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Mechanics' Lien Rights and the Pennsylvania Condominium Act

The boom in the construction of residential condominium projects followed by the recent economic downturn has resulted in a surge of 'troubled' condominium projects. Many have been cancelled or at least delayed. For those under construction or recently completed, sales have been slow, lenders have not been paid, and cash is at a premium. Even when general contractors have been paid by owners, subcontractors may not have been. Not surprisingly, the filing of mechanic's lien claims against condominiums has increased. This article explores some of the issues that arise with such filings.



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Claims Against Declarant

The Pennsylvania Mechanics' Lien Law of 1963, 49 P.S. §§ 1201- 1902 (the "Mechanics' Lien Law"), provides that:

Every improvement and the estate or title of the owner in the property shall be subject to a lien, [...], for the payment of all debts due by the owner to the contractor or by the contractor to any of his subcontractors for labor or materials furnished in the erection or construction, or the alteration or repair of the improvement

49 P.S. § 1301.¹

An 'improvement' is defined by the Mechanics' Lien Law as the building or structure. 'Property' is the improvements, the land, and the lot or "curtilage appurtenant thereto" which forms "a part of a single business or residential plant." Id. at § 1201. If work is performed on improvements that do not form a part of a single business or residential plant (e.g., lots of a subdivision),² the contractor claimant must apportion the debt among the improvements and file separate claims for each improvement. Id. at § 1306(b).

A claimant may file one lien claim against the developer of a condominium (the declarant) for work performed on all the common elements and units without having to apportion the debt to the separate units. The Pennsylvania Supreme Court concluded, in *Metco, Inc. v. Moss Creek, Inc.*, 529 Pa. 53, 601 A.2d 802 (1992), that a condominium was a 'single residential plant' under the Mechanics' Lien Law and that the claimant had properly filed an unapportioned single claim against the five remaining condominium units. (The condominium built by the contractor had eight units, but three had been sold before the filing of the lien. Section 1303(c) prohibits liens on property conveyed "in good faith and for valuable consideration" prior to the filing of the lien.)

In its ruling, the Court relied on the 'critical' characteristic of condominiums of undivided common ownership of the common elements,³ which 'justifies' the designation of a 'single residential plant,' and on the predecessor to Section 3419(c) of the Uniform Condominium Act, 68 Pa.C.S.A. §§ 3101-3414 (the "Condominium Act"). 601 A.2d at 804-805.

Section 3419(c) of the Condominium Act provides that if liens, including those attributable to work performed or materials supplied, become effective against two or more units, an affected unit owner may cause the lien to be released against his or her unit by paying the lienholder the amount of the 'lien attributable' to that unit. This section then states that this payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liability of all liened unit owners. (As an example, if all unit owners are liened, the release price would generally be that unit owner's percentage ownership of the common elements multiplied by the lien amount.) The Court in *Metco* reasoned that the legislature clearly intended to

permit a single unapportioned lien against multiple units by providing a mechanism for the release of single units and the apportionment of the claim upon release. 601 A.2d at 804.

Therefore, a claimant performing work for a declarant can file one unapportioned lien claim on all units remaining in the declarant's name at the time of filing. In turn, the declarant, which in addition to the demands of title insurance is required by the Condominium Act to obtain releases of all liens prior to conveying a unit (68 Pa.C.S.A. § 3409(a)), can cause the mechanics' lien to be released from a unit being sold by remitting a pro rata portion of the lien claim amount.

In order to protect itself, a declarant may require the contractor (and its subcontractors) to waive mechanics' lien rights, but only in residential projects in which the contract price with the contractor is less than \$1,000,000.00. 49 P.S. §§ 1401(a), 1402. A declarant may also limit claims against the condominium project to the unpaid balance of the contract price by filing with the county court clerk, the prothonotary, a copy of the contract or its pertinent provisions. Id. at § 1405.

