received notice of the fact that a lawsuit was filed to enforce a mechanic's lien.

Conclusion

These new requirements are for the protection of the property owners and lenders who will be directly affected by a mechanic's lien action. They require all lien claimants to modify their forms for Mechanic's Liens. They also now require strict adherence to the mailing of the Notice of Lien and recording of the Notice of Pendency of Action by the claimant once suit is filed.

We recommend that you update your forms, time lines and enforcement procedures to make sure that you are protected. The failure to do so may cause you to lose one of the best enforcement tools contractors have.

This article was prepared by Darryl J. Horowitz, a litigation partner at Coleman & Horowitz, LLP, emphasizing complex business, construction and real estate litigation, commercial collections, casualty insurance defense, insurance coverage, and alternative dispute resolution. He is a member of the Fresno County Bar Association (former Chair, Construction Law Section), Los Angeles County Bar Association, American Bar Association (member, Forum on Construction Law and Construction Law Committee, Litigation Section), Association of Business Trial Lawyers (past President, San Joaquin Valley Chapter), California Creditors Bar Association (former Secretary and founder), NARCA, and the Commercial Law League of America. If you have any questions regarding the subject of this article, please contact Mr. Horowitz at (559)248-4820/ (800)891-8362, or by e-mail at dhorowitz@ch-law.com.

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