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Association received notice of a mechanics lien. What does the board do?

By Damon Fisch

Most people understand that a lien against property is a serious issue to address. However, many people are not sure of how to approach it.

The Purpose of the Mechanics Lien

The primary purpose of a mechanics lien is to provide security to a contractor to assure that payment is made for labor, material and/or services rendered that add permanent value to the real property. However, there is also a secondary purpose to the mechanics lien, to protect real property owners by requiring notice to them and third parties of the existence of the lien.

If you have received a mechanics lien against the common elements of the association, you have received notice that a contractor believes that he is owed money for work that he did to improve the real estate. A mechanics lien is not a judgment. It is not a court order. It is not conclusive proof that the contractor is owed money. A lien merely provides notice to the Association and third parties that the contractor has the right to bring an action in a court of law to foreclose its lien.

A foreclosure of a mechanics lien is not much different than a foreclosure of a mortgage. It is a law suit that asks the court to allow the contractor to have the property sold at a sheriff's sale in order to recover funds the contractor believes it is owed. But, the contractor must prove in a court of law that he has a valid contract to perform the work identified in the lien and that the work was performed in a workmanlike manner. The lien is not proof that a contractor is owed money.

The lien also has a time limit. A contractor must file its lawsuit to foreclose a lien within two years from the date that the contractor completed the work, not the date of recording the lien. Another side note to timing is that the work must be completed within 3 years of the date of signing the contract.

Is it a valid lien?

A mechanics lien is a very technical document. It must be precise or it can be dismissed for being defective by a court once a law suit has begun.

It must be verified by affidavit of the contractor or its agent. Many contractors create their own liens in order to save the cost of hiring an attorney. A common mistake that is made by a contractor drafting its own mechanics lien is failing to verify the lien by a sworn affidavit. This omission would cause the lien to be unenforceable.

The mechanics lien must be based upon a valid contract, and that contract along with a description of the work performed must be identified in the mechanics lien. Therefore, if you receive a mechanics lien, review the lien to determine if it identifies a contract for work that has been performed for the Association. A copy of the alleged contract with the lienor will be information that you want to provide your attorney.

Also, the mechanics lien must identify the balance due after allowing for all credits. The lien should be checked against the records of the Association for payments made. Additionally, while checking for payments, records of lien waiver should be gathered as well. A lien is not enforceable if the contractor had previously provided a waiver of lien. Also, a lien can only be recorded for work performed. A lien that contains charges for work not performed should be held to be invalid. It is imperative to review these issues with your attorney upon receiving a mechanics lien.

Finally, the lien must provide a sufficiently correct description of the real property that is subject to the lien. This requires that the lienor properly attached the legal description of the property to its lien.

Preliminary Steps

After consultation with your attorney, there are a few proactive steps an Association can take if a mechanics lien has been recorded against the common areas.

One affirmative measure that the Association can take is to demand that the lienor file a lawsuit within 30 days. This may seem counterintuitive to encourage a lawsuit against the Association. However, if the contractor does not file a suit within 30 days, the lien is lost. This action requires the contractor to proceed with the cost of litigation instead of using the power of the lien as a negotiating instrument. Often times, an uninformed party will settle a matter simply to have a lien removed from their property. This provides a contractor that has done bad work with an advantage for which he is not entitled.

Another approach would be to file a suit for breach of contract against the lienor. There is no need to wait for a contractor to foreclose on its lien if the contractor has done unacceptable work. If suit is filed against the contractor, the 30 day notice can still be sent, putting more pressure on the contractor.

A mechanics lien is a powerful tool for a contractor. Yet, the Association that receives notice of a mechanics lien has many defenses against a contractor that has failed to live up to his end of a contract.