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Check the Lease Terms

A contractor's lien rights when performing work for a tenant

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It has long been established that a contractor or supplier is entitled to a construction lien for the value of the work, services or materials provided to a property owner (or, in the case of a subcontractor, to the owner's general contractor), if the performance is pursuant to a written contract. The lien will attach to the owner's property.

When faced with the very real prospect of nonpayment, a lien can be a very valuable collection tool, whether by way of foreclosure proceedings or secured status in a bankruptcy proceeding. However, if the contractor, subcontractor or supplier performed work or services for, or supplied materials to, a tenant of the property, until recently they would likely have been out of luck and without lien rights.

For a construction lien to attach to the owner's property, the owner must give written authorization to the contract between the tenant and contractor. N.J.S.A. § 2A:44A-3. It is unlikely that any owner would provide such written authorization, knowing that to do so would subject the owner to the risk of a construction lien where such risk previously did not exist. Moreover, nowhere in the Construction Lien Law, N.J.S.A. 2A:44A-1 et seq., is "written authorization" defined; thus neither guidance nor legal protection is provided to the contractor. Recently, a Chancery Division court has provided such guidance by turning to little-known case law from decades ago.

In the Camden County matter, a contractor provided renovation work for Levitz Furniture at its Cherry Hill location. The subject property was originally owned by Levitz, who operated a combination warehouse and showroom. During prior bankruptcy proceedings, Levitz sold the premises. A provision of the sale included a leaseback provision, whereby a smaller portion of the premises would be leased back to Levitz, who would continue to operate its showroom space. Levitz would vacate the former warehouse space in order for the new owner to ultimately operate a self-storage facility in the former Levitz warehouse space. For Levitz to vacate the former warehouse space in favor of its showroom space, and for the owner to operate the self-storage facility in the former Levitz warehouse space, the lease required that Levitz perform certain construction work to the interior and exterior of the building.

The contractor was approximately 92 percent complete, and had only been paid up to 22 percent of its contract, when Levitz filed for bankruptcy protection. As a result of Levitz's nonpayment, the contractor recorded a construction lien claim against the leasehold and the real property. The owner filed an Order to Show Cause seeking the removal of the lien on the basis that the owner had not "authorized in writing" the contract between the contractor and Levitz.

As an initial matter, the parties agreed that under the present Construction Lien Law there are no published decisions that address the issue of work performed for a tenant. Notwithstanding the lack of recent caselaw, it was recognized that "lien statutes are remedial and are designed to guarantee effective security to those who furnish labor or materials used to enhance the value of the property of others, and, where the terms of the statute reasonably permit, the law should be construed to effect this remedial purpose." *Thomas Group, Inc. v.*

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Wharton Senior Citizen Housing, Inc., 163 N.J. 507, 517 (2000). Consequently, the court looked to the old Mechanic's Lien Law and specifically N.J.S.A. § 2A:44-68, which was replaced by the present Construction Lien Law in 1994. N.J.S.A. § 2A:44-68 of the old Mechanic's Lien Law is nearly identical to the current N.J.S.A. § 2A:44A-3, in that the owner's written consent is required in order for a lien to attach to the property when work is performed for a tenant.

This provision was tested in the matter of *Hughes v. Durso*, 65 N.J. Super. 409 (App. Div. 1961), which involved the sale of property which contemplated, but did not require, that the purchasers would constuct a building on the property. Referring to a series of cases dating back as far as 1860, the court determined that the written consent required by the statue necessitated "a clear intent by the owner to subject his interest in the land to a possible mechanic's lien." Thus, the court held that the mere contemplation of construction did not provide the requisite consent.

However, in the Third Circuit case, *In re Fleetwood Motel Corp.*, 335 F.2d 863 (3rd Cir. 1964), the court addressed a hotel lease agreement that did not simply contemplate construction of a hotel, it required construction. The court noted that the owner was forced to admit that the tenant was "obliged" to perform the construction. Referring to *Hughes* and its predecessors, the Third Circuit stated that those cases, "stand only for the proposition that the consent required…cannot be inferred from a writing of the owner permitting construction by his tenant. None of them deal with the question whether a provision in a lease requiring construction by the tenant is a sufficient consent to erection to bind the owner."

Moreover, the court added that "the obvious basis for the consent requirement is that the owner should not be held liable for erection or repairs which he did not authorize. That authorization has most assuredly been given when the owner requires the construction which gives rise to the lien. We need hardly add that it would be difficult to imagine more perspicuous language manifesting the owner's consent to erection that that contained in the lease in the case at bar." Consequently, the court held the landlord was an "active participant" in the construction contract and the contractor's lien was valid.

In the Camden County matter, it was argued that the facts were akin to the *Fleetwood Motel* case. The Levitz lease did not merely contemplate certain construction work, but rather required the work for the owner to take full possession and enjoyment of the property. Here, too, was the owner an "active participant" akin to *Fleetwood Motel*. The owner of the Levitz property not only required the work, but also agreed to provide a rent credit specifically earmarked for a portion of the work. Perhaps most importantly, the owner retained supervisory control over the plans and specifications for the work. Further, the Levitz owner had the contractual right to disavow responsibility for the work, but did not do so. The Chancery Division denied the Order to Show Cause and upheld the validity of the construction lien claim, holding that, "There's no question that this lease and the provisions noted were more than adequate to provide the requisite written agreement." The court's decision is presently on appeal.

In sum, when representing a contractor who performed work for a tenant, it is crucial to review the tenant's lease agreement. The terms of the lease may provide the contractor with lien rights, when such lien rights may not have otherwise been recognized. Property owners may no longer hide from the claims of a tenant's nonpayment when the subject work is required by the tenant's lease. ■