Study H-821 January 21, 2005

First Supplement to Memorandum 2005-4

Mechanics Lien Law (Material Received at Meeting)

The following material was received by the Commission at the meeting on January 21, 2005, in connection with Study H-821 on mechanics lien law, and is attached as an Exhibit:

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

COMMENTS ON MEMORANDUM 2005-4

From: "Abdulaziz & Grossbart" <info@AGLaw.net>
To: <sterling@clrc.ca.gov>
Subject: Mechanic's Lien Law Memorandum, January 7, 2005
Date: Tue, 18 Jan 2005 12:27:13 -0800

January 18, 2005

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Rd. Room D-1
Palo Alto, CA 94303-4739

RE: Mechanic's Lien Law Memorandum, January 7, 2005

Dear Mr. Sterling:

I must apologize for not reviewing your memorandum as quickly and carefully as I should have. I have had numerous drains upon my time, not the least of which is a law that becomes effective July 1, 2005. If you ever want to see a model of inefficient drafting, please look at SB 30, which was passed in 2004 but becomes effective July 2005. It is so bad that urgency legislation has or will be introduced to do nothing but make the law consistent. Additionally, the California Performance Review has also taken a significant amount of time.

I have quickly reviewed your memorandum and my initial comments are herein. I have tried to follow your order of presentation.

I might suggest that you pass some of your thoughts by a title insurance company. One question that I would ask them is what assurance they would need so as to not report a stale Lien for a year. The common practice in the title insurance industry is to continue to report a Lien wherein there has been no action to foreclose well beyond a 90-day period. I guess that is because the Lien can be extended for up to a year. It may be that there is a fear that the Notice of Extension was not recorded but somehow the Lien itself is still a cloud on title.

Generally, I did not review the changes wherein you indicated there is no substantive change.

DIRECT CONTRACTOR

I am not wed to any of the definitions. However, it would seem that “Prime Contractor” would be the best definition, in that it is clearly understood.

NOTICE AND OTHER PAPERS

I believe the inconsistencies that are noted should be addressed. I have no idea why the residence address is needed unless that is in fact where the work is being done.

I believe that your last proposal which is the one most commonly used, the term, “Sufficient for Identification” provides adequate notice.

CHANGE ORDERS

It is my recollection that the requirement in Civil Code section 3123, subdivision (c), was included as a result of lobbying by construction lenders.

ARTICLE 8, RELEASE ORDER

Generally, I have a problem with small claims courts deciding contested issues dealing with a subject as complicated as Mechanic’s Liens. I would also suggest that the $5,000.00 relate to the “claim,” rather than “the claim after deducting credits and offsets.” The determination of credits and offsets alone could be a significant problem.

I have not yet reviewed the Release or Expungement section.

PRELIMINARY NOTICE

With respect to §3083.355, it is not always that easy to get a certified copy from the County Recorder's office. Indeed, some contractors may not even be able to obtain the book and page, or even the legal description of the property easily.

CONFORMING PROVISIONS

You might review 2004’s SB 30 for recent changes in the language as of July 1, 2005. I am not sure whether this will affect your changes.

RULES OF PRACTICE

Regarding §3082.230 rules of practice, what happened to the second sentence of former §3259?

SECTION 3082.320 DESIGNATION OF CONSTRUCTION LENDER

I would point out that there is a relatively recent appellate decision Kodiak Industries, Inc. v. Ellis (1986) 185 Cal.App.3d 75, wherein the lender was not

shown on documents of public record at the time the subcontractor served its Preliminary Notice. Sometime thereafter, the lender was designated yet the subcontractor was allowed to foreclose on the lien even though the construction lender was not listed on its Preliminary Notice. I am concerned that legislation passed after that case, would essentially make that case moot.

SECTION 3083.410 AMOUNT LIENABLE

It should be pointed out that oral change orders, that are fully executed, have been held to be part of the contract and therefore lienable. I am again concerned that any modification of the law would make those decisions moot.

LIABILITY OF CONTRACTOR FOR LIEN ENFORCEMENT

Section 3083.790. I believe that this section should be limited to labor and service equipment or material provided to a prime contractor.

