

# GETTING PAID!

## Statutory Requirements Regarding Notice Requirements For Preliminary (20-Day) Notices Must Be Strictly Followed

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Those involved in the construction industry know that serving a preliminary (20-Day) notice on the property owner is an absolute and necessary prerequisite to validating and pursuing California collection remedies such as Stop Payment Notices, Mechanic's Liens and Payment Bond Claims. Nevertheless, the eagerness to build (rather than paper the file) sometimes causes contractors, subcontractors and material suppliers to forget to follow the exact and precise statutory requirements related to the preliminary notices and the other construction related forms, leading to unnecessary and preventable litigation and sometimes appeals.

The recent Court of Appeal decision, *Hub Construction Specialties, Inc. v. Esperanza Charities, Inc.* (filed February 8, 2016, Second District, Div. Eight) 2016 DJDAR 1395 is an example of a material supplier not strictly complying with the preliminary notice requirements.

Hub Construction, a material supplier, had supplied rebar and other materials to the general contractor on a construction project owned by defendant Esperanza Charities, Inc. Upon failing to collect the outstanding balance of \$81,857.55 from the insolvent general contractor, Hub Construction recorded a mechanic's lien and proceeded to seek judgment to foreclose on the owner's property. The owner claimed the mechanic's lien was invalid because Hub Construction's preliminary notice was not properly served, and sought an order expunging the lien. The trial court, after hearing Hub Construction's summary judgment motion, agreed with the owner, denied the motion for summary judgment and ordered the owner's property released from the mechanic's lien.

Hub Construction paid for the postage and served by Certified Mail its Preliminary Notice, but did not request, nor did it pay the fee of less than \$3.00 to purchase a "return receipt" for the Preliminary Notice served on the owner. The U.S. Postal Service website tracked the Certified Mail as delivered. But since Hub Construction did not purchase the "return receipt," it lacked the signed return receipt and could not show "record of delivery" to prove service of the notice as required by the existing statute (former *Civil Code* §3097.)

The Court of Appeal stated that the issue on appeal was "whether a mechanic's lien is invalid because the plaintiff lienholder did not strictly comply with the then-effective statutory requirement governing *proof* that the preliminary written notice was served on the defendant property owner by certified mail."

In reaching its holding, the Court reviewed prior authority and compared the cases requiring strict compliance with notice requirements and others allowing substantial compliance in some circumstances. The Court followed the well-established principles related to mechanic's lien laws and citing to *Connolly Development, Inc., v. The Superior Court Of Merced County* 17 Cal. 3d 803, at 826-827 (1976) reiterated that "the mechanics' lien laws [are] remedial legislation, to be liberally construed for the protection of laborers and materialmen." The Court also mentioned that while the statutes protect claimants, at the same time, the Legislature "imposed the notice requirements for the concurrently valid purpose of alerting owners and lenders to the fact that the property or funds involved might be subject to claims arising from contracts to which they were not parties and would otherwise have no knowledge... The rule requiring their liberal construction may not be applied to frustrate the Legislature's manifested intent to exact strict compliance with the preliminary notice requirement." *Romak Iron Works v. Prudential Ins. Co.*, 104 Cal. App. 3d 767, 778 (1980).

The Court, however, focused on *Harold L. James, Inc. v. Five Points Ranch, Inc.*, 158 Cal. App. 3d 1, at p.6 (1984) which reconciles cases requiring strict compliance and those calling for liberal construction of lien statutes: "The general principles of liberal construction ... are still good law, subject to this refinement, ... where the Legislature has provided a detailed and specific mandate as to the manner or form of serving notice upon an affected party that its property interests are at stake, any deviation from the statutory mandate will be viewed with extreme disfavor." The Court also quoted the *Harold* language stating "**the transmittal methods and notice requirements must be strictly construed.** However, the issue of minor errors in the *body* of the notice must be independently addressed on a case-by-case basis, if and when such a case is presented." (bold added)

In looking at the facts, the Court gave great weight to the owner's admission and stipulation that it actually received the notice; that Hub Construction had actually mailed the preliminary notice by Certified Mail to the owner, and that Hub Construction furnished sufficient postage to the US Postal Service for the Certified Mail items and had a stamped record of it. Because of the stipulation, the Court found that it did not require strict compliance with the statute and reversed the trial court's ruling expunging the lien.

The Court of Appeal ruled that Hub was entitled to enforce its mechanic's lien despite not fully complying with the statutory notice requirements because "[t]o hold otherwise would defy reason and serve no conceivable purpose." The Court refused to uphold the trial court's ruling that placed form over function. The Court, however, stated that the ruling was very narrow and applied to the former statute and the case would not be before the appellate court under the new *Civil Code* §8118 which allows expanded methods of giving notice and methods of proving that notice was given. Moreover, without the owner's admission and stipulation, the mechanic's lien would be held invalid because of the procedural defects in the preliminary notice.

**Conclusion:** Some analysts have suggested that *Hub Construction* stands for the proposition that strict compliance with statutory provisions governing proof of service of a preliminary notice is not required. To the contrary, the *Hub Construction* ruling should be a constant reminder to all in the construction industry that the statutory requirements related to Preliminary Notices, Stop Notices, Mechanic's Liens and Bond Claims should be followed exactly and precisely. Since the California Legislature has provided detailed requirements regarding the manner and form of serving notices, they must be followed. The time, effort and the cost associated with using updated and correct forms, and giving proper and timely notice will make collection activities more efficient and economical, and more importantly will help avoid needless and costly litigation and lengthy appeals. The lawsuit and the appeal could have been avoided by Hub Construction, if it had purchased (at about \$3.00) and maintained the "return receipt" for the owner's preliminary notice.

If you need help understanding the statutory requirements impacting construction projects or complying with the statutory forms, reach out to professionals who can help. The investment will pay off in the long run.



**Milene Apanian** assists contractors, subcontractors, material suppliers, and owners prevent and resolve disputes on public and private projects. Prior to practicing law, she worked for architects and contractors, gaining valuable knowledge and experience in construction. Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients and it does not establish an attorney-client relationship with the reader. This document is of a general nature and is not a substitute for legal advice. Since laws change frequently, contact an attorney before using this information. Milene Apanian can be reached at Abdulaziz, Grossbart & Rudman, (818) 760-2000 or by E-Mail at [mca@agrlaw.com](mailto:mca@agrlaw.com) or at [www.agrlaw.com](http://www.agrlaw.com).

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