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This is a new feature for ***The Contractors Group*** *in which our "resident" construction attorney will analyze common (and not-so-common!) situations that arise in the construction field. Attorney David Barnier is a frequent contributor to The Contractors Group and welcomes your questions. David will use your questions as inspiration for hypothetical situations as a method of illustrating some laws and rules that affect contractors, as well as to illustrate some areas on which the law is currently unclear.*

This issue's hypothetical:

Ms. Beachhouse owns a rental property and has been renting the property to a tenant, Mr. Renter, for a few years. A few months ago, Mr. Renter became late on rental payments. Mr. Renter told Ms. Beachhouse that he would pay his past-due rent in full within three weeks and that "as a favor to" Ms. Beachhouse he would paint the unit and put in a new kitchen floor to "be nice" to Ms. Beachhouse.

Two weeks later, Mr. Renter paid all of his past due rent. A few weeks after that, Mr. Renter vacated the unit. Ms. Beachhouse then learned that Mr. Renter had painted the unit but that he had left the kitchen floor only half-covered with new tile and had ruined the other half of the kitchen floor. The cost of repairing the kitchen floor was $1,500, which coincidentally was the same amount as Mr. Renter's rental deposit. Ms. Beachhouse refused to return Mr. Renter's rental deposit of $1,500 upon Mr. Renter's moving out.

Upset that his rental deposit was not returned, Mr. Renter then recorded a mechanic's lien against the rental property in the amount of $5,000. The mechanic's lien stated on its face that the $5,000 amount related to "paint, tile, a late fee, and the non-returned rental deposit." The mechanic's lien was recorded 55 days after the last day that Mr. Renter performed any work on the rental property. Mr. Renter never served a preliminary notice on Ms. Beachhouse. Mr. Renter is not licensed as a contractor with the Contractors State License Board.

Mr. Renter then filed a lawsuit 92 days after the date he recorded the mechanic's lien. The lawsuit included a cause of action for breach of contract for amounts not paid to Mr. Renter for the improvements and a second cause of action for foreclosure of his mechanic's lien.

Under California law, what can Ms. Beachhouse do to defend against Mr. Renter's lawsuit?

A few laws affect these circumstances:

1. Ms. Beachhouse can argue that Mr. Renter's breach of contract cause of action should not succeed because the work Mr. Renter performed was done in exchange for Ms. Beachhouse's willingness to allow the late payment of rent. In other words, Ms. Beachhouse should argue first that there was no agreement that Ms Beachhouse would pay Mr. Renter anything, but that if there was a contract "price," that the contract "price" for Mr. Renter's work was Ms. Beachhouse being willing to allow the late payment of rent, without Mr. Renter incurring a late payment fee. (What may be more relevant than this argument, however, is the prohibition on a non-licensed contractor from recovering for work performed, which is described in Number 6, below.)

2. A contractor that contracts directly with a property owner must record its mechanic's lien within 90 days of actual completion of its work, or, if a valid notice of completion has been recorded by the property owner, within 60 days of the recording date of the notice of completion. This deadline is only 30 days if the contractor was a subcontractor and did not contract directly with the property owner). Mr. Renter filed his mechanic's lien claim 55 days after the last day that he performed any work. No notice of completion was recorded, but even if one was, Mr. Renter timely recorded his lien because the sixty day deadline would apply. Therefore, Mr. Renter's mechanic's lien claim does not fail solely on the basis of the timing of the recording of the mechanic's lien.

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3. The recoverable amount of a mechanic's lien claim is equal to the lesser of the contracted price or the actual value of the labor, materials, or other value bestowed to the property. A mechanic's lien may not include amounts unrelated to the improvement of the property such as a non-returned rent deposit. Mr. Renter included these amounts in his mechanic's lien, therefore the court would reduce the amount of his mechanic's lien claim to the value of the work he performed (as Mr. Renter would fail in being able to show any specific contract price).

Under present California law, it is uncertain whether a contractor may collect "late fees" on unpaid invoices, but it is probably unlikely that late fees, service charges, finance charges, etc., would be allowable.

4. A lawsuit must be filed on a mechanic's lien within 90 days of the date the mechanic's lien is recorded. Once 91 or more days have passed after the date of the lien, the property owner may file a petition with the court to remove the mechanic's lien from title.

If 90-plus days pass and a contractor files a lawsuit on a mechanic's lien before the owner can file a petition to remove the mechanic's lien from title, then the property owner cannot petition to remove the lien and must instead defend the lawsuit. However, Ms. Beachhouse will have an easy time defending Mr. Renter's lawsuit because she only has to show to the court that Mr. Renter filed his lawsuit more than 90 days after the date he recorded the mechanic's lien.

5. Mr. Renter did not serve a preliminary notice, but a preliminary notice is not required of a contractor who contracts directly with the owner of the improved property. The purpose of a preliminary notice is to make the property owner aware that the contractor is supplying labor, materials, etc., to the property, and that the contractor may eventually lien the property. Because Mr. Renter contracted directly with Ms. Beachhouse, the owner, there is no need to give Ms. Beachhouse additional notice in the form of a preliminary notice. Mr. Renter's mechanic's lien claim would not fail on the basis of a preliminary notice not having been served.

6. A party that acts in the capacity of contractor without a contractor's license is prohibited from collecting via a lawsuit for work performed. If Mr. Renter is not licensed, Ms. Beachhouse will succeed in defending Mr. Renter's lawsuit by illustrating to the court that Mr. Renter is not licensed.

Ms. Beachhouse can therefore expect to succeed in defending Mr. Renter's lawsuit for the reasons described above.

The above analysis is incomplete and is given with regards to a simple hypothetical and does not constitute legal advice. The analysis is intended as a general primer and the hypothetical facts are used solely to illustrate the general laws and rules discussed. While it is possible to apply California law to simple facts such as those described above, it is rare that in real life the facts of any given situation are as simple as in the hypothetical described above. While it is valuable for contractors (as well as property owners who hire contractors) to understand some of the general rules that apply to construction, an experienced construction attorney should be consulted immediately upon any construction dispute arising. Legal rights as well as the ability to accumulate helpful evidence may be adversely affected by any delay in contacting an experienced attorney.

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Practice Areas:
Construction Law
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Bar Admissions:
California, 1995
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Education:
J.D. from the University of Southern California, 1995
B.S. from the University of California, Berkeley, 1992

Summary:
Mr. Barnier is an attorney practicing general business litigation with an emphasis on construction law and a particular emphasis on litigation involving breach of contract claims, mechanic's liens, stop notices and payment bond claims. He frequently presents seminars to the construction industry by which he explains the complex laws affecting the industry, and how companies can avoid litigation or, as a last resort, be best prepared for litigation.

His articles on construction law topics have been published in numerous trade journals and magazines. In addition to construction law, Mr. Barnier represents businesses of all sizes on both litigation and non-litigation matters. In addition, Mr. Barnier is an active member in construction trade organizations including the Engineering General Contractor's Association (EGCA).

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