WHO IS ENTITLED TO A LIEN

With respect to who is entitled to a Lien, in that you have the general agency principal (Section 3082.270), I would also like to see the language from Section 3110 dealing with contractors, subcontractors, architects, etc. They are deemed to be agents of the owner for Mechanic's Lien purposes. That would keep people from having to go from one section to another.

Very truly yours,

ABDULAZIZ & GROSSBART

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Emphasizing Construction Law

MEMO

Date: January 20, 2005

To: California Law Revision Commission
ATTN: Nathanial Sterling, Esq.

From: Surety Company of the Pacific

Re: Study H-821: Memorandum 2005-4: Mechanics Lien Law

Surety Company of the Pacific (SCP) submits the following comments regarding the proposal that would expand the contractor's license bond to cover false lien claims (Memorandum 2005-4, p. 13):

1. Expansion of the contractor's license bond would open the door to attorney's fees and would prevent recovery by a homeowner for other valid claims.

In the event that a fraudulent claim of lien occurs, the lien would be expunged. Civil Code section 34118 provides that "any person who shall willfully include in his claim of lien labor, services, equipment, or materials not furnished for the property described in such claim shall thereby forfeit his lien." Therefore, the only damages resulting from fraudulent claims would be attorney's fees. The contractor state license bond was established in order to provide protection to a homeowner, subcontractor or material supplier in the event the original contractor failed to uphold quality workmanship. If the bond was allowed to be used to recover false lien claims, it is likely that other valid homeowner, subcontractor and supplier claims would be prevented due to the bond being diminished by payment of attorney's fees.

2. The homeowner may currently recover against the bond for fraudulent claims.

Section 7107 of the Business & Professions code provides that a homeowner may recover from the bond in the event the contractor abandons work without legal excuse. Section 7108 provides that a homeowner may recover from the bond if a contractor diverts funds or property received for completion of a project or where such contractor fails to account for use or application of such funds. Section 7109 provides for recovery from the bond where there is a willful departure in any material respect from accepted trade standards for good and workmanlike construction.

The situations for which a false claim of lien would be filed are already covered under existing law. If a court decides that a claimant is not entitled to a lien, the lien is expunged. Again, the inequitable result arises where the bond is being used merely as source of recovery for attorney's fees. This is contrary to the intent of the contractor license bond.

Please contact Jennifer Wada, Legislative Advocate, at (916) 441-0702 with any questions.

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File:

January 17, 2005

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Memorandum 2005-4 Dated January 7, 2005
Mechanic's Lien Law: Discussion of Issues

Dear Mr. Sterling:

This letter will serve as my comments on Memorandum 2005-4 dated January 7, 2005, concerning the revised draft of the Mechanic's Lien provisions.

With regard to the use of the term "direct contractor". I would suggest that the term "prime contractor" would be better usage. In the industry, most people use the term "prime contractor" to describe the contractor which has a direct contractual relationship with the owner to construct the project.

With regard to the discussion of "change orders", I agree with staff and their conclusion to eliminate Subdivision C and the cross-reference to it in Subdivision A.

With regard to the "Preliminary Notice", I would again suggest elimination of the requirement of a "direct contractor" or a "prime contractor" from having to give a Preliminary Notice to the construction lender for the reasons previously stated by the undersigned.

With regard to the subject matter of "completion issues" and specifically the question of "acceptance by public entity", I would again suggest that said section should be eliminated. It is true that the Courts have construed that section to apply to those portions of a normal private work of improvement that will ultimately be dedicated to the public entity. Again, we believe that that creates ambiguity and should be eliminated.

With regard to the "Waiver and Release" forms, I would suggest that notwithstanding the *Tesco Controls* case (*Tesco Controls, Inc. v. Monterey Mechanical Co.*, 124 Cal.App.4th 780), the Waver and Release forms should be revised. Early in our review of the Mechanic's Lien law,

I prepared and suggested certain forms. I would respectfully request that staff take a look at my recommendations as a starting point to possibly revise the forms along those lines.

