

# ◆ The Construction Report ◆

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## The contractor filed a mechanic's lien on my property - Now What?

**T**he construction project is winding down, but with disputes between a private owner and contractor. The contractor files a mechanic's lien under Chapter 53 of the Texas Property Code. Now what?

### 1. Bond to indemnify against lien.

Whether the lien is valid or not, the owner can bond around the lien by filing a bond in the real property records. The bond amount must be double the liens, unless the liens exceed \$40,000. If the liens exceed \$40,000, the bond must be the greater of 1½ times the liens or the sum of \$40,000 plus the liens. The surety for the bond must be a corporation licensed as a surety in Texas.

After the bond is filed, the county clerk issues notice to all named obligees (beneficiaries or lien filers). When a proper bond is

***A proper bond discharges the lien from the property — the lien then attaches to the bond.***

filed and the clerk's notice is issued, the mechanic's lien is discharged from the owner's property, and the lien claim attaches to the bond. In that event, a purchaser, title insurer, or lender is absolutely protected by the bond recording, and the property is considered to be lien free. The lien claimant must sue on the bond not later than one year after the bond notice date or after the date on which the underlying lien claim be-

comes unenforceable under Texas Property Code Section 53.158 (which provides a range of deadlines for suit depending on the circumstances).

### 2. Summary motion to remove invalid or unenforceable lien.

Texas Property Code Section 53.160 establishes an expedited procedure (no waiting for trial) to remove certain invalid or unenforceable liens. An interested party may file a verified motion to specify the



legal basis why the lien is invalid or unenforceable. There are only 7 grounds available. For more details, read the **Sidebar** on page 4.

- a) Notice of claim not furnished as required by law;
- b) Affidavit claiming lien not prepared or filed properly;
- c) Notice of filed affidavit not timely furnished to owner or original contractor;
- d) Owner properly withheld retainage, which was paid out with all other funds owed to original contractor before the lien claim was filed and the owner received notice;
- e) All funds subject to notice of

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## Lawyer Quips and Quotes

A paralegal, an associate and a partner of a large law firm were walking through city park, when they spotted an antique oil lamp.

The paralegal picked it up, and began rubbing the lamp. They were shocked when a Genie emerged in a great cloud of smoke.

The Genie announced, "In gratitude of your freeing me from the lamp, I will grant three wishes. As there are three of you, you each get one wish."

The paralegal exclaimed: "I want to be in Barbados, sipping cocktails with a gorgeous movie star." Poof! The paralegal was gone.

The associate excitedly stammered, "I want to be in Hawaii, relaxing on the beach with a hula dancer on one side and a Mai Tai on the other." Poof! The associate was gone.

"You're last," the Genie says to the partner, "What is your wish?"

The partner replied, "I want those two back in the office after lunch."

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What's the definition of a lawyer?

-A mouth with a life support system.

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How many lawyers are needed to change a light bulb?

-How many can you afford?

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How many personal injury lawyers are needed to change a light bulb?

-Three: one to turn the bulb, one to shake him off the ladder, and one to sue the ladder company.

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claim to the owner including retainage have been deposited in the court's registry and the owner has no additional liability to claimant;

f) For homestead property: (i) no contract was executed or filed as legally required, or (ii) the lien affidavit failed to contain the legally required notice, or (iii) the notice of claim failed to include the legally required statement; and

g) Claimant executed a valid and enforceable waiver or release of the lien claim.

The movant must provide 21 days notice of the hearing. The lien claimant need not file a response, but has the burden at the hearing of proving that the notice of claim and lien affidavit were timely and properly furnished to owner and original contractor. The movant has the burden of establishing the propriety of removal under any other ground authorized under Section 53.160.

