

# Newsletter

## Client Alert: Hope for Foreclosing Lenders with Subcontractor's Liens in Texas

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If you are a lender foreclosing on Texas real property securing commercial loans, you may be faced with subcontractors' mechanic's liens on the property. Before settling with a subcontractor, you may want to determine whether the mechanic's lien is valid or enforceable.

Assuming you did not provide express or implied assurances to the subcontractor that they would be paid:

1. If your lien was properly recorded before any work began on the property improvements, your lien is superior to the mechanic's lien except for "removables" provided by or through the subcontractor.<sup>1</sup> "Removables" are improvements that can be removed without material injury to the property. Concrete foundations, paint and plumbing pipes are examples of non-removables. Garage doors, air conditioning compressors, and plumbing and light fixtures are examples of removables.
2. Regardless of when your lien was recorded, the subcontractor's mechanic's lien may not have been perfected properly. The Texas Property Code has specific requirements for notices to the owner and original contractor.<sup>2</sup>
3. The subcontractor's mechanic's lien may be unenforceable if they did not file a foreclosure lawsuit within two years after the last day they could record a mechanic's lien or one year after completion, termination or abandonment of the work under the "original contract" under which the lien is claimed, whichever is later.<sup>3</sup>

In order to remove the lien, you can request a declaratory judgment from a court that: (1) you have priority over a particular subcontractor's mechanic's lien and that the particular subcontractor has no "removables" to foreclose, (2) that the subcontractor's mechanic's lien is invalid because it was not properly perfected, or (3) that the subcontractor's mechanic's lien is invalid because the subcontractor failed to sue for foreclosure within the applicable time.

The Texas Property Code also provides a Summary Motion to remove an invalid or unenforceable lien on the following grounds: (1) failure to give proper notice of the claim to the owner, (2) failure to file a proper lien affidavit, (3) failure to properly notify the owner of the lien affidavit, (4) payment by the owner of all the funds owed to the original contractor before the owner received notice of the claim (including 10% retainage withheld for 30 days after the earlier of completion, termination or abandonment of the work under the original contractor), or (5) all remaining funds that may subject to the claim (including retainage) having been deposited with the court.<sup>4</sup>

If successful, the lender may also be awarded its reasonable and necessary attorneys fees.<sup>5</sup>

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<sup>1</sup>Texas Property Code § 53.123, *University Savings & Loan Assoc. v. Security Lumber*, 423 S.W. 2d 287 (Tex. 1967) – inception date to beginning of work; *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974) – removables defined; *Dorsett Brothers Concrete Supply Inc. v. Safeco Title Ins. Co.*, 880 S.W.2d 417 (Tx. Civ. App.—Houston [14th Dist.] 1994, writ denied), plus *Matter of Jamail*, 609 F.2d 1387 (5th Cir. 1980) – subcontractor may only remove removables supplied by them; and *Page v. Structural Wood Components*, 102 S.W.3d 720 (Tex. 2002) – multiple original contractors may have multiple inception dates.

<sup>2</sup>Texas Property Code §§ 53.052, 53.055, 53.056, 53.057, 53.058, 53.252, 53.253, 53.054. Note however than an "original contractor" (i.e., that contracts directly with the owner) has a lien under Article XVI, Section 50 of the Texas Constitution and may not be required to follow these requirements. See *FDIC v. Bodin Concrete Co.*, 869 S.W.2d 372 (Tex. Civ. App.—Dallas 1994, writ denied) and *Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140 (Tex. App.—Amarillo 1996, writ denied).

<sup>3</sup>Texas Property Code § 53.158.

<sup>4</sup>Texas Property Code § 53.160.

<sup>5</sup>Texas Property Code § 53.156 and Tex. Civ. Proc. and Rem. Code § 37.009.

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