Will a Notice of Non-Responsibility Prevent Enforcement of a California Mechanics Lien?

The "Notice of Non-Responsibility" is one of the most misunderstood and ineffectively used of all the legal tools available to property owners in California construction law. As a result, in most cases the answer to the above question is "No", the posting and recording of a Notice of Non-Responsibility will *not* prevent enforcement of a California Mechanics Lien.

The mechanics lien is a tool used by a claimant who has not been paid for performing work or supplying materials to a construction project. The mechanics lien provides the claimant the right to encumber the property where the work was performed and later sell the property in order to obtain payment for the work performed or materials supplied. This is true even though the claimant had no contract directly with the property owner. When properly used, a Notice of Non-Responsibility will render a mechanics lien unenforceable against the property where the construction work was performed. By derailing the mechanics lien the owner protects his property from a mechanics lien foreclosure sale. Unfortunately, owners often misunderstand those circumstances where they can effectively use a Notice of Non-Responsibility. As a result, the Notice of Non-Responsibility is usually ineffective in protecting the owner and his property from the impact of the mechanics lien.

The rules for the use of the Notice of Non-Responsibility are found in California Civil Code section 8444. Deceptively simple, the rules essentially state that an owner "that did not contract for the work of improvement", within 10 days after the owner first "has knowledge of the work of improvement", may fill out the necessary legal form for a Notice of Non-Responsibility and post that form at the worksite and record it with the local County Recorder. Doing so is intended to prevent enforcement of a mechanics lien on the property.

What commonly occurs however is that early in the process the owner authorizes *or even requires* its tenant to perform beneficial tenant improvements on the property. This authorization is often set forth in a tenant lease or other written document. The dispositive factor for determining whether the Notice of Non-Responsibility will be enforceable though is whether the owner *knows* that these improvements will be made on the property. The fact is that in most cases the owner not only knows that the improvements will be made but has also actively negotiated these very terms into the lease contract. The owner then mistakenly believes that once work on the property commences it has 10 days to post and record a Notice of Non-Responsibility and thereby protect itself from a mechanics lien.

The usual error is two-fold. First, the statute states that the Notice is available when the owner "did not contract for the work of improvement". The fact though is that the owner *did* contract for the work of improvement. The owner did so *through the lease contract*. This is true even though the owner's contract was not with the contractor or supplier directly. Secondly, the 10 day period to post and record the Notice begins when the owner first "has knowledge" of the work of improvement. This knowledge was of course gained when the lease was negotiated and signed, providing knowledge typically weeks or months before the work has begun. Thus, the 10 day period can also seldom be met. The Notice of Non-

Responsibility will therefore fail both rules because the owner has in fact contracted for the improvement and because he does not act within 10 days of gaining this knowledge.

The next event in the typical scenario occurs when the tenant does not pay its contractor. The contractor then has nothing to pay its subcontractors. Material suppliers also go unpaid. Mechanics liens are then recorded by the unpaid claimants, followed by foreclosure actions within the statutorily mandated ninety days thereafter. Owners will typically point to the Notice of Non-Responsibility they posted and recorded, claiming its protection. Claimants then in turn point to the lease or other evidence that the owner *knew* of the pending improvements and contracted in some way that the improvements would be performed, often also more than 10 days before they posted the Notice. Judges generally agree with the unpaid mechanics lien claimants and the Notice of Non-Responsibility is deemed ineffective.

The fact that the Court does not enforce the Notice of Non-Responsibility under these circumstances is not an unfair result. Since the owner authorized the work to be performed and it received a substantial benefit in the form of those improvements, it is not unfair that the owner should pay for those benefits. It would be inequitable for the owner to obtain the benefit of the improvements which it authorized but for which it did not pay, while allowing those who provided the benefit to go unpaid. Moreover, without such a system in place the door would be open to owners setting up sham "tenants" who would enter into contracts to have work performed, only to disappear when the work is completed, leaving the contractor without a source of payment and the owner with a substantial benefit for which it has not paid. The system in place as described above prevents such duplicity. Owners would do well to arm themselves with proper knowledge of when the Notice of Non-Responsibility will and will not protect them and then responsibly use the Notice of Non-Responsibility.

For the legal eagles among you, the following cases illustrate the view of the courts, consistent with the above: *Baker v. Hubbard* (1980) 101 Cal.App.3d 226; *Ott Hardware v. Yost* (1945) 69 Cal. App.2d 593 (lease terms); *Los Banos Gravel Co. v. Freeman* (1976) 58 Cal.App.3d 785 (common interest); *Howard S. Wright Construction Co. v. Superior Court* (2003); 106 Cal.App.4th 314 (participating owner).

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