The court must "promptly determine" whether to grant the motion. However the court rules, there is no immediate appeal. If the court orders the removal of the lien, the court must set an amount of security

***The court must "promptly determine" whether to grant a lien removal motion.***

that claimant may provide to stay the lien removal. The security amount must reasonably estimate the costs and attorney's fees that movant is likely to incur in further proceedings to determine the validity or enforceability of the lien. The sum may not exceed the lien claim amount. If, within 30 days, the claimant files a bond or cash deposit in the amount set by the court, the court must stay the order removing the lien. If the court fails to set an amount of security, the amount re-

quired is the amount of the lien claim. Any such bond must be issued by a corporate surety licensed to issue surety bonds in Texas, and be conditioned on claimant's payment of any final judgment against claimant for movant's attorney's fees and costs. In lieu of a bond, claimant may deposit the set amount in cash or specified negotiable obligations. Any such deposit must be conditioned in the same manner as a surety bond. Accrued interest becomes part of the deposit.

If claimant fails to file a bond or deposit in lieu of bond, the owner may file a certified copy of the court's order directing lien removal with a court clerk certificate stating that no bond or deposit in lieu of bond was filed within 30 days of the court order, and there was no court order staying the lien removal order.

The lien claim is then removed and extinguished for a creditor or subsequent purchaser for valuable consideration obtaining an interest in the property after the certified copy of the order and court clerk certificate are filed with the county clerk. Lien removal does not release owner's liability, if any, to claimant.

If the lien removal order is not stayed, and claimant later obtains a final judgment validating and ordering foreclosure of the lien, claimant may file a certified copy of the final judgment with the county clerk. The filed judgment revives the lien, which claimant may then foreclose. A revived lien is void for a creditor or subsequent purchaser for valuable consideration who obtained an interest in the property after the lien removal order and court clerk certificate were filed with the county clerk, but before the final judgment reviving the lien was filed with the county clerk.

**3. Demand on original contractor.** If claimant secures a judgment against owner or owner's

## The Editor's Corner

*The Construction Report is published periodically by Quilling, Selander, Cummiskey & Lownds, P.C., to highlight construction matters of interest to at least the Editor, Brian W. Erikson. The information we provide is a community service and is not intended to displace the legal judgment of real (expensive) attorneys. We invite your comments. Write us c/o Brian W. Erikson, 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.*

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property, owner is entitled to deduct the judgment amount and costs from any amount owed to original contractor. If owner has fully settled with original contractor, owner is entitled to recover from original contractor any amount paid for which original contractor was originally liable.

### **4. Unenforceability of lien based on running of statute of limitations.**

The lien claimant must sue to foreclose its lien within two years of the last day a claimant may timely file a lien affidavit under §53.052, or within one year after completion, termination or abandonment of work under the original contract, whichever is later. Section 53.052 requires a claimant to file its lien affidavit with the county clerk by the 15<sup>th</sup> day of the fourth month after the day on which the indebtedness accrues. With a residential project, the lien affidavit must be filed by the 15<sup>th</sup> day of the third month after the day on which the indebtedness accrued.

Indebtedness for an original contractor accrues on the last day of the month in which the original contract was terminated, completed, finally settled, or abandoned.

Indebtedness for a subcontractor (or any other entity but a specially fabricated material provider) who has furnished labor or material to an

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original contractor or to another subcontractor accrues on the last day of the last month in which the labor was performed or the material furnished.

Indebtedness for a specially fabricated material provider accrues: (1) the last day of the last month that materials were delivered; or (2) the last day of the last month in which delivery of the last of the material would normally have been required at the job site; or (3) the last day of the month of any material breach or termination of the original contract by the owner or contractor or of the subcontract under which the materials were furnished.

A claim for retainage accrues on the last day of the month in which all work under the contract between owner and original contractor has been completed, finally settled, or abandoned.

If claimant does not file suit by the statutory deadline, the lien claim and any other claim under Property Code Chapter 53 are barred. The claimant may still have contract or other claims that may be addressed outside the Property Code.

### 5. Invalidity of lien.

The lien may be invalid for a variety of reasons — lack of notice of non-payment, improper or untimely lien filing, lack of notice of lien filing, etc. The basis for this defense depends on the facts. The case law teaches that the deadlines for notice and filing are strictly enforced. The lien may be invalid simply because a notice letter was mailed one day too late. The contents of the notice letter or lien affidavit receive less scrutiny — only requiring substantial compliance. In other words, if the owner timely receives effective notice of the claim, courts generally will not invalidate the lien.

