

LEGAL ALERT

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CONSTRUCTION LAW UPDATE

A Deadline is a Deadline

By Robert W. Parker, J.D.

One common hurdle contractors and suppliers must overcome when preparing a construction lien is obtaining the proper legal description of the real property to be liened. Although the legal description should be on the notice of commencement, often the responsible party has neglected to prepare or file a notice of commencement or to include the correct legal description.

An example of this very problem was presented in *Northern Concrete Pipe, Inc v Sinacola Companies - Midwest, Inc*. In that case, Northern Concrete Pipe provided materials to Sinacola Companies, the contractor. Sinacola failed to pay Northern and Sinacola ultimately filed for bankruptcy.

Relying upon an erroneous legal description provided by Sinacola, Northern attempted to record its claim of lien within 90 days of the last day it furnished labor or materials, as required by the Michigan Construction Lien Act. The Register of Deeds,

however, returned the lien twice, the second time for lack of a complete legal description of the property to be liened. Ultimately, the lien was recorded a month after the 90-day period expired. Northern then filed suit to foreclose its lien.

The trial court ruled against Northern, finding that the lien was untimely recorded. Although the Construction Lien Act is generally "liberally construed to secure the beneficial results, intents, and purposes of the Act, and as such substantial compliance with the Act is deemed to be sufficient," the trial judge determined that recording a construction lien over 30 days late, no matter what the reason, was not substantial compliance with the Act.

Not pleased with this decision, Northern appealed. While not specifically holding that the late filing constituted substantial compliance, the Michigan Court of Appeals observed that the filing created a material factual dispute and that

the trial judge had erred in granting summary disposition for defendant. Reading between the lines, the court concluded that it would be unfair to penalize Northern because of a faulty legal description that was provided by Sinacola. The Court remanded the dispute to the trial judge to determine whether Northern had substantially complied with the Act.

The property owner, not pleased with the Court's decision, appealed to the Michigan Supreme Court. In a decision dated December 23, 1999, the Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial judge, that Northern's lien was not valid.

While the Supreme Court acknowledged that in certain instances the "substantial compliance" provision may be invoked to overlook some procedural irregularities associated with the filing of a lien, it held that the 90-day statutory requirement was

absolute. This result may have been influenced by the arguments of the Michigan Land Title Association, a trade group of Michigan title insurers, which was allowed to intervene in the lawsuit as *amicus curiae*. The Supreme Court stated that:

Absent strict compliance with the 90-day filing requirement [citation omitted] every construction project could create a potential cloud on the title to property, creating uncertainty in land titles. Moreover, where property owners and subsequent purchasers

rely on the clear and unambiguous requirements of [the Act] and find no notice of lien filed with the county office of Register of Deeds, it would be inequitable to later subject those parties to the risk of foreclosure.

Sinacola is now bankrupt. Northern does not have a lien on the real property and, though not impossible, collecting from the owner on a theory of unjust enrichment is difficult. Northern's account is uncollectible and will have to be written off.

Small, seemingly insignificant mistakes and lack of strict adherence to the deadlines contained in the Construction Lien Act can lead to catastrophic results. When it comes to using the Act, you need to timely engage competent legal counsel who know the technical requirements of the Act and how courts are likely to interpret the Act's requirements. Smith Haughey Rice & Roegge attorneys regularly deal with the Construction Lien Act. They are ready to assist you when questions arise.

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