With regard to the subject "Court Order for Release of Property from Lien", I would respectfully suggest that Section 3083.810(A)(2) be deleted. The way the section is worded, a Court might interpret that section to mean that as long as the owner has given a Notice of Non-Responsibility under Section 3083.530, the owner may petition the Court for an Order to release the property from the claim of lien. The mere posting and recording of a Notice of Non-Responsibility may not, under the case law, have the effect of releasing the property from the effect of a Mechanic's Lien. There are many Notices of Non-Responsibility that are invalid and determined to be invalid by reason of the failure of the owner to comply with the Notice of Non-Responsibility provisions and/or the fact that the Notice of Non-Responsibility is invalid by reason of the fact that the owner has become a "participating owner" and therefore cannot relieve itself from the effect of a Mechanic's Lien on its property. I am enclosing herein a photocopy of Pages 297, 298, 299 and 300 of "California Construction Law", Sixteenth Edition, co-authored by Kenneth Gibbs and the undersigned. It clearly explains what the law is with regard to Notices of Non-Responsibility. I am also enclosing Pages 196 and 197 of the 2005 Cumulative Supplement to "California Construction Law", which discusses the recent case of *Howard S. Wright Construction Co. v. Superior Court*, 106 Cal.App.4th 314.

With regard to the procedural aspects, please see the case of *Jay Bailey Construction Co.*, cited in Footnote 38 on Page 297 of the enclosures contained herein. For example, a Notice of Non-Responsibility posted and recorded before the actual commencement of work is ineffective to defeat a Mechanic's Lien. The reason for that rule is that its object is to give notice to those actually engaged in work on or furnishing materials to a project. See Page 137 of 221 Cal.App.2d, 135. A Notice of Non-Responsibility recorded more than ten days after the owner learns of work on its property is likewise invalid.

With regard to the substantive invalidity of a Notice of Non-Responsibility where the lease makes the improvements mandatory, the Courts have held, in effect, that the owner cannot have its cake and eat it too. See particularly the *Howard S. Wright Construction Co.* case cited on Page 196 of the 2005 Supplement, which has recently reaffirmed that proposition. Also note that even where the Notice of Non-Responsibility is properly posted and recorded, the lien claimants still have a lien on the leasehold interest of the tenant and on the structure down to the surface of the ground. Only the owner's fee interest in the property is exempted from the lien. As a result, the mere posting and recording of a Notice of Non-Responsibility does not automatically make the lien invalid. Quite often, lien claimants have no knowledge of the involvement of the owner at the time of recording a Mechanic's Lien. It is only in the forthcoming action to foreclose where the attorney for the claimant has the opportunity to indulge in discovery to determine the extent of the owner's involvement in the improvements that it can be determined whether or not the Notice of Non-Responsibility is valid or invalid. Thus, I would respectfully suggest that Section 2 of Subdivision A of Section 3083.810 be deleted.

With regard to the subject "Notice of Recordation of Claim of Lien", that section is unnecessary and should not be added to the statute. It is now required that the County Recorder notify the owner of the property of the recordation of a Mechanic's Lien. When a Mechanic's Lien is recorded, an additional fee has to be paid to the County Recorder to provide that service. That is why the statute requires that the lien have the name and address of the owner. In addition, there are numerous flaws in the suggested *Civil Code* §3083.355. It requires the lien claimant to promptly give notice of the recordation of the lien to the owner of the property. Quite often, the actual owner of the property is unknown at the time that the Mechanic's Lien is prepared and recorded or the lien claimant names the "reputed owner" in the Mechanic's Lien. In that connection, I am enclosing herein a copy of Pages 337 and 338 of "California Construction Law" Sixteenth Edition, co-authored by Kenneth Gibbs and the undersigned. As you will note in the case of *Allen v. Wilson*, the Court upheld a lien where the lien claimant did not know the name of the owner and merely inserted the words "unknown". It would be almost impossible and extremely burdensome upon claimants to have to do a title search to ascertain the name of the owner before recording the lien. It is not uncommon in the industry for the people working on the jobsite to be advised that a certain entity is the owner and therefore becomes the reputed owner when, in fact, the actual owner of the property is some other entity at some other address. The proposed section also provides that a lien claimant that fails to give the notice would be liable to the owner for the cost and expenses incurred to release the property from the claim of lien and for consequential damages to the owner caused by the recordation of a claim of lien. That is excessive and contrary to law as well. The recording of a Mechanic's Lien is privileged. See *Frank Pisano & Associates v. Taggart*, 29 Cal.App.3d 1. For all the reasons stated above, the proposed Section 3083.355 is unnecessary and imposes an unreasonable burden on lien claimants and provides a remedy that is contrary to existing law.

