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Client Advisory

Subcontractor Mechanics Lien Worthless if Asserted Post-General Contractor Default

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On August 29, 2011, the Massachusetts appeals court handed down a decision confirming that a subcontractor mechanics lien recorded after the general contractor had defaulted on the prime contract is worthless because no money is “due” to the general contractor as of the date of the recording as required by the mechanics lien statute. In Maverick Construction Management Services, Inc. v. Fidelity & Deposit Company of Maryland, Inc., the court essentially affirmed its prior holding in BloomSouth Flooring Corp. v. Boys’ and Girls’ Club of Taunton, Inc., 440 Mass. 618 (2003) that because the mechanics lien statute only allows a subcontractor to recover up to the amount due to the general contractor at the time the lien is recorded, if the general contractor is already in default to the owner, as a matter of law, no money is due and it is therefore too late to lien.

Maverick was a subcontractor to Evergrass, Inc. for a project to reconstruct an athletic field complex at Nichols College. Maverick did site work. Evergrass delivered the facility to the college on September 16, 2005, and by October 11, 2005 it was apparent that there were serious problems with the field drainage. The college demanded that Evergrass address the problem. When repairs had not been effectuated by March 2006, the college broke off discussions and engaged a different contractor to do the necessary work.

On October 14, 2005, Maverick first recorded its lien for non-payment. On January 9, 2006, it recorded a dissolution of that lien to reflect receipt of a partial payment. On January 11, 2006, it recorded a new lien reflecting the revised balance due. The college recorded a creditor lien bond, thereby substituting the bond issued by Fidelity for the lien.

Meanwhile, the college initiated arbitration against Evergrass. The arbitrators found that Evergrass had substantially and materially breached the contract by reason of the defective drainage. Although the balance due under the prime contract with Evergrass at the time of project delivery was \$249,909, the college incurred expenses totaling \$803,308 to correct Evergrass’ defective work. Fidelity then argued that because the arbitrators had effectively

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confirmed that no money was due by the college to Evergrass at the time of Maverick's second lien (January 2006), Maverick's lien was worthless and should be thrown out. The trial court agreed and dismissed Maverick's case.

On appeal, Maverick argued that because it was not clear that no money was due as of January 2006, the case should have been allowed to proceed. Maverick relied upon BloomSouth which it read to say that if a subcontractor lien is filed before the general contractor abandons the project or is served with a termination notice, money may still be due and a subcontractor can still lien. Mavarick argued that because no termination notice issued and the arbitrators did not specify the date of the general contractor's breach, Maverick's lien was, arguably, timely and it should have been permitted to proceed to trial.

The appeals court rejected this narrow reading of BloomSouth. It noted that based upon the facts, it was apparent that Evergrass' breach existed at least as of the time of project delivery in September 2005. Therefore, irrespective of whether there had been a formal notice of termination, Evergrass was in default at least as far back as the date of project delivery and no money was due as of that time. While a formal termination notice could provide evidence as to the date of the default, BloomSouth did not stand for the proposition that absent a termination notice, a subcontractor lien would always be timely. Because the project had drainage problems in September 2005, well before Maverick recorded its lien, the court could properly determine that the contractor was already in default at the time recorded its lien, notwithstanding the lack of a formal termination notice. Therefore, because no further money was "due" to Evergrass at the time Marverick recorded its lien, the lien was too late.

The moral of the story is that if you are going to lien, lien early. Subcontractor liens can be recorded immediately following execution of the written subcontract, even before there is a problem. That will ensure maximum recovery. Lower tier subcontractors or suppliers can record a notice of identification (which is not technically a lien) within 30 days of executing their sub-subcontract which will fix their possible recovery at the amount due to the prime subcontractor as of the date of the recording of the notice. If Maverick, a site contractor, had recorded its lien earlier instead of waiting until the end, the result could have been very different. Though it would not have changed the result in this case, another approach may have been for Maverick to have recorded an amended statement of account (as opposed to discharging the initial lien) or, assuming no fraud, simply prosecuted its original lien with the outstanding amount claimed adjusted at trial. By dissolving its initial lien, the maximum amount recoverable would be measured as of the date of the second filing and not the first. That could have significantly altered the economics of the potential recovery. What is clear is that by waiting



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until the end of the project and after problems with the general contractor's work surfaced, Maverick lost the opportunity to obtain any meaningful security by recording a mechanics lien.

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