

## ***E-NEWSLETTER – April 2006***

### **Attention: Owners, Contractors and Subcontractors**

#### **Can A Temporary Employment Agency That Provides Employees to a Subcontractor Benefit From the Statutory Mechanic's Lien in Texas?**

The basic principle behind Texas statutory mechanics and materialmen lien law has been that any person who improves an owner's real property should be able to place a lien on that property to the extent of the value that was added to the property to make certain that the property owner is not able to obtain value to the property without paying for it. Consistent with this basic principle, the Texas Legislature has promulgated specific parts of the Texas Property Code to protect contractors, suppliers and subcontractors. For instance, chapter 53.021 of the Texas Property Code states:

- (a) A person has a lien if:
  - (1) the person labors, specifically fabricates material, or furnishes labor or materials for construction or repair in this state of:
    - (A) a house, building or improvement;
    - (B) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or
    - (C) a railroad; and
  - (2) the person labors, specially fabricates the material, or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor.

May a temporary employment agency, which provides employees to a subcontractor, claim a lien under the foregoing statute? This issue was addressed in *Advance'd Temporaries, Inc. v. Reliance Surety Co.*

In that case, construction had begun on a project known as the Corpus Christi Crosswinds Apartments ("Crosswinds"). Lamar, the general contractor for Crosswinds, had entered into three subcontract agreements with the subcontractor ("Gonzalez") in which Gonzalez would supply framing labor, drywall installation, and roofing labor to Crosswinds. Subsequently, Gonzalez contracted with a temporary employment agency ("Advance'd") to provide Gonzalez with temporary employees for Gonzalez's use in performing its subcontract with Lamar on Crosswinds.

After the relationship between Lamar and Gonzalez collapsed, Gonzalez's work at Crosswinds ended and Lamar paid Gonzalez for all outstanding work. However, an outstanding balance in favor of Advance'd remained unpaid. Advance'd filed a lawsuit to claim the outstanding balance, and the trial court subsequently denied Advance'd's claim against Crosswinds, Lamar and the surety of Crosswind's contract with Lamar. Advance'd appealed, contending that it, as a provider of temporary workers, should benefit from a claim of lien under Texas Property Code Chapter 53.021.

The court stated that the purpose of the statutory mechanic's lien is to protect laborers and materialmen who come within its terms for labor and materials consumed in the construction of improvements to real property. A subcontractor in Texas is entitled to a lien when furnishing labor or materials for construction or repair of a building under or by virtue of a contract with the owner or the owner's subcontractor. However, the statute is not designed to protect only subcontractors. Rather, the Supreme Court of Texas has held that "the mechanic's and materialman's lien statutes of this State will be liberally construed for the purpose of protecting laborers and materialmen." Accordingly, the court in *Advance'd Temporaries, Inc.* held that chapter 53 of the property code affords protection to those who "furnish labor" as well as those who actually labor on a construction project in Texas.

Nevertheless, the court also concluded that not every arrangement will establish that a temporary employment agency "furnishes labor" as defined by chapter 53. The legal status of an employer of laborers furnished to a work of improvement is the crucial factor which distinguishes a person who "furnishes" such laborers to the project, and is thus entitled to lien rights, from a person who merely organizes the work force, performs administrative functions, advances wages, or does all three on behalf of another, and is consequently not entitled to lien rights. The determination of whether an entity has "furnished labor" for Chapter 53 lien purposes is a question of fact. Factors to help determine that question of fact are as follows:

- (1) the temporary employment agency's involvement in selecting and screening the workers for hire;
- (2) the use by the agency of its own criteria for hiring the workers;
- (3) affirmative representations by the agency to the workers that it is their employer;
- (4) the nature of documentation exchanged between the workers and the agency at the start of the working relationship;
- (5) the agency's involvement in training, supervising, and disciplining the workers and otherwise retaining control over the workers or directing their behavior;
- (6) whether the agency rather than the contractor determined which workers could be terminated;
- (7) and whether the agency withheld workers rather than services on nonpayment by the contractor.

In the instant action, the record showed that Advance'd recruited carpenters and general laborers to work for Gonzalez on the construction project. Advance'd qualified the workers by verifying legal documentation, driver's licenses, social security cards, and federal employment forms. Advance'd also recruited and hired all workers as its own employees and provided all worker's compensation, unemployment insurance, and general liability insurance. And, all workers hired by Advance'd to work for Gonzalez received paychecks from Advance'd, and Advance'd made all the proper payroll deductions. Based upon these facts, the court held that Advance'd "furnished labor in direct prosecution of the work" on the Crosswinds construction project pursuant to Chapter 53 of the Texas Property Code.

*Advance'd Temporaries, Inc.* is significant in that it demonstrates the wide variety of parties that Texas statutory mechanics and materialmen lien law covers. Owners, contractors and subcontractors should have been put on notice that even an employment agency may, in certain circumstances, maintain a lien against real property in Texas.

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