The foregoing represents my comments on the staff memorandum. I have not had time to read through and analyze the actual wording of the staff draft of the statute. Once I have had an opportunity to do so, I may provide additional comments.

I hope that this letter will be of some help in reviewing the current draft of the Mechanic's Lien law revisions.

Very truly yours,

HUNT, ORTMANN, BLASCO,
PALFFY & ROSSELL, INC.

Gordon Hunt

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SIXTEENTH EDITION

KENNETH C. GIBBS
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In *Red Mountain Machinery Co. v. Grace Investment Co.*,[37] the Ninth Circuit held that a mechanic's lien claim could be asserted against the leasehold interest of a party who had leased tribal lands from the Yavapai-Prescott Indian Tribe. The lease had a term of 65 years and contained an option to renew for 25 years. The purpose of the lease was to develop a multiple-use facility on the tribal land, including retail, office, lodging, medical, residential, and recreational buildings. The lessee was responsible for paying the costs of all construction on the project, which was called "Frontier Village." The lessee obtained a construction loan from a bank to finance the improvements. The bank's security was on the leasehold interest.

When Red Mountain was not paid for equipment it rented for the project, it recorded a mechanic's lien, naming the tribe as the owner of the property and the lessee as the lessee. Red Mountain filed an action to enforce its lien against the leasehold interest of the lessee only; it did not seek to foreclose its lien upon the underlying real estate owned by the tribe. The lease had been approved by the Secretary of the Interior, who has responsibility for approving such leases. The Ninth Circuit held that federal law did not preempt application of the Arizona mechanics' lien law to the leasehold interest held by the lessee.

[6] Notice of Nonresponsibility

The *notice of nonresponsibility* is defined in California Civil Code § 3094:

> *Notice of nonresponsibility: Posting.* Notice of nonresponsibility means a written notice, signed and verified by a person owning or claiming an interest in the site who has not caused the work of improvement to be performed, or his agent, containing all of the following:
>
> a. A description of the site sufficient for identification.
>
> b. The name and nature of the title or interest of the person giving the notice.
>
> c. The name of the purchaser under contract, if any, or lessee, if known.
>
> d. A statement that the person giving the notice will not be responsible for any claims arising from the work of improvement.
>
> Within 10 days after the person claiming the benefits of nonresponsibility has obtained knowledge of the work of improvement, the notice provided for in this section shall be posted in some conspicuous place on the site. Within the same 10-day period provided for the posting of the notice, the notice shall be recorded in the office of the county recorder of the county in which the site or some part thereof is located.

There has been much litigation over the validity of notices of nonresponsibility.[38]

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[37] 29 F.3d 1408 (9th Cir. 1994).

[38] *See* Jay Bailey Constr. Co. v. Berry Hotel Corp., 221 Cal. App. 2d 135 (1963) (summary of cases addressing notices of nonresponsibility).

When the person causing the work to be done is a vendee who does not acquire title, then the lien is likewise against the building, and the owner may protect its fee interest by posting and recording a notice of nonresponsibility.[39]

A line of cases has developed holding that an owner who is a "participating owner" in the construction project may not protect its interest in the property by posting and recording a notice of nonresponsibility. In the early case of *Ott Hardware Co. v. Yost*,[40] the owner (Yost) leased the property, which had an obsolete and antiquated theater building on it, to Kaplan under a lease that contained the following provisions:

1. That Kaplan would remodel the building to be used as a motion picture show;
2. That the plans and specifications for the remodeling would be presented to and approved by Yost;
3. That Kaplan would furnish a faithful performance and a labor and material bond;
4. That Yost would pay Kaplan $100 per month from rentals for the actual costs of alterations, up to $10,000;
5. That Kaplan would furnish Yost a statement of the labor and materials supplied as the work progressed;
6. That Kaplan would pay the cost of all labor and materials at least five days prior to the time for filing any lien;
7. That Kaplan would not have the right to remove any improvements made by him when the lease terminated;
8. That the lease would remain in escrow until all the improvements were completed and paid for; and
9. That an addenda to the lease provided that Kaplan would pay to Yost $1,000 (to be returned to Kaplan upon the expiration of the time for filing liens) in consideration for waiving the requirement for a labor and material and faithful performance bond.

