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MECHANIC'S LIENS:

AN EXPLANATION OF THE LAW OF MECHANIC'S LIENS FOR CONTRACTORS AND SUBCONTRACTORS

INTRODUCTION: This outline is a general explanation of mechanic's lien laws. We hope it will help you understand the technical subject of mechanic's liens. However, it is not a complete guide to all of the problems and complications that might arise, and it should not be relied upon for specific legal advice.

DIFFERENCES BETWEEN GENERAL CONTRACTORS AND SUBCONTRACTORS: Under the Mechanic's Lien laws, there are very substantial differences between a Contractor and a Subcontractor

- **A Contractor**, or "general contractor," is someone who has a contract directly with the owner of the property, or with someone "knowingly permitted" by the owner to improve the real estate. Determining who is the owner or "knowingly permitted" by the owner is discussed in more detail below.
- **A Subcontractor** is someone hired by the "general contractor," rather than the owner, or the owner's agent. Thus, the agreement to do the work is never made directly between the subcontractor and the owner.

All subcontractors should be aware that their lien rights are totally dependent on the contract between the owner and the general contractor. If the general contractor does not have a contract with the owner or a person "knowingly permitted" by the owner to make the improvements, or if the contract between the general contractor and the owner contains a clause that mechanic's liens may not attach to the property, then the subcontractor will not be able to have a lien.

III. STEPS REQUIRED OF A GENERAL CONTRACTOR TO ESTABLISH A MECHANIC'S LIEN: The requirements that must be met by a general contractor to establish a mechanic's lien are as follows:

- **A valid contract:** There must be a valid contractor for performance of the work. Although the contract can be verbal, it is always better practice to have a written contract, with a complete list of all work to be performed, and all of the terms of the contract clearly stated.
- **The contract must be with the owner, or with someone "knowingly permitted" by the owner:** The contractor should determine at the outset whether the person engaging his services is the owner of the real estate, or is knowingly permitted by the owner to make improvements. The best practice is to determine (by a current title commitment or title search) the identity of the owner of the real estate, and require the owner to join in the

construction contract. If the person entering into the contract is not the record owner of the property, then his authority to enter into the contract must be determined. The following rules apply:

- **Land Trusts:** If the property is held in a land trust, the trustee should sign the contract, or the contractor should get a statement from the land trustee disclosing the names of the beneficiaries, and the beneficiaries should sign the contract.
 - **Landlords and Contract Sellers:** The “owner” of rented property is the landlord, and the “record owner” of property being sold under a land contract is the contract seller. Most leases and land contracts forbid the tenant or buyer from making improvements which would create mechanic’s liens. Therefore, the contractor should require the landlord or contract seller to consent in writing to the contract on rented property, or property being sold under a land contract.
 - **Real Estate Developers:** Often the developer is not the owner of the land. The contractor should require that the owner consent in writing to the contract.
 - **Married Persons:** Where one spouse (i.e., the wife) holds title to the property, and the other spouse (i.e., the husband) enters into the construction contract, the contractor claiming a mechanic’s lien would have to prove that the spouse holding title knowingly permitted the other spouse to make the improvements. It is therefore best to require both spouses to sign the contract.
- **The contractor must furnish materials or services:** The types of “materials or services” which must be furnished to create a contractor’s lien are specifically described in the mechanic’s lien statute. The statute is very detailed, and almost all types of materials or services used in construction are included.
 - **Performance of the contract:** The contractor must complete work under the contract, or show a valid excuse for non-performance.
 - **Sworn Contractor’s Affidavit:** The contractor is not entitled to be paid unless and until he gives the owner a sworn contractor’s statement, and a Notice about subcontractors. Therefore, this step is crucial to both your right to be paid, and your right to claim a mechanic’s lien.
 - **Record the lien claim:** The contractor must record with the Recorder in the county where the property is located, an “Original Contractor’s Claim for Lien” within four (4) months after the final work was completed. (However, a lien claim recorded within two (2) years is still valid against the owner, but not other creditors.) If not paid sooner, the contractor must also file a lawsuit to foreclose the lien within two (2) years from the completion of the work.

These are generally the steps that a “general contractor” must follow in order to establish and preserve his mechanic’s lien claim. As stated above, however, these laws are extremely technical, and it is very easy to make serious mistakes.

