

Question 9 – July 2015 – Selected Answer 1

1. Staircase Artisan has a valid lien against the Property.

A mechanic or materialman's lien is a special type of lien on property that arises by operation of law when a mechanic or materialman provides construction to a building. This type of lien has priority over all other liens on the property. It is used to protect mechanics and materialman's from owners who do not pay for the services that the mechanics and materialman provide. When a mechanic or materialman provides services or builds or constructs on the property of another, a lien attaches to the property. However, the lien does not attach to the sidewalks, streets, and public easements. If the mechanic or materialman follows the statutory procedure, it may attach its lien to the property. A mechanic or materialman that is a subcontractor, a contractor other than the original contractor, cannot obtain a lien that exceeds the value of the materials used or the property furnished.

Staircase Artisan has a valid materialman's lien on the property. Here, there was a valid contract between Mark (the homeowner) and Contractor. This agreement was put into writing. One of the terms was the addition of the fabrication and installation of a custom hand-carved staircase. Contractor, then, entered into a subcontract with Staircase Artisan to design the staircase and oversee its installation on the Property of Mark. Contractor hired the subcontractor to finish the original contract with Mark. In addition, the material used by the subcontractor was specially made for the Property. This new hand-carved staircase was intended for Mark's home. Indeed, Contractor had to demolish the Property's existing staircase to make room for it. While there is an argument that since subcontractor never installed the staircase, the subcontractor never provided material for the Property. However, this argument will fail considering the written terms of the subcontract, the design of the staircase, and the demolition of the old staircase. Based on these facts, Staircase Artisan has provided materials for the Property and has a valid lien on the property, even though they were never installed.

2. Staircase Artisan must send notice to Mark and Contractor.

Once a mechanic's lien has attached, the mechanic or materialman has to follow a rigorous statutory procedure to perfect its lien. If the materialman is a subcontractor, the indebtedness accrues at the end of the month in which the materialman provided his services or property. The materialman must then file an affidavit with the county court in which the property is situated by the fifteenth day of the fourth month in which the indebtedness accrues. In addition, if the materialman is a subcontractor, the subcontractor must send notice, by certified mail return receipt requested or first class mail, to the owner of the property and to the Contractor that hired the subcontractor. This notice must be sent within five days of filing the notice of affidavit.

Here, Staircase Artisan must send a copy of the notice of affidavit and a copy of the contract to Mark and to the Contractor. Staircase Artisan must also send this notice by the fifth day after it has properly filed its notice of affidavit. Failure to send it by that time may foreclose its power to perfect its lien. Staircase Artisan must send this notice by certified mail, return receipt requested or first class mail.

3. Mark had a duty to retain ten percent of the contract price if he wanted to prevent the materialmans lien from attaching.

A owner of real property can prevent a materialman or mechanic from obtaining a lien on his or her property by withholding statutory retainage. Statutory retainage states that the owner can withhold ten percent of the contract price of the original contract for thirty days after the contract is completed. If done, the materialman will not have a lien on the real property, but will be able to access the statutory retainage. If the owner fails to retain the required amount for the required amount of days, then the lien may attach to the property. This statutory retainage prevents the contractor from withholding payment to his subcontractors and allows for the owner to make sure that all subcontractors are paid.

Mark should have kept ten percent of the contract price. Here, Mark signed a standard construction contract. This contract did not specify that Mark had to retain any of the contract price. This is understandable since Mark signed Contractor's pre-authorized form. In addition, the risk of Contractor skipping town with the proceeds and not paying his subcontractors was on Mark. Mark had the duty to make sure that Contractor and Subcontractors got paid for their material provided. Since Mark did not keep ten percent as he was required to do under the statute, Mark's real

property, his Dallas home, is subject to Staircase Artisan's lien.

Question 9 – July 2015 – Selected Answer 2

1) Staircase Artisan has a valid mechanic's lien against Mark's property.

In Texas a mechanic's or materialman's lien is used to protect laborers, suppliers, fabricators, and subcontractors from nonpayment. It functions by requiring property owners to retain 10 percent of the project price when creating construction contracts. If any workers make claims against the funds and the original contractor does not dispute them, the homeowner pays the claim from the retainage and deducts it from the total amount owed to the original contractor. When property owners properly handle the retainage and claims, they are shielded from liability for any claims made as a result of their construction contract.

The expense of fabricating custom fixtures is counted in a mechanic's lien claims even when the fabrication is not installed. This is because a custom fabrication cannot be taken to a new job site and used on another project.

Texas Property Code requires that subcontractor mechanic's lien claimants who abandon projects file their liens by the 15th of the month, two months after the abandonment of the project.

A mechanic's lien is filed at the county clerk's office by presenting a statement of the lien claim, written as to statutory specifications, as well as an affidavit from the claimant attesting to the work done, the cost of the work, and how much he is owed.

