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How to Avoid the Mechanic's Lien

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How to Avoid the "Mechanic's Lien"

One of the most annoying things that can happen to an association is to have a mechanic's lien filed against association property. The lien, until the lienor is paid, can block the sale of every unit in the association. An association may pay a contractor in full and still have a mechanic's lien filed if the contractor failed to pay one of his suppliers or subcontractors. It is important for the manager and the association to make sure the language in the contract precludes the filing of a mechanic's lien against the association unless the association has failed to pay the contractor for one reason or another.

Below is a list of issues which, if addressed in a contract, can help avoid mechanic's liens.

INDEPENDENT INSPECTOR

From the beginning of the project, the association should hire an independent inspector (e.g., engineer, architect, contractor) to monitor the progress of the work, and especially any completed work, for which the contractor is due to receive payment. The inspector can provide timely and valuable insight on progress or problems to the association. Unlike most homeowners who serve on the Board, professional inspectors are familiar with the project and how the contractor should proceed. If the work turns out to be unsatisfactory after a period of time, the association can seek redress from the contractor and the inspector. If work is improperly completed, the association may be able to withhold payment and will be justified in doing so if a lien is filed and the case goes to court.

LIEN WAIVERS

The association should require the contractor obtain lien waivers from every supplier and subcontractor who works on the project. The contractor should be required to provide copies of all lien waivers to the association with monthly billing invoices and prior to payment. This protects the association from unknown liens filed by the contractor's suppliers - people who might slap a lien on the association if the contractor has not paid them.

RETAINAGE

The association should consider retaining a percentage of its payments to the contractor, e.g. ten percent of each payment due. The association can use the funds withheld to pay off suppliers or subcontractors the contractor may owe money to and who has, or is threatening to file a lien on the association's property.

HOLD HARMLESS AND INDEMNIFICATION CLAUSE

This is not strictly a lien avoidance measure, but a technique to shift responsibility if a lien is filed. Any contract should contain a "hold harmless and indemnification clause," which requires the contractor to hold the association harmless for any damage or bodily injury resulting from the work being done under the contract, and whereby the contractor agrees to indemnify the association for any claims, actions, damages, etc. (i.e., reimburse the association for any damages or judgment against the association). This clause makes the contractor, not the association, liable for such things as broken windows, accidentally painted cars, or even injuries, should a resident trip over a piece of scaffolding or be hurt by a falling paint bucket.

WARRANTY

All materials used on the job should, by contract specification, be new and there should be no exclusion of warranties permitted, either expressed or implied. Wording of the contract should also state that work will be done according to warranty standards of the manufacturer and that the contractor guarantees that the work will be done correctly.

CONTRACTOR'S PROMISE

The contractor must promise, in writing, to keep the property free of liens, and in the event any lien is filed, the contractor will take immediate steps to remove the lien or risk being in breach of the contract.

CHANGE ORDERS

The contractor must agree to obtain the association's written authorization prior to initiating any work not specifically provided for under the contract.

ATTORNEY FEES

A clause in the contract which states in case of a legal dispute between the parties, the party prevailing in the dispute will recover all legal and professional fees and court costs. That way getting a \$5,000 judgment against a contractor won't cost the association \$5,000 in attorney fees. Of course, if the association loses in any dispute, it will be responsible for the contractor's attorney fees.

REVIEW

Have your contract reviewed by the association's legal counsel. The expense of the attorney usually outweighs the possible financial consequences created by not having an enforceable legal document or terms unfavorable to the association.

NOTICE OF INTENT TO FILE A LIEN

A company or person supplying labor, materials, or other construction services, including architectural or engineering services, may claim a mechanic's lien against the property to be improved if he serves notice of his intent to file the lien upon the owner and general (principal) contractor and, no sooner than 10 days thereafter, records his mechanic's lien statement with the clerk and recorder's office. Colorado law requires certain information to be contained in the mechanic's lien statement, including the names of the owner, principal contractor, and the claimant, and the amount claimed, together with a legal description of the property and the address of the party making the claim. The mechanic's lien statement must be recorded with the clerk and recorder within four months of the last work performed by the claimant or within four months after completion of the construction. A contractor who files a lien after the four months has expired, loses his right to file a lien. The claimant may still have a contract claim against the contractor with whom the claimant dealt, but that claimant has no mechanic's lien claim against the property of the owner.

Once the mechanic's lien is recorded with the clerk and recorder, the party claiming the lien must institute a lawsuit within six months of the completion of improvements. Thus, the lawsuit must be commenced six months after the entire construction is completed, whereas the mechanic's lien must be filed no later than four months after the particular claimant has completed his last work.

The association should keep careful track of notices and of when work on a project stops (especially the last delivery of any materials). If the person attempting to file the lien has missed either deadline, and the association can prove it, the lien is unenforceable.

CONTRACTOR AFFIDAVIT

When the contractor's final payment is due, the contractor should supply a contractor affidavit listing all lienors and stating who is still owed money. Unfortunately, the association cannot always accept the contractor's word, and every person who might possibly have reasons to file a lien (suppliers, subcontractors, etc.) must be contacted by the association and asked if they have been paid. If money is owed, the association should make the final payment check payable to both the contractor and anyone owed money, thus making sure that a possible lienor gets paid.

PAYMENT BOND

A payment bond is a bond supplied by the contractor which isolates the property from liens. It guarantees payment on the part of the bond holder (the contractor). However, payment bonds are difficult to obtain because most contractors have insufficient assets to qualify for such a bond.

WITHHOLDING PAYMENT

If the association withholds payment for part of the work not performed properly, the association should only withhold the estimated amount for the value of the work actually due to the association. The association should not withhold the entire final payment if the contractor owes you work valued at less than full payment. Why? Because when the contractor takes the association to court to demand, say \$20,000 and the association tries to explain to the judge it will cost \$1,000 to clean up his mess, the judge will award the contractor the other \$19,000. This outcome makes the contractor the "prevailing party" of the suit and the association will be responsible for his or her attorney fees.

The association should withhold only that portion of the payment which covers the disputed portion of the work and have should have that amount verified by an outside expert, inspector, or, in the case of cleanup, a contractor who states he will do the job for that amount.