The lease and the addenda were deposited into escrow. The escrow instructions provided that the escrow agent was to hold the documents until Yost notified the escrow holder that the lease had been complied with. Yost executed a notice of nonresponsibility, posted it on the property, and recorded it on November 2, 1940. More than $12,000 was spent for labor and material in rehabilitating the building. Kaplan failed to pay for the labor and material, and the claimants recorded mechanics' liens against the property. Yost demanded that the escrow agent return the lease and the addenda for Kaplan's failure to comply with its terms and conditions. The escrow agent complied, and Yost served Kaplan with

[39] *See* American Transit Mix Co. v. Weber, 106 Cal. App. 2d 74 (1951).
[40] 69 Cal. App. 2d 593 (1945).

a notice of default under the lease. Yost took possession of the property and sold it to a third party.

The trial court rendered a judgment for the lien claimants and provided that if the liens were not paid within 90 days after the judgment became final, the building (down to the surface of the ground) would be sold according to law, with the lien claimants being paid out of the proceeds of the sale. The trial court further held that the lien claimants were not entitled to a lien upon the land or any portion thereof.

That judgment was reversed on appeal. The court of appeal noted that a lessee is not considered the agent of the lessor within the contemplation of the mechanic's lien statutes merely because of the relationship of landlord and tenant; and that an agency relationship is not created merely by the fact that the lessor consents to the making of improvements by the lessee on the property; however, an agency relationship will be created under the mechanic's lien statutes where there is a contractual provision in the lease that requires the lessee to make the improvements.

The court of appeal then examined the California case of *English v. Olympic Auditorium, Inc.*,[41] which held that when the building of the improvements is optional by the lessee, then the posting and filing of the notice of nonresponsibility by the lessor relieves the land from the effect of a mechanic's lien. However, the court went on to state that, if the instrument creating the relationship (the lease) is such that the transaction establishes, in effect, that the lessee is but an agent of the owner in causing the improvements to be made to the owner's property, and if the making of the improvements is not optional with the lessee and the lessee is obligated as a condition or covenant of the lease to make the improvements, and if a breach of that covenant returns the property to the owner greatly enhanced in value, and if the owner promises to repay the lessee the estimated cost of a major portion of the improvements out of future rents, then an agency relationship is created. In view of that statement, the court held that, under the facts of this case, the lease made the improvements mandatory upon the lessee. The court distinguished *English* by stating that in *English* the lessee was merely authorized to construct the auditorium building and was not obligated to construct it. The court held that, when a lease makes it mandatory upon the lessee to make the improvements as a condition of the lease, then a notice of nonresponsibility filed by the owner is ineffectual and will not relieve the owner of liens filed against the owner's property, and said liens will attach not only to the leasehold interest of the lessee but also to the fee interest of the owner. Therefore, the notice of nonresponsibility filed in this case was invalid.

The *Ott Hardware* case was followed in *Los Banos Gravel Co. v. Freeman*.[42] In *Los Banos*, the owner leased the property (undeveloped land) to a tenant, under a lease that provided that the lessee was to start construction of a gas station and restaurant within 120 days or the lease would be rendered invalid. When the

[41] 217 Cal. 631 (1933).

[42] 58 Cal. App. 3d 785 (1976).

lessee did start the work, the owner posted and recorded a notice of nonresponsibility. The lien claimants, who had furnished labor and material to the lessee and had served no preliminary notice, sought to foreclose their liens; but the trial court denied the liens by reason of the owner's notice of nonresponsibility. The court of appeal reversed and held that, under *Ott Hardware,* because the lease made the improvements mandatory, the owner was a "participating owner," and therefore the notice of nonresponsibility was invalid. The court further held that a preliminary notice was unnecessary because the claimants had a direct contract with a "participating owner."

