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Monday, February 11, 2008



NEWS | SAN DIEGO

To lien or not to lien, that is the question

By Pamela J. Scholefield

Friday, February 8, 2008

Print E-Mail

Question: Our company is a construction equipment rental company. Some of our equipment was leased by a contractor to use for a meat packing plant expansion. The expansion also includes relocating the plant's emergency power system.

The contractor rented from us various items such as a backhoe, emergency generators, and site fencing. The contractor has fallen way behind in making payments for the rented equipment. We provided the 20-day preliminary notice as required for this project when we first sent the equipment out.

Can we record a mechanic's lien to protect our rights to payment?

Answer: The right to a mechanic's lien for persons supplying labor, services, equipment, or materials to improve property is vested in the California Constitution.

The public policy behind liens is to prevent a property owner from being unjustly enriched by the value added to their land if the one who supplied the labor, services, equipment or materials for that increased value went unpaid.

But it is not always easy to figure out who, exactly, has lien rights and your seemingly simple question, unfortunately, cannot be answered with a "yes" or "no."

Per Civil Code, section 3116, you can file a mechanic's lien *after* you have "ceased furnishing labor, services, equipment or materials" to the project.

So the first question is whether or not your company is still leasing its equipment to the site. Assuming that you've retrieved your equipment, we have to assume that the project is ongoing, or if not, that the time to record a lien has not expired. That is subject of another question.

Next, we have to consider each piece of equipment your are supplying and determine whether or not it was "used or consumed" in the "work of improvement." (Civil Code, section 3110). Court cases analyzing this statute have held that the word "used" means actually and directly used to improve the property and increase its value.

The leasing of the backhoe would most likely entitled you to lien the property for the rental charges that have not been paid for that piece of equipment.

The backhoe was used for earthwork that altered the property. Thus, the backhoe was

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used in the work of improvement, meaning it was used to directly improve the property.

On the other hand, site fencing is usually not an item that would entitle a rental company to lien rights. The fence may have been required by contract, insurance or even local ordinance, and was actually in place during the construction work.

Without the fencing in place, the contractor probably would not have been allowed to proceed with the construction work.

So, there is no doubt that the fencing was a necessary element in completing the work of improvement. But, the fence was constructed solely for security and liability purposes. It is temporary and does not, itself, directly improve and add value to the property.

The emergency generators are another issue all together. In some instances, a generator may be used to supply power to a jobsite in order to power up various tools being used to perform construction work. Wouldn't that be similar enough to the backhoe?

Each piece of equipment, while not permanently installed on the land, was actually used to improve the property. If the generator, or backhoe, was delivered to the jobsite and left there for the duration of the leased time -- but for some reason sat idle and was never used -- there would be a strong argument the rental company does not have lien rights in that situation, because the equipment was never actually used to improve the property.

By your question, it would seem that the emergency generators were rented to be on site for the purpose of supplying backup power to the existing operations just in case the normal utility power failed during the time the plant's emergency power system was being relocated.

If that is the case, then how would those generators, themselves, be adding value to the property? In this case, aren't more like the fencing? They are needed in order for the project to go forward. But, the generators not actually and directly used in the actual work of improvement -- they are not being used to enhance the value of the property.

As you see, mechanic's lien rights are not very straightforward. The California Law Review Commission (CLRC) has been wrestling with this issue for some time and is currently in the process of revamping the mechanic's lien laws in order to provide clarity as to who is entitled to a lien. Those of us in the construction industry are eager for any guidance these new laws will provide.

Disclaimer

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