PUBLICATION UPDATE

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The Complete Guide to Mechanic's and Materialman's Lien Laws of Texas

Publication 82598 Release 28 October 2024

HIGHLIGHTS

Release 28 of The Complete Guide to Mechanic's and Materialman's Lien Laws of Texas includes revisions and updates, with new cases and commentary on such topics as:

- Chapter 1 Constitutional and Equitable Liens
- Chapter 2 Current Mechanic's Lien Law: Chapter 53 of the Texas Property Code
- Chapter 3 Perfecting the Lien Under Chapter 53
- Chapter 4 Priorities, Preferences, and Foreclosing the Lien
- Chapter 5 Bonds
- Chapter 6 Trust Fund Statute
- Chapter 7 Liens Against Mineral Property
- Chapter 8 Bankruptcy

Chapter 2—Current Mechanic's Lien Law: Chapter 53 of the Texas Property Code. Under Prop. Code § 53.023, "[t]he lien secures payment for: (1) the labor done or material furnished for the construction, repair, design, survey, or demolition; or (2) the specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage value." Although machinery rental may be included in materials provided and secured by a lien, it has been held that this does not include: (1) food and lodging for employees

of the machine owner to repossess the equipment, (2) fuel used in transporting the repossessed equipment, and (3) labor costs for preparing the repossessed equipment for transport off the job site. *Eagle Rock Timber, Inc. v. Rock Hard Rental, LLC,* 672 S.W.3d 438, 449 (Tex. App.—San Antonio 2023, pet. denied).

Chapter 3—Perfecting the Lien Under Chapter 53. A lien affidavit which misstated the name of the owner was ultimately found effective. In *Pioneer Emerald Pointe, LLC v. Texmenian Contractors, LLC*, 2023 Tex. App. LEXIS 4094 (Tex. App.—Dallas 2023, no pet.), the affidavit identified the owner of an apartment complex as "Emerald Point Apartments, LLC," when the actual name was "Pioneer Emerald Pointe, LLC." However, the claimant had done a fair amount of diligence in attempting to ascertain the correct name, including that: (1) the name used in the affidavit was the name obtained from the Dallas Central Appraisal District records, (2) the property manager hired by the owner was confused about the name, and (3) a prior property manager had identified the owner by the name used in claimant's affidavit without any correction the name was not correct. *Id.* This, coupled with the fact that the evidence indicated that the owner in fact received the affidavit, resulted in a finding that the affidavit was effective. As the court stated, "[b]ecause the misnomer was a technical defect that did not mislead [the owner] to [its] prejudice, the affidavit substantially complied with Chapter 53's requirements." *Id.*

Chapter 4—Priorities, Preferences, and Foreclosing the Lien. A typical case where summary removal is proper under sec. 53.160 is where a derivative claimant does not send notices to the proper parties. In this regard, it is important that a derivative claimant not make a mistake on its end about the identity of the owner or original contractor. In *Arredondo's Mechanical Services, LLC v. Ortega Medical Building, LLC,* 2023 Tex. App. LEXIS 6933 (Tex. App.—Hous. [14th Dist.], no pet.), a subcontractor's lien was deemed invalid because the notices did not correctly identify the general contractor on the project. The subcontractor identified one entity, "Trojan Global Construction, LLC" because that is what was on the subcontractor's original quote and invoices. However, it turned out that this was the wrong entity (and in fact had been dissolved by the Secretary of State before the work in question). All documents from the owner had identified instead the correct entity, "Trojan Group Contractor." Additionally, all prior checks sent to the subcontractor were from the correct general contractor, "Trojan Group Contractor." Notwithstanding this, the subcontractor sent its section 53.056 notices to the incorrect entity. Accordingly, the court upheld a summary removal of the subcontractor's lien under Prop. Code § 53.160.

Chapter 5—Bonds. Whether claims on a performance bond were

subject to arbitration was an issue that arose in *Trans-Vac Systems, LLC v. Hudson Insurance Company,* 2023 Tex. App. LEXIS 4468 (Tex. App.—El Paso 2023, no pet.). In that case, a dispute arose between a subcontractor and a sub-subcontractor on a US Army construction project. The sub-subcontract contained an arbitration clause. The contract also required the sub-subcontractor to obtain payment and performance bonds (which recited that they were acquired in compliance with Chapter 2253). The bonds did not themselves contain an arbitration clause, but they incorporated the sub-subcontract by reference. The sub-subcontractor defaulted, and the subcontractor itself completed the work, and then asserted a claim on the bond, demanding arbitration. The surety resisted, claiming it was not party to an arbitration agreement. "Normally, because arbitration is contractual in nature, only parties to an arbitration agreement can be compelled to arbitrate." (citations omitted). "However, Texas courts have long recognized the six theories, arising out of common principles of contract and agency law, that may bind nonsignatories to arbitration agreements: '(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary.' " *Id.* In this case, incorporation by reference was argued to bind the surety to arbitration, since the bond incorporated the sub-subcontract by reference, and that sub-subcontract contained an arbitration clause. However, the court noted that the mere presence of an arbitration clause was not determinative—the language must be referenced, and it is important to determine of the arbitration is a "broad" (all-encompassing) one, or a "specific" one, applicable only to the two specific contracting parties. The court in the *Trans-Vac* case found that the specific arbitration clause at issue was intended only to be between the two parties—i.e., the subcontractor and sub-subcontractor—for disputes arising specifically from performance of the subcontract. It was not, on the other hand, designed to more broadly encompass disputes related to the performance bond. In fact, the surety's primary argument was related to the statute of limitations for claiming on the bond, not any claims related to the underlying performance of the subcontract. Accordingly, the court held that the performance bond was not subject to arbitration.