In *Ecker Bros. v. Jones,*[43] the owner had posted and recorded a notice of nonresponsibility. The lien claimant obtained a judgment foreclosing its lien on the building down to the surface of the ground. The lessee was given 90 days to pay the lien claim. The trial court held that, if the lien claim was not paid within the 90-day period, the building would be sold and the buyers would be obligated to remove the building within 20 days; and if the building was not removed, the lien rights would terminate. The court of appeal upheld the judgment, holding that the lien claimant has a lien on the building down to the surface of the ground when the lien claimant deals with a lessee and the owner has posted and recorded a valid notice of nonresponsibility. The court stated that this was the equitable result for the noncontracting owners inasmuch as the building would not remain on the land, making it unusable.

In *Baker v. Hubbard,*[44] the owner posted and recorded a notice of nonresponsibility for a project wherein work was being done by its tenant. Because neither the notice of nonresponsibility that was posted on the property nor the notice of nonresponsibility that was recorded was verified, the court of appeal held the notice of nonresponsibility was invalid.

In light of the foregoing cases, it is clear that, if an owner posts and records a valid notice of nonresponsibility within 10 days after obtaining knowledge that work is being done by its tenant, then the lien claimants will have a lien on the leasehold interest of the tenant and on the building down to the surface of the ground. If the building is then sold and removed, the claimant's lien continues in full force and effect. If the building is not removed, then the lien claimant's lien rights cease. If the lease between the landlord and the tenant, under the facts of a particular case, make the improvements by the tenant mandatory, then the notice of nonresponsibility may be held invalid, and the lien claimants will be entitled to claim a lien on the owner's fee interest in the property. Thus, the terms and conditions of the lease must be examined carefully in each case, to determine the extent of the landlord's participation in the construction project.

[B] Stop Notices

Although the constitutional provision in § 9.01 refers only to a mechanic's lien right, the legislature has provided for a stop notice right on private works of

[43] 186 Cal. App. 2d 775 (1960).
[44] 101 Cal. App. 3d 226 (1980).

[1] Description of Site Sufficient for Identification

One of the contents of the mechanic's lien under California Civil Code § 3084 is a "description of the site sufficient for identification."[134] Numerous cases have discussed the issue of what happens when the description set forth in a lien contains some errors.

In *Howard A. Deson & Co. v. Costa Tierra, Ltd.*,[135] one of the lien claimants recorded a mechanic's lien that omitted the words "northwest corner" from the description but described the project as "commonly known as Palo Fierro Estates." The court stated that, as a general rule, the description of the property sought to be charged with a lien will be deemed sufficient if it enables a party familiar with the locality to identify the property with reasonable certainty to the exclusion of other properties (citing *Hollenbeck-Bush Planing Mill Co. v. Roman Catholic Bishop*,[136] *Union Lumber Co. v. Simon*,[137] and *Borello v. Eichler Homes, Inc.*[138] The court stated that errors in the description may be disregarded if the identification of the property is otherwise sufficient and if the recorded notice of lien is not fraudulent and does not mislead the owner or innocent third parties (citing 54 Cal. L. Rev. 179 (1966), *Borello v. Eichler Homes, Inc.*, and *American Transit Mix Co. v. Weber*[139]). The court held that use of the words "commonly known as Palo Fierro Estates" was a sufficient description, and therefore it upheld the mechanic's lien.

In *Borello v. Eichler Homes, Inc.*, the lien described the property as "Unit 3 and Unit 4 Terra Lina, San Rafael, California," whereas the correct description of the property was "Terra Linda Valley, Unit 3 and Unit 4." Civil Code § 3261 provides that no mistake or errors in the description of the property against which the lien is recorded shall invalidate the lien unless the court finds that such mistake or error was made with intent to defraud or that an innocent third party, without notice, has, since the claim of lien was recorded, directly or constructively become a bona fide owner of the property and that the notice of claim was so deficient that it did not in any manner put the party on further inquiry. As a result, the court held that the description of the property was sufficient.

