

Lien, Lien Go Away: Construction Liens

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Construction liens can become an issue during the improvement of commercial and retail property in a number of ways and at various times during the improvement project. A developer/landlord may face a construction lien issue during the completion of a new building or turn-key build out for a tenant. On the other hand a tenant may contract for alterations or tenant improvements which could result in contractors or material providers having construction lien rights. Under either scenario, you could find yourself being on the receiving end of a lien claim if there's non-payment or a dispute with a contractor, subcontractor or supplier on the project.

Under the laws of many jurisdictions, a person who has improved property by providing labor, materials, and other services, whether new construction or remodeling, may have a lien against the "owner's" interest in the property if the contractor complies with the notice requirements and deadlines set forth in the statute.

In a landlord/tenant situation, the question often arises as to who is the "owner" of the property. Where a tenant has contracted for the work to be done directly, the answer to that question is not always crystal clear. In that context under the laws of a number of states, in order to have a claim against the property owner's interest in the underlying property – and not just the tenant's leasehold interest in the leased premises – the lien claimant would have to prove that the landlord had knowledge of the tenant's improvement project and the landlord consented to the improvement. By doing so, the lien claimant is proving that the tenant was acting as the landlord's agent, and had the right to act on landlord's behalf in contracting for improvements to landlord's property, and therefore, the lien claimant may have a lien against the underlying property.

If a lien is filed, landlord and/or tenant may have to take prompt action to try to prevent things from getting contentious. For instance, if a lender is involved in funding the improvements, the lender or the title company may refuse to release further funds until the lien is resolved. To avoid that, the disbursing agreement could provide that the title company can hold funds equal to the amount of 150% of a lien claim, if one is filed. Or, it may be possible to have a bond or other form of security posted with the clerk of courts in order to have the lien released from the property. By way of example, Wisconsin law allows this type of undertaking to be posted, and once approved the lien

becomes a claim against the security and is no longer a claim against the property.

The law of the state in which the project is located should be reviewed to determine whether the general contractor has an obligation to defend the lien claim. The duty of defense is typically conditioned on payment of the general contractor for the work performed. The contract may also require the general contractor to bond over the lien claim. In either case, the landlord or tenant should promptly contact the general contractor about the lien claim.

Finally, if the lien was filed as a result of work being done by the Tenant, it is important to review the lease language. Most "tenant improvement" or "alterations" sections of leases will include language prohibiting tenants from allowing liens on the property and requiring them to take action to remove the lien in the event one is filed. A brief review of the law, your contracts, and the lease terms could go a long way in resolving the situation, avoiding delays on the project, and making sure that the lien claimant is no longer in a position to force a foreclosure sale of the property.

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