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LITIGATION PRACTICE GROUP | JUNE 2014

Otten Johnson Alert -

Mechanic's Liens: Tips for Landlords

Colorado maintains a very strong mechanic's lien statute designed to ensure that construction and design professionals receive the payments to which they are entitled. Generally, anyone who performs services or labor is entitled to a lien against the subject property; to secure payment of the amounts to which they are contractually entitled. The statute defines the parties entitled to a mechanic's lien very broadly. It includes laborers, architects, engineers, contractors, sub-contractors, and anyone who provides materials to a project.

Although there are strict deadlines by which a prospective lien holder must serve a notice of intent to file a lien and then record it, the process is relatively simple and it is not uncommon for a party to file a lien even if there are legitimate disputes over the quality of the work performed or the amounts owed.

The filing of a mechanic's lien against property can create major problems with secured lenders. Even if the lien is ultimately found to be invalid, litigating that issue typically takes many months and the lien remains a cloud on property title during that period. In most cases, the only way to remove the lien during the pendency of litigation is to file a cash or surety bond in the amount of 150% of the claimed lien.

Fortunately for landlords, a provision of the Colorado mechanic's lien statute allows a landlord to serve and/or post a notice of non-responsibility for payment of construction commissioned by a tenant. It is more common for landlords to post a notice on the property rather than personally serving contractors and sub-contractors - primarily because it is easier. On a significant project, a combination of the two methods is most effective. That is, the general contractor and known significant sub-contractors should be served with notice and the property should be posted with a notice.

To successfully defend a lien claim by posting a notice, the landlord or its property manager must be vigilant. The statute requires that the notice be posted in a conspicuous place. In the case of new construction under a ground lease, that would be at the construction entrance. In the case of

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tenant finish to existing space, notice should be posted both at the main entrance to the premises and at any other location on the premises to which materials are delivered. The statute also requires that the notice remain continuously posted for the entire project.

Although the posting issue would seem to be straightforward, disputes about it are very common. If a notice is posted without real-time evidence of posting and forgotten, it can be difficult for a landlord to prevail on its defense of a lien claim. Construction professionals have argued that no notice was posted, that it was posted and then torn down, or that the posting was not conspicuous and wasn't seen.

A few simple measures can reduce the possibility of these issues arising:

- When a notice is posted, there should be photos taken of the postings and affidavits signed by the people doing the postings as to the date and time of the postings;
- A landlord's representative should visit the site every few days, take additional photos, and keep a checklist of the times and dates of the inspections; and,
- To avoid an argument that the notice wasn't seen, the notice should be enlarged. It is typical to have notices blown up to 3 feet x 2 feet and mounted on pasteboard. If the notice will be posted outside, it is also a good idea to have it lacquered for weather protection.

This provision of the Colorado mechanic's lien law is one of the few that favor property owners rather than construction professionals. With a bit of diligence, it can provide strong protection to landlords. For a more detailed discussion of best practices, see the July 16, 2014 issue of the Colorado Real Estate Journal.

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