[2] Name of Owner or Reputed Owner

Another requirement of the mechanic's lien is that the name of the owner or reputed owner, if known, be included. In an early case, *Allen v. Wilson*,[140] the claim of lien named no one as the owner or reputed owner. In fact, the claim of lien stated, in the blank for the name of the owner or reputed owner, the word

[134] *See* Cal. Civ. Code § 3084(a)(5).
[135] 2 Cal. App. 3d 742 (1969).
[136] 179 Cal. 229 (1918).
[137] 150 Cal. 751 (1907).
[138] 221 Cal. App. 2d 487 (1963).
[139] 106 Cal. App. 2d 74 (1951).
[140] 178 Cal. 674 (1918).

"unknown." The court held the lien valid. Specifically, the court stated that the lien claimant is only required to state the name of the owner if known. Therefore, if the name of the owner is not known, the claim of lien is sufficient if it is silent on the subject. The court went on to state that the name of the owner or reputed owner is not presumed to be within the knowledge of the claimant.

In *Frank Pisano & Associates v. Taggart,*[141] the court held that, in a claim of lien, it "is sufficient to give only the name of the reputed owner. Where an individual does so in good faith, he does not lose his lien if he subsequently determines that some other individual is the actual owner." Thus, if the claimant, in good faith, reasonably believes that a given individual is the owner of the property and names that person as reputed owner, and it later turns out that someone else is the actual owner, the lien will not be held invalid.

Compare, however, *H&L Supply, Inc. v. Ewing.*[142] In that case, the plaintiff was a material supplier to a subcontractor of a subcontractor. The president and sole stockholder of the material supply company prepared the preliminary notice and directed an employee to serve it upon the owner, Mr. Ewing. Although the opinion is unclear on the point, it appears that the preliminary notice named Mr. Ewing as the owner of the property. There was a conflict of testimony as to whether the notice was served upon him. In the mechanic's lien, the plaintiff described the property as 160 acres and also indicated that it was commonly known as "Ewing's Café." The space for the name of the owner was left blank. At the time the lien was recorded, the Ewings did operate a café, but it was known as "Ewing's Tam-O-Shanter Inn" and was located several miles away, on the opposite side of the city of Bakersfield from the place described in the lien. The court held that the lien was invalid, stating that it was rendering that holding based upon the "limited facts of the case" and that "we do not intend to say that a preliminary lien notice cannot serve to estop an owner from asserting a defect in the Notice of Claim of Mechanics' Lien." The lien claimant argued that, because it had served Mr. Ewing with the preliminary notice, the owner was estopped to assert the defect in the name of the owner in the lien. It is the opinion of the authors that this case appears to be in conflict with *Allen v. Wilson* and *West Coast Lumber Co. v. Newkirk.*[143] Evidently, the court in *H&L Supply, Inc.* based its decision on the idea that since the lien claimant did name an owner in the preliminary notice, he should also have done the same thing in the mechanic's lien.

[3] Name of Person by Whom Claimant Was Employed or to Whom Claimant Furnished Its Materials

Another requirement of the contents of the mechanics' lien is the name of the person by whom the claimant was employed or to whom the claimant furnished its labor, service, equipment, or materials. In *Wand Corp. v. San Gabriel Valley*

[141] 29 Cal. App. 3d 1 (1972).
[142] 253 Cal. App. 2d 283 (1967).
[143] 80 Cal. 275 (1889).

CALIFORNIA CONSTRUCTION LAW

SIXTEENTH EDITON

2005 Cumulative Supplement

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In *Betancourt*, mentioned *supra*, the California Supreme Court took jurisdiction of that case and affirmed the decision of the district court of appeal set forth above. Specifically, in *Betancourt v. Storke Housing Investors*, 31 Cal. 4th 1157 (2003), the California Supreme Court held that the laborers for a subcontractor on a private work of improvement were entitled to lien rights for their fringe benefits under Civil Code § 3110. The California Supreme Court concluded that Civil Code § 3110 was a law of general application that does not itself refer to ERISA Plans. Further, Civil Code § 3110 is not specifically designed to affect Employee Benefit Plans. Finally, the California Supreme Court noted that Civil Code § 3110 does not bind ERISA Plans or compel such plans to function in any certain way.