Issues which are not directly addressed by either the Condominium Act or the Mechanics' Lien Law and which have not been resolved by the courts include lien rights when work is (1) performed during a declarant's control and only on the common elements, but after some units have been conveyed to third parties, or (2) performed only on certain units owned by a declarant. Specifically, the questions of whether or not (1) the undivided interest of the non-declarant unit owners in the common elements can be charged for work performed on the common elements by declarant's contractor; and (2) work performed for a declarant on only certain declarant's units can be charged against all of the declarant's units appear not to be answered.

Claims Against the Assn.

The condominium association⁴ can enter into contracts to have construction work performed on the common elements as well as in the units under certain circumstances. 68 Pa.C.S.A. §§ 3302, 3307, 3312. It may be sued for claims arising from a contract and have judgment entered against it. Id. at §§ 3311(a)(2)(i), (b), 3419(a). Unit owners, however, may not be sued for the acts of the association. Id. at § 3311(a)(2)(ii).

Sections 3311(b) and 3419(a) of the Condominium Act provide that a money judgment against the association is not a lien against the common elements but is a lien against all the units of the condominium. However, no other property of the unit owners is subject to claims of the judgment creditor. As a result, a judgment creditor of the association cannot execute against the common elements or other property of the unit owners, but it can execute against the units and foreclose its lien.⁵

A contractor should also consider filing a lien claim for work performed under a contract with the association, acting as the agent for the unit owners. If the work was on the common elements, the lien should be filed against all the unit owners by reason of their undivided ownership of the common elements. If work was performed on less than all the units, filing as to only those units should be considered because each unit, together with its common element interest, "constitutes for all purposes a separate parcel of real estate." 68 Pa.C.S.A. § 3105(a).

As with a declarant, an association, as agent for the unit owners, may protect itself and require the contractor (and its subcontractors) to waive mechanics' lien rights if the project contract price is less than \$1,000,000.00 and may also limit claims to the unpaid balance of the contract price by filing with the prothonotary a copy of the contract or its

pertinent provisions. 49 P.S. §§ 1401(a), 1402, 1405.

Claims Against Unit Owner

A contractor performing work for a unit owner should consider filing a lien against the unit owner's interest in the unit and its common element interest. The residential unit owner should obtain waivers and seek to limit the claims to the unpaid contract price.

Summary

The increase in the need to file mechanics' lien claims (an observation that is admittedly anecdotal) has forced lawyers to closely review the Mechanics' Lien Law and the Condominium Act, to be creative in their applications, and to search for and exploit, if possible, ambiguities and/or inconsistencies in the statutes. As more cases are filed and progress through the system, the courts will be forced to address and resolve the issues, some of which were identified above. Others are the subject of the next article.

1. The Mechanics' Lien Law was recently amended, effective January 1, 2007. In short, the amendments eliminated waivers of liens by contractors and subcontractors (except for certain residential projects), extended mechanics' lien rights to include second tier subcontractors/suppliers, deleted subcontractor preliminary notice requirements which existed in certain situations, extended time period for filing a mechanic's lien from four months to six months after the last day of work, and ensured that mortgages take precedence over mechanics' liens.

2. See, e.g., *Martin Stone Quarries, Inc. v. Robert M. Koffel Builders*, 786 A.2d 998, 1002 (Pa. Super. 2001)(confirming that material supplier was required to apportion and file separate claims even though the proposed subdivision was not yet divided into lots but the subdivision plan had been recorded).

3. In a condominium regime, each unit owner owns a share of the common elements in addition to his or her unit and cannot convey the unit separately from the common element interest. See, e.g., 68 Pa.C.S.A. §§ 3105(a), 3208(a).

4. The Condominium Act provides that the association shall be organized no later than the conveyance of the first unit. 68 Pa.C.S.A. § 3301. Control passes from the declarant to the association the earlier of 180 days after conveyance of 75% of the units or seven years after conveyance of the first unit, unless the declaration provides for an earlier time. Id. at § 3303(c). The association is not liable for a breach of contract by the declarant and can recover all unreimbursed losses suffered by the association, including attorney's fees. Id. at § 3311(a)(3).

5. Sections 3311(c) and 3419(c) state that a judgment against the association must be indexed in the name of the condominium and association and, if so indexed, is notice of the lien against the units.

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