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

Publication 82598 Release 21

October 2017

HIGHLIGHTS

Release 21 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 1—Constitutional and Equitable Liens. Where a subcontractor had

entered into a side agreement with the owners, and performed additional work for the residential owners in a direct contract outside the scope of the subcontract with the general contract, a constitutional lien for the amount of the direct, side contract would potentially be appropriate (although not, of course, for the work performed pursuant to the subcontract with the general contractor). *Lopez v. Bucholz*, 2017 Tex. App. LEXIS 3071 (Tex. App.—Austin 2017, no pet.).

Chapter 2—Current Mechanic's Lien Law: Chapter 53 of the Texas Property Code. In *Lyon v. Building Galveston*, 2016 Tex. App. LEXIS 11922 (Tex. App.—Hous. [1st Dist.] Nov. 3, 2016, no pet.), a subcontractor challenged the trial court's finding that its lien had exceeded the section 53.024 formula for mechanic's liens, and thus was an invalid and fraudulent lien under Chapter 12 of the Civil Practice and Remedies Code. The court made a couple of observations. First, although the subcon-

tractor did not use the section 53.024 formula to calculate his lien, such formula usage is not required so long as the claim does not exceed the formula calculation. *Id.* Further, as there was no evidence at trial on two of the formula's components—the subcontractor's proportionate profit margin and the reasonable overhead expenses—there could be no determination that the formula limit had been exceeded by the subcontractor's claim. *Id.* Finally, the party asserting the lien is invalid and fraudulent bears the burden of proving the elements under section 53.024. *Id.*

Chapter 3—Perfecting the Lien Under

Chapter 53. The failure to include a statement of each month in which the work was done and the materials was furnished, as required by section 53.054(a)(3), has been held as grounds for finding that the lien is not perfected. However, this requirement to state each month in which work was done or materials furnished, is only required for any such month for which payment is requested. In *Persimmon Ridge Partners EO, L.P. v. Fannie Mae*, 2016 Tex. App. LEXIS 8604 (Tex. App.—Amarillo Aug. 9, 2016, pet. denied), a subcontractor worked during the months of June and July, but then claimed the balance owing only for the month of July (some initial payments having apparently been made to satisfy the June balance). The court found that there was no need, under section 53.054(a)(3), for the affidavit to mention the months for which payment was not being requested, even though work was done in such other months. Rather, it was sufficient to describe the months in which work was performed, for which payment was being requested. *Id.*

Chapter 4—Priorities, Preferences and Foreclosing the Lien. Mechanic's liens have a *preferential first priority* over all other liens on removable improvements. Those improvements that the courts have

determined can be removed without “material injury to the land or other improvements” can be retrieved by the claimant through court order. Recently, a court clarified that mechanics' liens on removables survive foreclosure of a deed of trust lien; the items may be taken from the property after foreclosure. *Western-Southern Life Assur. Co. v. Kaleh*, 193 F. Supp. 3d 756, 777 (S.D. Tex. 2016).

Chapter 5—Bonds. A court has recently held that a county government had waived immunity from suit for amounts owed under a breach of contract claim by the contractor, including amounts owed under the Prompt Payment Act, even though the applicable statute waiving county immunity from suit, Local Gov't Code § 262.007(b), only referred to “interest allowed by law” and not to the Prompt Payment act specifically. *County of Galveston v. Triple B Services*, 498 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The rationale was that interest under the Prompt Payment Act was “interest allowed by law.”

Chapter 6—Trust Fund Statute. In a commercial project, there is no requirement that trust funds be kept separate from other funds; that is, funds from other sources can be deposited into, and commingled with, the same deposit account into which the trust funds have been placed. *Bolding v. State*, 2016 Tex. App. LEXIS 6878 (Tex. App.—Corpus Christi June 30, 2016, no pet.) (citing *Boyle v. Abilene Lumber, Inc.*, 819 F.2d 583, 586 (5th Cir. 1987)).

Chapter 7—Liens Against Mineral Property. In *Shell Western E&P v. Pel- State Bulk Plant*, 509 S.W.3d 581, 589 (Tex. App.—San Antonio 2016, no pet.), a subcontractor obtained a valid lien against a mineral owner, for nonpayment by the fracking general contractor. The owner and

general contractor had a single master service agreement for an entire lease, which was comprised of numerous wells. For each separate well within the lease, the owner and general contractor would enter into specific work orders for each particular well. The subcontractor had been engaged by the general contractor on some of the wells within the lease, but not all of them. At the time of the filing of the subcontractor's lien, the subcontractor was owed over \$3 million. The owner at that time owed over \$10 million to the general contractor. However, it only owed approximately \$700,000 to the general contractor on the specific wells on which the subcontractor had been engaged. However, the court held that the amount owed under section 56.043 is not dependent on the number of contracts and which ones involved the subcontractor asserting the lien, but rather the entire "state of the account" between the mineral owner and the general contractor. Therefore, the entire \$10 million "counted" as the amount the owner owed to the general contractor, rendering the entire amount of the subcontractor's lien payable and subject to withholding.

Chapter 8—Bankruptcy. *In re Santoyo (Sommers v. Aguirre)*, 2016 Bankr. LEXIS 2364 (S.D. Tex. June 23, 2016), involved a dispute whether the contractor had sent the lien affidavit to the owner in a timely fashion. Before the contractor's lien was resolved by court decision, the homeowner filed for Chapter 7 bankruptcy. The bankruptcy trustee sought a determination that the lien was invalid because of the late notice (which, again, the contractor contested). In the context of the bankruptcy, where the trustee is given the powers of a hypothetical lien creditor under 11 U.S.C. § 544 of the Bankruptcy Code, the court held that the trustee was not entitled to claim the protections of the section 53.055(a) notice. As a result, the court held that it was unnecessary to decide whether the contractor violated section 53.055(a). Such notices (as opposed to filing and recording the lien affidavit in a public record) are only designed to protect owners, contractors and subcontractors, and not subsequent purchasers.

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