

Mechanic's & Materialman's Lien Basics for the Consumer Lawyer

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I. Introduction: The Homeowner and Contractor

One of the largest purchases most consumers make is for the purchase of a home. While homeownership has many financial and psychological benefits, the ownership of a physical structure also comes with a host of responsibilities and a new set of legal issues for the homeowner, from tax treatment to premises liability. Among the most prosaic concerns for a homeowner is the repair of the home, whether due to normal wear and tear or the abuses of a particularly robust storm season. Unfortunately for many homeowners, the attempt to fix one problem often results in another: a dispute with the contractor.

Stories about the difficulty of finding a good contractor to repair your home have been a staple of water cooler conversation for generations. Despite the rise of the Internet, and the growth of services like Angie's List which claim to provide the names of reliable and reputable contractors to homeowners, it appears that homeowners now are no better at picking good contractors than in the time before Craig's List. This is not surprising since virtually no homeowners are, or reasonably could be, experts in the myriad trades required to keep a home in good repair. Because most homeowners wind up hiring someone they do not know to fix a problem they may not themselves fully understand, it is not surprising that consumer disputes about home contractors are a perennial phenomenon.

Further, while many disputes between a consumer and a contractor are the result of an honest disagreement between the parties over the scope of the work or the quality of the job, sadly some contractors make a living preying upon the understandable ignorance of the average homeowner about what is needed to repair their home. This seems to be particularly true after natural disasters, such as hurricanes, when homeowners are desperate to make quick repairs to prevent further damage to their homes, and are prone to strike a deal with the first person who swings by the house in a pickup truck.

While various laws and legal theories apply to the relationship between a homeowner and a contractor, with the contract between the parties generally looming the largest, one of the most problematic for the homeowner is the ability of the contractor, under certain circumstances, to place a lien upon the home. This is an important protection for contractors from deadbeat homeowners, and allows contractors to be assured of payment when they perform certain types of work upon a property and satisfy the requirements of the law. But because the threat of placing a lien on the property is frequently used as bludgeon to force the timid homeowner to

pay for shoddy work, or to agree to pay for work beyond the scope of the original contract, it is important for homeowners and their attorneys to understand the law of mechanic's and materialman's liens.

II. The Constitutional Lien

Texas is unique among all the states in having a self-executing, constitutional lien. Article XIV, § 37, enacted in 1876, provides:

Mechanics, artisans and materialman of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

A. Establishment of the Constitutional Lien

In general, a contractor can establish a constitutional lien if the contractor has **privity of contract** with the owner of the building or article and if the contractor **made or repaired** the building or article, and or **supplied goods incorporated** into the construction or repair of the building or article. *Ralph M. Parsons Co. v. South Coast Supply Co. (In re A&M Operating Co.)*, 182 B.R. 997, 1004 (E.D. Tex. 1995) *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974)).

Most contractors doing residential work should be able to satisfy the relatively intuitive legal definitions of "mechanic, artisan, or materialman" under Texas law. (See *In re Enron Corp.*, 295 B.R. 190 (Bankr. S.D.N.Y. 2003)¹, *Warner Mem'l Univ. v. Ritenour*, 56 S.W.2d 236, 237 (Tex.Civ.App. 1933).), and a home is clearly a "building" for purposes of establishing a constitutional lien. Work done on a homeowner's property, but not on a building or something attached to a building is probably not covered. While a pier extending from the shore into a lake has been held to be a "building" (*Ambrose & Co. v. Hutchinson*, 356 S.W.2d 215 (Tex.Civ.App. 1962)), work on a well (*Ball v. Davis*, 18 S.W.2d 1063, 118 Tex. 534 (Tex. 1929)), the laying of sewer and water lines on an unimproved tract of land (*Taylor v. Rigby*, 574 S.W.2d 833 (Tex. Civ.App.-Tyler 1978)), and the clearing of underbrush and building of a road (*National Western Life Ins. V. Acreman* 415 S.W.2d 265 (Tex. Civ. App.-Beaumont 1967)) have all been held insufficient to create a constitutional lien because the work was not upon a "building."

¹ Ironically, given Enron's famously obscure and complex business methods, in this case a contractor which provided gas "fractionation" services to Enron was determined to not qualify as a "mechanic, artisan, or materialman" because the esoteric nature of the services and/or goods provided did not fall within the usual and customary Texas legal definitions of those terms.

