

Owner Roulette: Avoid Construction Lien Headaches

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Many contractors routinely have an issue getting paid from an owner, and may evaluate tackling the task of filing a construction lien and all the details involved. One of those details is making sure you know who the "real" owner of the real estate is – especially in this day when developers set up individual LLCs for each parcel. A recent Wisconsin Court of Appeals case provides further clarification as to what contractors can do to ensure that they properly file a construction lien, naming the correct owner, and ultimately get paid for their work.

In *Bayland Buildings, Inc. v. Spirit Master Funding VIII, LLC*,¹ the Court of Appeals addressed the concept of "constructive notice" to the land owner under Wisconsin's construction lien law. The principal of "constructive notice" may help the contractor who uses the incorrect owner name in their lien documents, but can prove the actual owner was aware; this concept is important because land owners, to avoid lien claims, will argue the lien named the wrong owner. In that case, Bayland Buildings ("Bayland") filed a construction lien against Siren Saukville, LLC ("Siren"), the party that Bayland believed to be the owner of the project under the terms of its construction contract. However, Siren had in fact been bought out by Spirit Master Funding VIII, LLC ("Spirit"), and Spirit was then the actual owner of the project at the time Bayland filed its construction lien.

Spirit argued that because Bayland had received notice that it was the actual owner, Bayland had improperly named "Siren" when it filed its construction lien, and the foreclosure lawsuit for the construction lien should be dismissed. In contrast, Bayland argued that it filed its lien against the party it believed to be the owner, and never received "constructive notice" that ownership of the project had changed. After considering both arguments, the Court of Appeals agreed with Bayland, and found that Spirit was subject to the lien Bayland filed against Siren because it was now the owner of the project and did not provide Bayland with "constructive notice" of the change in ownership.

Wisconsin's Construction Lien Law and "Constructive Notice"?

The Wisconsin Court of Appeals has previously held that "[a]ny person who performs, furnishes, or procures any work, labor, service, materials, plans, or specifications, used or consumed for the improvement of land" may file a lien against the real estate if he or she does not receive payment.²

However, in order to comply with the defaulted statutory requirements for construction liens, the contractor must give written notice to the actual owner prior to filing a lien claim. Once a lien has

been filed in Court, the contractor is under no continuing duty to check the real estate records to confirm the ownership since "the critical date, insofar as the lien claimant's duty to check the records in the office of the register of deeds is concerned, is the first date on which he furnishes labor and materials because the right to a lien of a supplier of labor or materials arises on that date."³

So what happens when ownership changes during construction? Wisconsin courts have concluded that "[c]onstructive notice exists when a person without knowledge of a fact is subjected on grounds of public policy to knowledge of that fact, as well as the liabilities associated with that knowledge."⁴

When dealing with construction liens, courts interpret construction lien laws liberally. Courts accept the fact that a contractor does not lose its lien rights when a property is sold without notice of the sale to the contractor.⁵ A contractor that never received constructive notice of a sale of a property will not lose his lien rights even if after the contractor commences work, the property is sold to a different owner, assuming that the contractor complied with the legal requirements of Wisconsin's lien laws.⁶

What Steps Can Contractors Take to Avoid Construction Lien Ownership Headaches Down the Road?

As with most things in life, it's better to take early proactive steps rather than simply wait for bad things to happen before taking action. There are a few simple tasks that contractors can do before filing a construction lien to avoid technical problems with their lien later on.

1. Verify the Owner of the Project

In a perfect world, every contract a contractor enters into would accurately state the full, legal name of the owner. However, in reality, owners sometimes use a d/b/a or trade name in their contracts. Contractors should not assume that just because an owner uses a name on a business card or letterhead that name is the registered, legal name of the owner of the property.⁷ To ensure that the name of the owner listed on the contract is the actual owner of the project, a contractor can take a few simple steps.

a. Check the Register of Deeds

Many counties have online databases that contain much of the information that is physically stored at the county courthouse in the Register of Deeds. Contractors can check the ownership status of a property online, or in person at the County's Register of Deeds, to verify that the owner listed on the contract is the actual legal owner of the property.

b. Get a Letter Report

For more complex projects where multiple changes in ownership has occurred in a short period of time, or to avoid trips to the Register of Deeds Office, it may be worthwhile for a contractor to pay a title company for a letter report that states the property's ownership title as of a specific date. While a title report letter does not provide any title insurance for the property, it will provide a contractor with the most recent information available concerning the actual owner.

c. Check the Local Tax Bill

While this may be a less reliable way to get information regarding real estate ownership, checking the most recent municipal tax bill records will at least provide a contractor with ownership information as of the end of the most recent tax year. Some communities may even have this information online, making it even easier to check the ownership status of a property prior to signing a contract or filing a construction lien. Often times the tax bill owners' information is abbreviated, making it less useful.

2. Monitor Communication from the Owner

Contractors shouldn't assume that just because they signed a contract and started a project with a specific owner that the legal owner cannot change during construction. Contractors need to pay close attention to all owner communications to watch for anything related to the change in ownership of a project. If a court needs to decide if a contractor received constructive notice regarding a change in ownership of a project, the court will review all communications between the parties, even text messages and emails.

3. Pay Attention to Change Orders

Obviously change orders can vastly change the scope or price of any construction project. However, they may also provide a contractor with constructive notice of a change in ownership or even impact lien rights. To the extent that change orders are issued and a contractor is asked to sign a "Partial Waiver of Construction Lien," a contractor needs to be aware that signing such a waiver may impact the ability to foreclose on a lien and obtain a monetary judgment for the full amount that is owed, or even provide constructive notice regarding a change in ownership.

By following the above-mentioned best practices, contractors will be in a better position to avoid disputes regarding whether or not their lien documents are defective because of who they have named as the ownership of a projects. The goal is to avoid any claim that the contractor's lien claim is defective because they used the wrong owner's name.

1 Appeal No. 2016AP1807

2 *Wes Podany Constr. Co. Nowicki*, 120 Wis. 2d 319, 324, 354 N.W.2d 755 (Ct. App. 1984).

3 *Duitman v. Liebelt*, 17 Wis. 2d 543, 548-49, 117 N.W.2d 672 (1962).

4 *Bump v. Dahl*, 26 Wis. 2d 607, 613, 133 N.W.2d 295 (1965).

5 *Wes Podany*, 120 Wis.2d at 324.

7 Searches for the exact legal name in Wisconsin can be found online at <https://www.wdfi.org/apps/CorpSearch/>

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