Designer's dilemma: How does a professional lien work?

Construction Law

By PAMELA J. SCHOLEFIELD

Question:

I am an architect and I drafted plans for the re-design of an existing restaurant in downtown San Diego. I entered into a contract with the owner of the property and completed my end of the contract, although I have not yet been paid. The city has issued all the necessary project permits. Construction is set to begin in the next few weeks, however, with the recent filing of bankruptcy by major financial institutions, I am extremely concerned that the construction lender will decide not to commit and the project will be scrapped. I heard that there is something called a design professional's lien that is different from a mechanic's lien. How does it work?

Answer:

You have a very valid concern considering the current state of the economy and the negative impact it may be having on the construction industry. However, you do have a way of protecting yourself if the owner does not pay you. You are right — there is a potential solution by using a design professional's lien. The California Legislature has established this lien remedy exclusively for licensed design professionals in cases where no actual construction of the planned work of improvement is commenced. This remedy is found in the Civil Code starting with section 3081.1.

One major difference between a design lien and a mechanic's lien is that a mechanic's lien only applies to labor, materials and services actually used in the project to improve the property and, thus, requires that the project actually commences, whereas a design professional's lien is used when the construction never commences.

However, first things first — who is considered to be a design professional and in what type of project is a lien available? Under the Civil Code, a design professional is defined as any certified architect, registered professional engineer or licensed land surveyor who furnishes services under written contract with a landowner for the design, engineering or planning of a work of improvement. One exception is that the design lien cannot be used for design of a single-family, owner-occupied residence with construction costs of less than $100,000 in value.

Also, there are some limitations to a design lien: 1) it attaches only to the land, and 2) it may not be recorded unless a building permit or other governmental approval in furtherance of the work of improvement has been obtained in connection with the design professional's services.

There is another significant constraint on the right to record a design lien — the lien can't be recorded unless the design professional knows, or has reason to know, that the owner is not going to build the project. Consequently, a defense to the lien could be that the owner is going to build the project. In your case, while your concern that the construction lender may pull out is valid, it may not yet be a strong enough indication that the project won't go forward unless that really happens.

Another important difference between a mechanic's lien and a design professional's lien is the timing, deadlines and required notice. For example, the time to file a mechanic's lien begins when the claimant's contract or work is completed with the deadline for recording tied to the completion of the entire work of improvement. But, the time to record a design lien begins when the owner fails to pay under the terms of that contract, and the deadline is 90 days after the design professional knows or has reason to know that the planned improvement is not going to commence. But, even if these criteria are met, a design lien cannot be recorded unless at least 10 days before recording the lien, the design professional gives written notice to the owner, by registered or certified mail, that the owner is in default under the contract. The notice must include the amount owed. A claimant trying to record a mechanic's lien does not need to give any such notice.

The lien's priority over other liens and encumbrances is another significant difference between a design professional's lien and a mechanic's lien. With a mechanic's lien, the lien is deemed to have attached when the lien claimant first provided materials, labor or services to the project regardless of the fact that the mechanic's lien itself may not be recorded until months, sometimes years, later. But, a design lien does not relate back to the time when the design professional rendered services to the proposed project. Instead, the lien is effective from the date of recording it with the county recorder's office. Also, the design lien is only valid if the contracting owner is also the owner of the property at the time the design lien is recorded. This is not the case for mechanics' liens.

For both a mechanic's lien and a design lien, the failure to file a lawsuit to foreclose on the lien within 90 days of recording the lien will render the lien null and void. A design lien also becomes null and void if the work of improvement actually does commence. But, the design professional is not out of luck if his or her lien becomes void due to the project commencing. This is because once the project commences, the design professional now has a right to a mechanic's lien under the same rules as any other clamant who has provided labor, materials, services or equipment to the project.

The key to perfecting your design lien is to keep tabs on the financing situation to see whether the current construction lender is going to back out. If it does, you need to investigate whether or not the owner has a viable funding source alternative lined up to confirm whether the project is scrubbed. If you know that it won't go forward, then go ahead with your design lien keeping in mind the various deadlines and notice requirements. And, good luck to you in this time of financial uncertainty.

Do you have a construction question? Send it to: info@construction-laws.com

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Notebook

Continued from ***Page 3C***

announced the completion of electrical work on six projects: High Bluff Ridge, Sunroad Spectrum I, 707 Broadway, One America Plaza, Terraces at Copley Point and the Qualcomm AV Building.

Channey Doud, executive vice president of Dynalectric, said the company's work for the 160,000-square-foot High Bluff Ridge at Del Mar included electrical services, tel-data, fire alarm system, access control and security system.

The project team for High Bluff Ridge, which consists of two Class A corporate office buildings, includes general contractor **Swinerton Builders**, and architect Brian Paul Associates. Dynalectric's project team included Bob McMakin, project manager, and Andy Anderson, project foreman.

The Sunroad Centrum I is a new 11-story, 275,000-square-foot Class A office tower located on Spectrum Center Boulevard. Dynalectric provided the electrical, fire alarm system, tel-data, and security system and access controls.

The project team included developer **Sunroad Enterprises**, general contractor Swinerton Builders, design architect BPA Architecture, LEED consultant Drew George & Partners, and electrical engineer Michael Wall Engineering. Dynalectric's project team included John Price, project manager, and Steve Coffin, project foreman.

In downtown San Diego, Dynalectric provided electrical services for the remodel of the 18-story, 187,000-square-foot Washington Mutual Tower at 707 Broadway. The general contractor was Sundt Construction. Dynalectric's project team included Bob McMakin, project manager.

At One America Plaza, Dynalectric provided the electrical services, fire alarm system and tel-data for the 34-story, 623,000-square-foot downtown San Diego office building. The general contractor was **ROEL Construction**. Dynalectric's project team included Terry Gilbert as the project manager.

Dynalectric also completed work on the tenant improvement of the 150,000-square-foot Qualcomm AV office building, consisting of two floors of laboratories and six levels plus a basement. Dynalectric provided the total electrical systems and the fire alarm systems.

The project team included general contractor Swinerton Builders, design architect Ware Malcomb, and electrical engineer **Michael Wall Engineering**. Dynalectric's project team included John Price, project manager and Joaquin Gonzales, project foreman.

The new Terraces at Copley Point is a 530,000-square-foot Class A office campus plus parking at 5887 and 5893 Copley Drive in Kearny Mesa. The office campus encompasses two steel-framed, six-story office buildings totaling 175,000 and 205,0000 square feet.

An adjacent three-story, concrete, open-air parking structure will accommodate 1,073 cars. The $115 million project, which is intended to be Leadership in Energy and Environmental Design (LEED) certified by the U.S. Green Building Council. Dynalectric provided the complete elec-

See **Notebook** on 28C