During the past year or so, the Nevada Supreme Court has issued a number of decisions affecting Nevada’s mechanics’ lien laws. For construction practitioners, the guidance has been welcome. The often ambiguous (and occasionally contradictory) language found in NRS 108.221 through 108.246, inclusive, can sometimes make counseling construction clients like drawing to an inside straight. Thanks to the court, some clarity is starting to emerge on issues of mechanics’ lien priority.

Generally, “mechanics’ lien priority” disputes exist in the tension between lien claimants and construction lenders. Under NRS 108.225, mechanics’ liens establish their priority from the date construction commences, and relate back to that date regardless of when the notice of lien is recorded. Under NRS 108.22112, construction commences when it is visible. Deeds of trust securing construction loans, in comparison, establish their priority on the date of recording. Whichever date is earlier, construction commencement or the recordation of a deed of trust, establishes which has first priority to the real property encumbered and, as a result, usually recovers its loss upon the owner’s default. Since 2008, this issue has come up a lot.

The issue raises two factual questions, and a thorny legal one: was there visible construction work on the day the deed of trust was recorded? Was that visible work enough to make a reasonable person believe construction had begun? If the answer to both questions is yes, the mechanics’ liens have priority. The third question is then often raised by a lender found to be second in priority: are there legal or equitable arguments to trump the mechanics’ lien priority? Until now, trial courts have had little help finding answers.

Visible Construction Needed

Prior to 2003, people who performed offsite work (such as architects), were not included in the statutory list of potential mechanics’ lien claimants. While case law expanded lists to include them, the 2003 mechanics’ lien statute amendments included such persons as potential lien claimants. Disputes then arose as to whether or not such work could commence construction, even though it was not visible. In J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC, 127 Nev.Adv.Op. 5 (2011), the court held that “preconstruction services” which are not visible, do not commence construction for priority purposes. Rather, “visibility alone determines priority.” Under the mechanics’ lien law, work that is entitled to a lien is not necessarily entitled to priority. Priority and “lienability” are two entirely separate issues. The court needs to see more to start the priority clock:

“(C)ommencement of construction requires ‘actual on-site construction’…. These [preconstruction] activities may involve some physical presence on the site … but this presence is insufficient…. [P]reparatory work on a site, such as clearing or grading, does not constitute commencement of construction.”

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That last sentence gives grading contractors (and their lawyers) indigestion. It’s hard to believe a reasonable person could see a 20-ton earthmover scraping dirt off a vacant lot and not believe visible construction had commenced. But that must be for a future case. For now, work has to be visible on site to secure the date of mechanics’ lien priority, and preconstruction services are not enough.

**Contractual and Equitable Arguments Don’t Help**

If work is visible on site, a lender may demand the owner provide additional protection (such as additional collateral and loan guarantees), or it may refuse the loans entirely. In Nevada, there are legal, but no commercially feasible, ways to re-establish a lender’s title priority once visible construction starts. Lenders, having made loans without priority, asserted both legal arguments for contract subordination and equitable arguments for subrogation, to avoid the superior liens. Trial courts struggled mightily with these issues until In re: Fontainebleau Las Vegas Holdings, LLC, 128 Nev. Adv. Op 53 (2012).

In Fontainebleau, the Supreme Court was asked if the doctrine of equitable subrogation could be applied under Nevada law to avoid mechanics’ lien priority. The court said no. NRS 108.225 unambiguously gives priority to lien claimants over deeds of trust recorded after the commencement of construction “because the principles of equity cannot trump an express statutory provision.”

With equal dispatch, the court dismissed a prospective contractual subordination agreement obtained prior to the mechanics’ lien attaching, as violating the non-waiver provisions in NRS 108.2453. But the court left the door open just a crack for a “post-commencement” subordination agreement. Mechanics’ lien claimants could lawfully waive their priority after construction commenced, provided that the requirements of NRS 108.2457 were met, because “neither NRS 108.2453 nor NRS 108.2457 completely prohibit waiver of or impairment to the right to a mechanics’ lien after it arises.”

The requirements of NRS 108.2457 are generally the execution of a form statutory release, and the payment of money. There is no specific language authorizing subordination of lien right priority. What a post-commencement subordination agreement complying with NRS 108.2457 looks like, likewise remains a question for a future case.

Bottom line: keep priority disputes simple. A mechanics’ lien has priority when visible (NRS 108.22112) construction work (NRS 108.22184) occurs on site, before the deed of trust is recorded (NRS 108.225). One cannot get a pre-construction subordination agreement (NRS 108.2453); however, one entered into after the lien right attaches might fly – if it comports with NRS 108.2457. Equitable subrogation won’t re-establish priority. Simple enough.

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1 In simple terms, a mechanics’ lien is the right granted by statute for an unpaid contractor to sell a construction project to recover the value of his work performed.

2 Definitions of “preconstruction services” are as numerous as construction company websites offering them. NRS 338.169, while not directly applicable, indicates that they include scheduling, constructability review and estimating.

3 Equitable subrogation is the concept that when a new lender takes a deed of trust after construction has commenced, and the loan proceeds are used to pay off a note and deed of trust that existed on the property before construction commenced, the new lender would “skip over” the mechanics’ liens and take priority of the original lender, at least to the extent of the paid-off loan amount.

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