

Consider . . .

WATCH THOSE LIEN RELEASES!

A 2004 Oregon Court of Appeals case reiterates the need for construction parties to be careful about the language of their lien releases. Western Security v. FDS Diving Construction, 193 Or App 1 (2004).

The release at issue appears to have been a fairly common one that said it unconditionally released “any and all liens and claims whatsoever” except for claims specifically mentioned. The release also stated that, if there were any specific exceptions, the parties must “so state” in a blank area provided. The release also stated “if none, so state.” Neither party filled in the blank.

At trial, the general contractor contended that the release barred the subcontractor’s claims. In turn, the subcontractor claimed that the payment sought was for work not covered by the release.

Because no one had filled in the blank, the court held that the release was ambiguous and, therefore, had to be heard during trial instead of by a summary judgment motion. Thus, the failure to make the release clear and unambiguous meant that the parties were forced to spend substantial amounts in litigation and attorney fees.

Once again, the lesson is to “say what you mean and mean what you say.” All parties in the construction industry need to carefully read the releases they are about to enter. If you don’t understand the terms, consult with your attorney before you sign.

LITIGATION: PART 3 OF A SEVEN-PART SERIES

This article (Part 3 of our seven-part series on litigation) is on “**Service of a Lawsuit.**” Once a lawsuit is filed with the court, the plaintiff must serve both a Summons and the Complaint on each defendant. There are a number of ways to accomplish this.

The most common method of service is “personal service.” This means that a process service company physically gives true copies of the Summons and Complaint to each defendant. If the defendant is a corporation or limited liability company, then the process server gives the copies to the company’s registered agent. This is the primary purpose of a registered agent.

Since the failure to respond to a lawsuit in a timely manner can mean a judgment is taken against you, companies should consider having their attorney be their registered agent. The July 2005 issue of this newsletter will discuss default judgments in detail.

The process server then gives an Affidavit of Service back to the attorney, who then files these documents with the court. Once this is accomplished, the defendant has 30 days from the date of service in which to file an answer; if not, the plaintiff can seek a default order. (in Washington, it is a 20-day deadline).

The above is the ideal scenario. Lawyers probably would not exist if everything always went correctly. For example, what happens when the process server is unable to locate the defendant?

Locating the defendant is one area where the client can assist the attorney (and, through him, the process server). Clients should keep records of every address known for each customer and then give copies of those records to the attorney. Also, clients should pass on any information about where the defendant may work or play; defendants have been served at taverns more than once.

Sometimes the process server cannot reach the defendant personally but may be able to reach the defendant’s agent. For example, if an attorney is the registered agent, the process server is likely to leave the Summons and Complaint with the attorney’s receptionist. If the defendant is an individual, the process server may leave the documents with someone else in the defendant’s household.

When the service is made on someone other than the defendant (or its registered agent), it is known as “substituted service.” In that situation, the attorney must send a copy of the Summons and Complaint to the defendant via first class mail and must also file an Affidavit of Substituted Service with the court. The date of service is the date the letter is mailed to the defendant.

Sometimes, it can take quite some time to serve a defendant. This can be important if the lawsuit is filed close to its statute of limitation. Construction lien claims are a good example of this.

When a defendant is served within 60 days of the date the lawsuit was filed, then the court rules say that the lawsuit was commenced on the initial filing date. If a defendant is not served by that deadline, then the lawsuit is commenced on the date of service.

Returning to the construction lien claim scenario, those lawsuits must be commenced within 120 days of the date the lien was recorded. If the attorney files the lawsuit on day 120, then the defendant generally must be served within 60 days of that date or the lawsuit may not be timely.

For all of the above reasons, attorneys tend to cultivate a very good relationship with their process service companies.

BUSINESS VALUATION

Companies with more than one stockholder are well served to make annual valuations of their company (and, thus, the value of the stocks). This is particularly important where the stockholders have entered into a Buy-Sell Agreement that places certain restrictions on the transfer of stocks.

When valuations are made on an annual basis, it is a fairly easy task that can be assisted by the company’s CPA. Also, when it is done as part of the normal annual corporate maintenance, few issues are likely to arise as to the company value. If this task is not maintained, then it will invariably come up at a later date. At that point, the stockholders may be less willing to agree on the value of the company.

If there is disagreement about the value of a company, then it is necessary to hire a business valuation expert. Aside from being a substantial cost,

business valuation is somewhat of an “art”; thus, the stockholders may not agree on the valuation and may want to hire opposing business valuation experts. Not only is that expensive, it is often accompanied by expensive litigation.

As noted above, valuations should be done on an annual basis. Then, that valuation should be included in the company’s written annual minutes (which should be signed by all of the stockholders). Doing so is not only good business, but also helps avoid later disputes.

CCB QUICK TIP

If you are a contractor defending a CCB claim by a homeowner, be sure to obtain written estimates from outside contractors as to the cost to perform the work being claimed by the homeowner. While you may believe you are the only expert you need, the use of outside contractors is very helpful in defending against the homeowner’s claims.

Of course, it never hurts to ask those outside contractors to comment on the quality of your work as well as the cost of the claimed repair work. Remember, every legal claim consists of two necessary elements: (1) Liability (who is responsible?); and (2) Damages (what is the cost?).

FIRM NEWS:

ALAN L. MITCHELL is now licensed to practice law in the State of Washington.

GAYLE ALLEN, PLS will be sworn in as President of NALS of Oregon on April 21, 2005.

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