Staircase Artisan was both a subcontractor and a fabricator. He entered into his contract for the staircase as a subcontractor of the original contractor. Staircase Artisan has a valid claim because he reached the point of the contract where it was stipulated that he would be paid "immediately," and he was not paid. Staircase Artisan gave notice of his claim, and then filed his claim. Therefore, his claim is valid.

2) Staircase Artisan must notice Mark and Contractor within file days of the filing of the lien, and he must do so by certified mail.

Mechanic's liens claimants have five days after the timely filing of a lien with the county clerk to deliver notice. A subcontractor must notice not only the homeowner, but also the original contractor. This notice is to be given by certified US Mail with return receipt requested, and it is to be sent to the last known address of the parties to be noticed.

3) Mark had a statutory duty to retain ten percent of the contract price or make himself personally liable for the claims that retainage would have funded.

Mechanic's liens impose a statutory duty on homeowners to retain 10% of construction contract payments until 30 days after the completion of the projects. When property owners do not comply, they become personally liable for what they should have retained. A mechanic's lien claimant that the property owner refuses to pay may file in court to have the lien perfected, and then to foreclose on the property to satisfy the debt. Homesteads cannot be foreclosed on for mechanic's liens, however.

Mark had a statutory duty to withhold ten percent of the total contract price until 30 days after the completion of the project. His failure to do so made him personally liable for the nonpayment.

Question 9 – July 2015 – Selected Answer 3

1. Staircase Artisan probably has a valid statutory lien against the Property. At issue is whether Staircase Artisan complied with the requirements to validly perfect a statutory materialman's and mechanic's lien (MML).

A statutory MML arises when a contractor or subcontractor: (1) provides materials that will be, or are intended to be, incorporated into chattel; (2) is in the usual business of providing such materials; (3) files a lien affidavit with the county clerk (which provides the names of the owner and general contractor, a description of the property, and the nature of the material provided); and (4) sends a notice of a filed lien Affidavit to certain required persons (see part 2 below). Although a contractor or subcontractor is not usually entitled to a statutory MML for materials that were not actually provided and incorporated into a chattel, there is an exception for unique goods. Because there is no market for unique goods, the contractor or subcontractor is entitled to a statutory MML even if the goods are not incorporated into the chattel. The statutory MML must be filed no later than the first Tuesday on the third month after payment is due.

Here, Staircase Artisan was a subcontractor hired by Contractor for the renovation of Mark's staircase. Staircase Artisan fabricated a unique staircase for Mark's home on the Property, but refused to deliver it without payment. While a subcontractor must generally deliver and install, or attempt to install, materials to be entitled to a lien, the staircase at issue will qualify as a unique good. Because there will be no market for this staircase in another home, Staircase Artisan satisfies the first requirement. Second, Staircase Artisan was in the usual business of fabricating custom staircases. Third, after Staircase Artisan was refused payment, it filed a lien Affidavit against the property with the Dallas County Clerk (the facts state that the lien was "timely" filed). The facts do not indicate whether Staircase Artisan supplied the necessary information in the lien Affidavit, so it will be assumed that it did. Lastly, Staircase Artisan must give timely notice to certain parties, as discussed in part 2, below. Therefore, Staircase Artisan has a valid statutory lien against the Property.

2. Staircase Artisan must give notice of the filed lien Affidavit to Contractor and Mark within five days of filing the lien Affidavit by certified mail, return receipt requested. At issue are the notice requirements to perfect a statutory MML.

The statutory MML requires the applicant to give notice to all interested parties, which includes the general contractor, the owner of the property, and any other debtors or creditors of the property. This notice must be given within five business days of filing the lien Affidavit and must be sent by certified mail, return receipt requested.

Here, Staircase Artisan must send notice to Contractor and Mark, as well as any other creditors or debtors with an interest in the Property, because they are interested parties. Staircase Artisan must give this notice within five days from when it filed the lien Affidavit with the County Clerk. In addition, the notice must be sent via certified mail, return receipt requested.

3. Mark was required to withhold a retainage of ten percent from his payments to Contractor. At issue is whether Mark was required to withhold a retainage from any payments to Contractor even though he did not have notice of such retainage.

Under Texas statute, an owner of property who hires a contractor must automatically, with or without notice, withhold a retainage from his payments to the contractor. This retainage must be either ten percent of the contract price or ten percent of the estimated value of the work. The owner must hold this retainage until either 30 days have elapsed or he receives notice that all subcontractors have been paid in full.

Here, Mark hired Contractor to renovate his home, but the construction contract was silent as to the amount of the contract price Mark was to withhold as retainage. Nevertheless, notice is not required for the duty to withhold a retainage to arise, as it is present in every construction contract such as this. Hence, Mark had a statutory duty to withhold either ten percent of the contract price or the estimated value of the work as a retainage from the payment to Contractor. Thus, Mark breached this duty by not withholding the retainage.