### 6. No Debt Owed.

A mechanic's lien is not valid if no debt is owed to claimant. If claimant has done no work, there is

no legally cognizable debt, and no valid lien. A claimant cannot validly seek money for work not performed, or for profits on work not performed.

### 7. Fraudulent liens.

In 1997, Texas enacted the Fraudulent Lien Bill to counter fraudulent liens filed by Republic of Texas members. (This bill is now codified in Chapter 12 of the Texas Civil Practice & Remedies Code.) The Republic of Texas issued judgments from its internal courts directing legislators and judges to pay millions. Chapter 12 established a statutory scheme for invalidating fraudulent liens, enjoining further lien filing, and imposing civil liability. The Act created civil monetary penalties including the greater of \$10,000 or the actual damages caused by the lien, plus court costs, reasonable attorney's fees, and such



exemplary damages as the court deemed appropriate.

Despite its roots and purpose to combat "proper terrorism", the Act increasingly is being used against lien claimants who overstate or improperly state their lien claims.

If an owner can show that the lien claimant knew (or perhaps should have known) that its lien was overstated or invalid, the owner may be able to prevail under Chapter 12. Such a counterclaim may in any event lessen a claimant's resolve to pursue even proper lien claims.

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(Continued from "Sidebar" page 4)

If owner properly holds none of original contractor's money, then owner and owner's property have no liability to the original contractor's subcontractors and vendors.

**(e) All funds subject to notice of claim to owner including retainage have been deposited in the court's registry.**

If owner otherwise has no liability to lien claimant, owner may deposit the money identified in non-payment notices, together with the statutory retainage in the court's registry, and escape further involvement (and expense) in the legal proceeding.

**(f) For homestead property: (i) no contract was executed or filed as legally required, or (ii) the lien affidavit failed to contain the legally required notice, or (iii) the notice of claim failed to include the legally required statement.**

Homestead property is treated with more sanctity than commercial or other residential property. If the original contractor does not perfect a homestead contract with the owner, none of its subcontractors or vendors may file a valid lien on the homestead. Married owners must both sign the contract, which must be recorded with the county clerk. (Section 53.254 has many other requirements to perfect a lien on homestead property.)

**(g) The claimant executed a valid and enforceable waiver or release of lien claim.**

If the claimant has waived or released its lien claim, it cannot have a valid lien. Also, claimants may agree to a blanket pre-waiver of lien by contract, invalidating any subsequent attempt to file a lien.

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Diplomacy is the art of saying "Nice doggie" until you can find a rock.

— Will Rogers

**Sidebar: Grounds for summary removal of lien**

**T**exas Property Code §53.160 sets out 7 (and only 7) grounds to support an expedited removal of a mechanic's lien. The grounds include:

**(a) Notice of claim not furnished as required by law.**

The lien claimant is required to furnish notices of non-payment, retainage, and lien filing. The notices must be sent by certified mail to the owner and original contractor (unless the claimant is the original contractor). A subcontractor must provide the owner notice of non-payment by the 15<sup>th</sup> day of the third month after the month in which the unpaid labor or materials were furnished. Sub-subcontractors must provide the same notice, plus notice to the original contractor by the 15<sup>th</sup> day of the second month following

the month in which the unpaid labor or materials were furnished.

**(b) Affidavit claiming lien not prepared or filed properly.**

The lien affidavit must comply with Texas Property Code §53.052, which requires that the lien contain information about the parties, the claim amount, the work at issue,



etc. The lien must be filed with the county clerk by the 15<sup>th</sup> day of the fourth month after the day on which the indebtedness accrues (third month for residential property).

**(c) Notice of filed affidavit not timely furnished to owner or original contractor.**

For the lien to be valid, claimant must send a copy of the lien affidavit by certified mail to owner and original contractor (if the claimant is not the original contractor) by the fifth day after the affidavit was filed with the county clerk.

**(d) Owner properly withheld retainage, and had paid out the retainage and all other funds owed to the original contractor before the lien claim was filed and the owner received notice.**

The owner is required to withhold ten percent retainage from the money paid under the original contract until thirty days after the work is finally completed. With no notices of non-payment or liens, owner can pay out all the contract amount with no liability to lien claimants.

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