

Limited Right of Lien on Condominiums and Individual Condo Units

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Mechanic's Liens are simple – right? First fill out a form with basic information concerning the owner, project, contract and payments. Then serve and file the mechanic's lien in the County clerk where the private improvement is located within the statutory time period (8 months for commercial improvements and 4 months for residential improvements). Not so fast.

Mechanic's liens are a great tool to contractors and subcontractors looking to get paid on projects, but there are pitfalls. Besides the timing elements, a contractor must make sure that all the information is properly input into the form, a misdescription of the property or owner can be a fatal flaw. Another such pitfall is whether the project can even be "liened." A contractor should take a pause, when thinking about filing a lien on multi-unit properties, like condominiums.

As explained in a recent case, labor performed on, or materials furnished to, a condominium is not a basis for filing a mechanic's lien against individual units when the unit owner does not expressly consent to or request the work, except for emergency repairs. Moreover, labor and materials furnished to common elements of the building is also not a basis for filing a lien. Common charges, however, are "trust funds" for the purpose of paying the cost of labor and materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers. That means, such common charges must first pay for the improvements before expending any part of same for any other purpose.

In this recent case, a contractor had its mechanic's lien canceled by the court upon the application of the condominium's board of managers. The board of managers argued that the contractor's lien was an improper blanket lien on the real property, which was not valid against the individual condominium units, including any unsold units retained by the board of managers, or the common elements of the condominium. The board of managers further alleged that the work performed by the contractor was limited to the common areas and not on or for any individual unit or units.

In opposition, the contractor alleged that the board of managers breached the parties' agreement and, essentially, the contract was not paid because of strife between an old and newly elected board. The contractor further alleged that there was unanimous consent for the board of managers to enter into the parties' contract, as well as unanimous consent of the unit owners.

Ultimately, the court held that the mechanic's lien must be discharged because only common elements of the condominium were improved and the statute does not allow for mechanic's liens on common elements. The court, in its holding, stated that the purpose

of the statute is to prevent a situation where the common elements can be encumbered by a mechanic's lien or otherwise encumbered without the express, unanimous consent of the unit owners. The court did note, however, if a unit-owner controlled board of managers approves of work to be completed on the common areas, even though the contractor is not permitted to place a lien on the common areas, should the condominium fail to pay for the work, all common charges are considered trust funds for the purposes of monies due until same are paid.

Commentary

Here, the contractor lost (and actually never rightfully had) its mechanic's lien for improvements to the common areas of the condominium, however, the common charges are considered trust funds. This means, while the contractor does not have mechanic's lien rights, the common charges are a source of funding for the unpaid labor and materials. While the contractor will not have a lien foreclosure action, it can commence an action for breach of contract and/or trust fund diversion and the collected common charges are effectively a security to pay any award.

The absence of lien rights on common areas of condominiums must be fully appreciated. This is especially the case when a contractor is performing work in each unit during the course of new construction and finished units begin to get sold. Knowing when to file a mechanic's lien is important. Filing the lien too late may result in the loss of lien rights.

Feel free to call me to discuss mechanic's liens.