B. Enforcement of the Constitutional Lien

Because the constitutional lien is “automatic” and “self executing,” there is no requirement that the contractor file a notice of lien, or comply with any of the other provisions required to establish a statutory lien, prior to filing suit to enforce the lien. (*Hayek v. Western Steel Co.* 478 S.W.2d 786, 790 (Tex. 1972).) Further, the automatic and self executing nature of the lien means that beyond establishing the existence of the debt, and the fact of the labor being performed, it is not necessary for the trial court to submit any issue relating to the lien to the jury. (*San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 107-108 (Tex.App.-San Antonio, 2003) (Court rejects homeowner’s arguments that the jury should have been able to consider the value of services and/or materials used in the construction before the court imposed and ordered foreclosure upon the lien.) However, defenses which might apply to collection of the underlying debt, such as a statute of limitations, still apply. (*AAA Rapid Concrete Service, Inc. v. Woods*, 818 S.W.2d 178, 179 (Tex.App.-Houston 1991) citing *University Savings & Loan Ass’n v. Security Lumber Co.*, 423 S.W.2d 287 (Tex.1967).)

C. Constitutional vs. Statutory Liens

The benefit of the constitutional lien over the statutory lien discussed further below is that the constitutional lien it is automatically created if the above requirements are met, without following the technical notice and filing requirements necessary to perfect a statutory lien. There are some disadvantages to the use of a constitutional lien, the largest being that a constitutional lien may not be enforced against a subsequent, innocent, bona fide purchaser. (*Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359, 362 (Tex.Civ.App.-Houston 1963).) Because of this, the prudent contractor who can establish a constitutional lien may seek to perfect statutory lien rights as well, since in certain circumstances courts have given statutory liens a priority privilege or preferential lien status over constitutional liens. Because of the privity requirement, however, the constitutional lien is of little use to subcontractors, who rarely have a contractual relationship with the owner of the property. Conversely, homeowners who contract for repairs or improvements to the homes should be aware that even if the contractor fails to provide the notices and make the filings required to perfect a statutory lien, it is possible that the contractor already has a constitutional lien against the property which was created automatically, and which may be enforced upon non-payment.

III. The Statutory Lien

Chapter 53 of the Texas Property Code sets forth the steps necessary to establish a statutory lien. These simplest requirements exist for contractors who directly contract with the owners of commercial buildings. The requirements are more complex when dealing with residential property, and are quite involved for a subcontractor seeking to place a lien upon a homestead.

A. Establishing a Statutory Lien - Contracting Directly with the Owner

If a contractor has a direct contractual relationship with the owner (“original contractor”), the process for establishing a statutory lien is the simplest. For a residential project, the contractor must file an affidavit with the county clerk in the county where the property is located not later than the **15th day of the third month after the day the indebtedness accrues**, (Property Code § 53.052(b).) and serve the owner by certified mail no later than the fifth date after the affidavit is filed with the court. (Property Code § 53.055(a).)

The indebtedness “accrues” for an original contractor on the last day of the month in which the contractor provides notice that the contract has been completed, or the last day of the month in which the work has been completed, finally settled, or abandoned. (Property Code § 53.053(b).)

The technical requirements of the affidavit are fully set forth in Property Code § 53.054, but the failure to include a statement, by month, of the work done and materials furnished, the failure to provide an adequate legal description of the property, and the failure to sign a legally sufficient jurat (in addition to the acknowledgment at the end of the affidavit) to establish a sworn statement of the claim, are the defects most likely to result in failed lien.

However, only “substantial compliance” with the statute (and therefore also with these deadlines) is required, and keep in mind that “the materialman’s lien statute is liberally construed for the purpose of protecting laborers and materialmen.” (*Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, (Tex.App.-Austin,2004) (Held that failure to put proper postage on notice is not substantial compliance with statute.)) Despite these advantages, the average home contractor performing repairs and improvements below the \$10K price range seems to be relatively lax in the drafting of contracts, meeting the statutory deadlines, and in drafting competent affidavits. Homeowners should expect new home and large remodeling job contractors to do a better job with their liens.

B. Establishing a Statutory Lien - Subcontractors

It is much more difficult for a “derivative claimant,” such as a subcontractor who does not have a contract with the owner, to establish a statutory lien. The subcontractor must comply with the basic requirements of the lien affidavit set forth above, but must also provide an additional, earlier “trapping” notice to both the owner and the original contractor, on or before the 15th day of the second month in which all or part of the labor was provided. (Property Code § 53.252.) The subcontractor notice requirements are highly technical, require the inclusion of much special language, and are for the most part set forth in Subchapter K of Chapter 53 of the Property Code, which is devoted to requirements for residential construction.

C. Enforcing the Lien

The lien must be enforced by judicial foreclosure (Property Code § 53.154.), and suit to foreclose a lien on a residential property must be commenced within a year of the last day to file the lien affidavit under section 53.052, or within one year of completion, termination, or abandonment of the project. (Property Code § 53.158(b).) The claimant has the burden to prove up the contract, the location of the real property, and the perfection of the lien. (*Ramsey v. Criswell*, 850 S.W.2d 258 (Tex.App.-Texarkana 1993).) The court may award costs and reasonable attorney's fees as are "equitable and just." (Property Code § 53.156.)