IV. STEPS REQUIRED OF A SUBCONTRACTOR TO ESTABLISH A MECHANIC’S LIEN: The requirements that must be met by a subcontractor to establish a mechanic’s lien are:

- There must be a valid contract between the general contractor and the owner of the property, or someone “knowingly permitted” by the owner to make improvements. Since the right of a subcontractor to claim a lien depends on the contract between the owner and the general contractor, the subcontractor should be aware that the general

contractor must have a contract with the owner, or someone “knowingly permitted” by the owner to make improvements (discussed above).

- The subcontractor must have a contract with the original contractor. Again, although a verbal contract may be acceptable, it is much better to have a written contract, with all the terms clearly stated.
- The subcontractor must furnish certain materials or services. Almost any type of materials or services used in the construction industry is included.
- The subcontractor must complete the contract, or have a valid excuse, beyond his control, for not completing the work.
- Finally, the subcontractor must serve, and file, notice of his claim for lien as described below:
 - **FOR EXISTING, OWNER-OCCUPIED, SINGLE FAMILY RESIDENCE:** The subcontractor must notify the occupant-owner by certified mail, return receipt requested, addressed to the occupant-owner at his residence, WITHIN 14 DAYS FROM HIS FIRST FURNISHING MATERIALS OR LABOR, that he is supplying materials or labor. The notice must state the name and address of the subcontractor (or material supplier), the date he first performed labor or services or furnished materials, the type of work done or to be done (or materials delivered or to be delivered), and the name of the contractor who hired him. The notice must contain the following warning in bold type.

NOTICE TO OWNER

Do not pay the Contractor for this work or material delivered unless you have received from the Contractor a waiver of lien by, or other satisfactory evidence of payment to, the Subcontractor or Materialman.

- **90 DAY NOTICE OF SUBCONTRACTOR’S LIEN:** A subcontractor must serve the owner with a written notice of his claim within ninety (90) days after the date of completion of his work. This notice must be served on the owner of record (as shown in the Recorder’s Office), or on the owner’s architect, agent or superintendent, and it must be served either in person, or sent by “Registered or Certified Mail, with Return Receipt Requested, and delivery limited to addressee only...” This notice must also contain the “Notice to Owner” language discussed above.
- **SERVICE ON LENDING INSTITUTION:** The “Notice” must be served on lenders with mortgages on the property.
- **Record Claim for Lien:** Within four (4) months after completion of work, the subcontractor must record a claim for lien in the Recorder’s Office of the county where the land is located. He does not have to wait until he has completed his work, but he must first serve a “Notice of Claim” on the owner and the lending agency, as set forth above, and wait ten (10) days after that service.
- **File Suit Within Two Years:** If still not paid, the subcontractor must file suit within two (2) years after he has completed his work.

V. LIEN WAIVERS: A contractor or subcontractor can lose his mechanic's lien if he signs a lien waiver before being paid, so be very careful about signing lien waivers.

VI. EXTRAS: Extras, or work in addition to the contract, should always be in writing, so that there is no question later about whether the "extra" was actually work to be performed under the first contract. Extras should be specifically designated as "extras to the contract dated _____," so that the extra is not treated as a separate, new contract. This is important for at least two reasons. First, two separate lien claims would be necessary if the extra is treated as a separate contract. Second, the time for filing the Notice of Lien begins to run when work is completed under the contract; if the "extra" is not part of the first contract, the time for filing the Notice of Lien on the first contract would begin to run without regard to when the work is performed on the "extra." For these reasons, it is best to have written extras specifically referred to as "extras" to the contract.

VII. "NO LIEN" CLAUSES IN CONTRACTS: If the contract between the owner and original contractor says: "No lien or claim may be filed or maintained by anyone..." then no one can have a mechanic's lien on that particular job (with a few limited exceptions).

VIII. FORECLOSURE SALE: If the real estate is ultimately sold at a foreclosure sale, the sales proceeds will be distributed to the creditors according to very technical and complicated rules.

IX. CONCLUSION: THIS DOCUMENT IS INTENDED ONLY AS A GENERAL GUIDE TO MECHANIC'S LIENS, IN ORDER TO FAMILIARIZE CONTRACTORS AND SUBCONTRACTORS WITH THE BASIC PROVISIONS OF THE LAW. BECAUSE THE MECHANIC'S LIEN LAWS ARE VERY TECHNICAL, AND THERE ARE EXCEPTIONS TO ALL RULES, ANY SPECIFIC LEGAL ISSUES SHOULD ONLY BE HANDLED BY A COMPETENT ATTORNEY.

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