Following the U.S. Supreme Court decisions mentioned above, which have recently narrowed the scope of ERISA preemption by stating that the starting assumption under ERISA is that Congress did not intend to supplant State laws, the California Supreme Court concluded that Civil Code § 3110 was not designed to "supplement" the enforcement scheme for employee-benefit obligations. Instead, California Mechanic's Lien Law implements California's Constitutional Mandate to protect laborers of every class and allow them to recover their entire compensation regardless of the form that the compensation takes. Thus, Civil Code § 3110 and the right to recover fringe benefits by virtue of a mechanic's lien is not preempted by ERISA.

[6] Notice of Nonresponsibility

Page 300, add at end of subsection:

The concept of the "participating owner," which is discussed in the main text, was reviewed by the California Court of Appeal in *Howard S. Wright Construction Co. v. Superior Court (BBIC Investors)*, 106 Cal. App. 4th 314 (2003). BBIC Investors leased property to 360 Networks for a fiber optics business. Alterations were written in a supplement to the lease. The improvements were not optional, and without them the business had no viability. The lease required BBIC's approval of the alterations. BBIC collected a fee for overseeing the construction work. 360 Networks contracted with Howard S. Wright Construction Co. (HWCC) to perform the work. 360 Networks went bankrupt and HWCC ceased construction. HWCC brought an action to foreclose a mechanic's lien for $2.4 million against the owner BBIC. BBIC had recorded a notice of nonresponsibility and, pursuant to that notice, the trial court granted BBIC's motion to remove the lien. HWCC argued that BBIC was subject to the lien under the "participating owner" doctrine.

The appellate court remanded the case back to the trial court for a trial on the issue of whether BBIC had become a "participating owner." The court held that if a property owner causes or participates in improvement to the leasehold, the owner cannot shield his property interests from a mechanic's lien by recording

a notice of nonresponsibility. The court noted that the alterations to BBIC's property were required under the lease. Further, BBIC actively participated in and retained control over the construction. Both BBIC and 360 Networks (the tenant) intended for the construction to enhance the value of the property. The court noted that by implication the tenant, 360 Networks, became the agent of the landlord BBIC because the lease required 360 Networks to make the improvements. The court concluded that the undisputed evidence established the probable validity of HWCC's lien and the case was remanded for trial.

In referring to the participating owner doctrine, the court stated,

> By statute, a notice of non-responsibility is of no effect when the landowner "caused the work of improvement to be performed. . . ." (Civ. Code § 3094.) The case law has held that the tenant may be treated as an agent of the landowner (so that the landowner is deemed to have caused the work to be performed) when the tenant is required by the lease to make the improvements. (*Ott Hardware Co. v. Yost* (1945) 69 Cal. App. 2d 593, 597-599 *(Ott)*; *Los Banos Gravel Co. v. Freeman* (1976) 58 Cal. App. 3d 785, 793-797 *(Los Banos Gravel).)* On the other hand, when the improvements are optional with the tenant, then the notice of non-responsibility relieves the land from the mechanic's lien (and the lien attaches only to the tenant's improvements). (*English v. Olympic Auditorium, Inc.*, supra, 217 Cal. at pp. 642-643.)

The court followed the cases of *Ott Hardware Co. v. Yost* and *Los Banos Gravel Co. v. Freeman,* discussed on pages 298-300 of the main text.

On page 300 of the main text, *Baker v. Hubbard,* 101 Cal. App. 3d 226 (1980), is cited for the proposition that a notice of nonresponsibility, which was posted and recorded but not verified, was invalid. That statement is in error. In fact, the court held that lack of verification to an otherwise sufficient notice of nonresponsibility will not deprive a land owner who, except for verification, fully complies with the statutory requirements of the protection offered by the nonresponsibility section.

§ 9.02 PROCEDURE FOR FILING MECHANICS' LIENS AND STOP NOTICES

[A] Twenty-Day Notice

[2] Contents of the Notice

Page 314, add at end of subsection:

On page 314 of the main text, the contents of the Preliminary Notice are set forth, including the following:

> General description of the labor, services, equipment or materials furnished [or to be furnished,] . . . with an estimate of the total price of same.