IV. The Homestead Exemption

The Texas Constitution, Article 16, §50(a), generally protects a Texas homestead from forced sale, and these homestead rights have "traditionally enjoyed great protection in Texas jurisprudence and statutes which affect homestead rights are liberally construed to protect the homestead." (*Florey v. Estate of McConnell*, 212 S.W.3d 439, 443 (Tex.App.-Austin 2006, pet. denied).² Despite this, both the constitution and the Property Code have carved out an exception for the foreclosure of mechanic's liens. Section 50(a)(5) of Article 16 of the Texas Constitution allows the forced sale of a homestead to pay a contractor who provides work or materials for repairs or improvements to the homestead, and executes a contract with all of the owners of the homestead prior to commencing the work. This is also codified in Property Code § 53.254.

Since a written contract with the owner is required, most subcontractors will not be able to perfect a lien against a homestead. Only if a subcontractor does have a written contract with the owner, and also complies with all of the technical notice and filing requirements of the Property Code, will the subcontractor be allowed to establish and foreclose a lien upon a homestead. While many original contractors will have a written contract with the owner, the most litigated deficiency in this situation is the failure of the contractor to secure the signatures of both spouses on the contract.

In *Cadle Co. v. Ortiz*, 227 S.W.3d 831, (Tex.App.-Corpus Christi, 2007), the court held, under circumstances where the contractor may be forgiven for assuming that Mrs. Ortiz was the sole owner of the home, that the failure to have Mr. Ortiz' signature on the contract rendered the contractor liable for wrongful foreclosure. The Ortizes were first married in 1979, divorced later that year, and remarried in 1989. When Mrs. Ortiz purchased the home in 1994, she deliberately kept Mr. Ortiz' name off the deed to protect the house from Mr. Ortiz' possible creditors who might be seeking child support payments. Mrs. Ortiz' tax returns were also erratic, and while she filed a joint return with her husband in 1994, she filed as "unmarried single" the following year. When, in 1996 she signed a contract for home remodeling, she did not put her husband's name on the contract. When she applied for a HUD loan to fund the

² Query how courts are expected to resolve the directives of the case law to "liberally construe" these statutes to both protect the homestead and protect laborers and materialmen.

improvements, she signed a credit application prepared by the contractor's representative with the box marked "unmarried" on the credit application. (*Id.* at 833-834.)

After the contractor's assignee foreclosed upon the home based upon a mechanic's lien, the Ortiz' brought suit alleging a wrongful foreclosure. The contractor's assignee argued that the homestead exemption did not apply because Mrs. Ortiz fraudulently misrepresented her marital status. At a bench trial, the court rejected this argument, and the court of appeals affirmed that decision, finding that Ms. Ortiz made no affirmative misrepresentations about her marital status because she was merely silent as to the issue, and only signed documents prepared for her by the contractor which made no mention of her husband.³ (*Id.* at 836.) That said, the homestead protection may waived if a married individual affirmatively misrepresents himself or herself as single (*Id.* At 835. See also *Brown v. Bank of Galveston, Nat'l Ass'n*, 963 S.W.2d 511, 515 (Tex.1998) (Held that falsely writing "a single man" on purchase documents raised a question as to whether the homestead exemption had been waived.)

V. Challenging a Lien

A. Summary Motion to Remove Invalid or Unenforceable Lien

Property Code Section 53.160 allows an owner to bring suit and file a motion to declare a claim or lien invalid or unenforceable based upon the grounds set forth in Section 53.160(b).

B. Civil Practice and Remedies Code

The filing of false liens is prohibited pursuant to Section 12.002 of the Civil Practice and Remedies Code, which generally prohibits the knowing filing of false records or documents in court, with the intent that the false records or documents be given the legal effect of valid documents. Violation of the section subjects the violator to liability for (1) actual damages or \$10K, whichever is greater, (2) costs and fees, and (3) exemplary damages as set by the court.

VI. Useful Resources

Texas Property Code, Chapter 53, "Mechanic's, Contractor's, or Materialman's Lien."

The Complete Guide to Mechanic's and Materialman's Lien Laws of Texas, Fifth Edition, Steves and Barnes, 2008, Matthew Bender and Company.

³ Interestingly, the HUD credit application, which the Court indicated was an affirmative misrepresentation by Mrs. Ortiz, was not considered in this analysis because the contractor's assignor admitted that he was not relying upon that document.