

Kimball, Tirey & St. John LLP

Mechanics' Liens

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An unpaid contractor or supplier who furnishes labor or materials to improve California property can record a mechanic's lien against the property. Property can be subject to a mechanic's lien even if the property owner did not personally enter into the agreement. In some cases a property owner may be liable to a contractor who has dealt with a property manager or tenant. To avoid these involuntary liens, property owners and managers should be familiar with mechanics' lien law.

Property is subject to a mechanic's lien if the owner authorizes the work, either directly or indirectly. Examples of indirect authorization would be:

- An owner who entered into a lease that requires lease improvements by the tenant;
- The owner's property manager made the agreement with the contractor; or
- The owner becomes aware of the work and does not advise the contractor, materials provider or laborers that he is not responsible through a Notice of Non-responsibility.

How Can an Owner Avoid Paying Twice?

Sometimes a general contractor fails to pay subcontractors or suppliers even if the general contractor has been paid. The subcontractors and suppliers can file mechanics' liens against the property if they haven't been paid, even if the amount in dispute has previously been paid to the general contractor. There are several ways that an owner can protect himself against having to pay the same bill twice.

- **Posting and Recording a Notice of Non-responsibility.** An owner who did not order the services or materials can prevent a mechanic's lien from being attached to his interest in the property by posting a "Notice of Non-responsibility." It states that the owner will not be responsible for any claims that arise because of the work. Notices of Non-responsibility are very technical, and all of the requirements of the law must be followed for them to be effective. A Notice of Non-responsibility must:

- Be given in a particular form that is signed under penalty of perjury;
- Specifically describe the property and the nature of the interest of the person giving the Notice;
- Identify the person who ordered the work;
- Be posted on the property, in a conspicuous place, within 10 days of the date that the owner knew, or had reason to know, of the existence of the work. This knowledge may come from receiving a Preliminary 20-Day Notice from a contractor or supplier or by actually observing people working at the property;
- A verified copy must also be recorded with the county recorder during that same ten-day period.

- **Lien releases.** Requiring that the contractor obtain lien releases signed by the contractor and each subcontractor and material supplier; and paying the contractor only when s/he

provides the lien releases. The Kimball, Tirey & St. John LLP article, Mechanics Lien Releases, has information about the four types of mechanics lien releases.

- **A payment bond.** Requiring that the contractor obtain a payment bond. A payment bond is another source where an unpaid subcontractor or supplier can seek payment rather than through a mechanic's lien on the property.
- **Joint payments.** Making payments to the general contractor in the form of a joint check to the general contractor and the subcontractors or suppliers providing the labor or materials. Joint checks give the subcontractors and material suppliers an opportunity to negotiate with the contractor regarding payment in exchange for their signature on the check.
- **Fund control.** Requiring that a fund control company be used to disburse payments. A fund control company is a licensed escrow company that specializes in handling funds for construction jobs. The fund control company receives the funds then makes payments to the general contractor, subcontractors, and suppliers.

Once a Mechanic's Lien has been Filed, What Can the Owner Do?

If a mechanic's lien has been filed, a property owner may want to consult with an attorney to develop an action plan. Possible actions may include one or more of the following:

- **Negotiating with the contractor.**
- **Complaining to the Contractor's State License Board.** A person harmed by a contractor can file a complaint with the Contractors State License Board which has the authority to investigate and discipline a contractor for the contractor's wrongful actions. The Contractor's State License Board may not always be successful in obtaining restitution for an injured party; in some cases a lawsuit must be filed by the owner against the contractor.
- **Obtaining a Bond to Release the Lien.** The cloud on title created by a mechanic's lien can be avoided by purchasing a surety bond equal to 1.25 times the mechanic's lien amount. The bonding company agrees to guarantee payment. A release bond allows the owner to sell or encumber the property without first having to satisfy the mechanics lien. A standard provision in commercial leases, such as those utilized by the American Industrial Real Estate Association, requires the tenant to post the bond if a mechanic's lien is recorded.
- **Litigating the Dispute.** A contractor is required to file a lawsuit to foreclose on the mechanic's lien within 90 days after the lien is recorded. If the contractor fails to file the action on time, the lien right is lost. If the contractor does file a timely lawsuit, the property owner may file an answer and litigate the lien's validity. It may also be advisable for the owner to cross-complaint against the contractor and/or the contractor's bonding company. Contractors are required to maintain a \$12,500 bond with the California State Contractor's License Board. Owners that are injured or defrauded as the result of a contractor's violation of the Business and Professions Code may bring an action against the Contractor's bonding company to require payment of the bond to the owner. Status of the bond may be confirmed through the Board before authorizing the work of improvement.
- **Petitioning to Remove the Lien if a Foreclosure Lawsuit Isn't Filed.** If a lawsuit to foreclose on the mechanic's lien isn't filed within the time period specified by law, the property owner may petition the court for an order releasing the petition from the lien.

While the applicable law is complex, mechanics' liens can be avoided through careful management. When faced with a mechanics' lien issue and in doubt as to the best course of action, seek legal advice.

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