Chapter 6—Trust Fund Statute. Neither section 162.006 specifically, nor the Trust Fund Act generally, defines the term "residential homestead." One Time Construction Texas, LLC v. Snow, 2023 Tex. App. LEXIS 7109 (Tex. App.—Fort Worth 2023, no pet.). Before the One Time case encountered a challenge to whether section 162.006 applied, apparently no case applying Chapter 162 had defined the term for purposes of the Act. The court noted, however, that "the caselaw regarding what constitutes a 'homestead' for purposes of the exemption from creditor claims provided by the Texas Constitution and Chapter 41 of the Property Code

is well-developed, and we find it instructive." Specifically, "[i]n Texas, a landowner seeking to claim a homestead exemption for a particular property has the burden to establish '(1) overt acts of homestead usage and (2) the intention to claim the property as a homestead.' . . . A landowner may also establish a homestead over unoccupied land by showing '(1) a present intent to occupy and use the land as a home and (2) an overt act in furtherance of this intent.' " (citing *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 159 (Tex. 2015); *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 698 (5th Cir. 2009)). In the One Time case, the court found sufficient evidence that a new house under construction (and for which the contractor did not maintain the account required by section 162.006) was a "residential homestead." The evidence was that the owners intended to move into the house to occupy as their primary residence, that they had incurred expenses for alternate living arrangements when the construction was not timely completed, and the contract further indicated the owners' intent to use the property as their residence. Therefore, the court found that section 162.006 applied, and the contractor violated the Trust Fund Act by not complying with its provisions requiring maintenance of the deposit account.

Chapter 7—Liens Against Mineral Property. On *In re Pearl Resources, LLC,* 2024 Bankr. LEXIS 405 (Bankr. S.D. Tex. 2024), the court applied Prop. Code §§ 56.041 and 53.156, and held that awarding attorney's fees to an owner that successfully proved a mineral lien was invalid, was appropriate given section 53.156's provision that "the court may award costs and reasonable attorney's fees as are equitable and just" in proceedings to foreclose a lien or "in any proceeding to declare that any lien or claim is invalid or unenforceable in whole or in part."

Chapter 8—Bankruptcy. Although owners in *residential* construction projects can now assert beneficiary status under the Trust Fund Act (and thus, potentially nondischargeability under Bankruptcy Code § 523(a)(4)), the statute does not give such beneficiary status to owners in *commercial* construction projects. In *In re Harwell,* 2024 Bankr. LEXIS 217 (Bankr. W.D. Tex. 2024), a city-controlled entity subcontracted with a HVAC subcontractor to provide HVAC systems in a building being remodeled as an apartment complex. The subcontractor made several false representations, and used contract trust funds on non-project expenditures in violation of the Act. The subcontractor eventually filed bankruptcy, and in the context of the bankruptcy proceeding the city asserted that as an "owner" it should be a beneficiary under the Trust Fund Act—this claim was made with a view towards seeking nondischargeability of the debt as a breach of fiduciary duty under Bankruptcy Code § 523(a)(4). The court stated "[w]hile property owners like [the city] can be beneficiaries under TCTFA, they can only be beneficia-

ries under a 'residential construction contract.' " (citing Prop. Code § 162.003(b)). Although "residential construction contract" is not defined in the Act, the court looked to the definitions in Prop. Code §§ 53.001(9) and 27.001(7), and concluded that those definitions "pointed towards defining 'residential construction contract' as where an owner-dweller of a single dwelling seeks construction or improvements on that dwelling." Although the city intended the apartment complex to constitute residences for its eventual numerous tenants, it was not the "residence" of the owner—in this case, the city. As such, the city was unable to prevail under its asserted Trust Fund Act claim, and therefore was similarly unable to prevail on its claim of nondischargeability for fiduciary breach under Bankruptcy Code § 523(a)(4) (although it prevailed under other claims).

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Revision

☐	Title page.	Title page
☐	1-21 thru 1-27	1-21 thru 1-27
☐	2-7 thru 2-8.1.	2-7 thru 2-8.1
☐	2-17 thru 2-19	2-17 thru 2-20.1
☐	2-31 thru 2-46.7.	2-31 thru 2-46.7
☐	3-4.1 thru 3-5.	3-5 thru 3-6.1
☐	3-19 thru 3-27	3-19 thru 3-28.1
☐	3-37 thru 3-41	3-37 thru 3-42.1
☐	3-93	3-93 thru 3-94.1
☐	3-103 thru 3-104.3	3-103 thru 3-104.3
☐	4-27 thru 5-9	4-27 thru 5-10.3
☐	5-21 thru 5-34.5.	5-21 thru 5-34.7
☐	5-47 thru 5-53	5-47 thru 5-57
☐	6-7 thru 6-13	6-7 thru 6-14.1
☐	6-28.1 thru 6-29.	6-29 thru 6-30.1
☐	7-5.	7-5 thru 7-6.1
☐	7-27	7-27 thru 7-28.1
☐	8-15 thru 8-20.5.	8-15 thru 8-20.7
☐	TC-1 thru TC-25	TC-1 thru TC-25

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