ILLINOIS STATE BAR ASSOCIATION™

REAL PROPERTY

The newsletter of the ISBA's Section on Real Estate Law

January 2015, vol. 60, no. 7

Who do you think you're dealing with? Implied contracts and the Illinois Mechanic's Lien Act

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Misidentifying the parties to a contract can be fatal to a mechanic's lien claim. Complications can also result when the contract at issue is an implied contract rather than an express written or oral agreement.

The Illinois Mechanic's Lien Act provides that a lien, "…shall consist of a brief statement of the claimant's contract…" (770 ILCS 60/7) This means that the lien must property identify the parties to the lien claimant's contract.

In *Candice Company, Inc. v. Ricketts*, 666 N.E.2d 722 (1st Dist. 1996), the lien claimant's name on the contract was "Father and Sons, Inc." However, the lien claim itself identified the contracting party as "Candice Company, Inc." Thus, the lien claimant who was identified as the contracting party on the lien claim did not match the name of the lien claimant identified on the actual contract giving rise to the lien. The court therefore held that the lien, "incorrectly describes the parties to the contract on which the lien is purportedly based and therefore, does not meet the requirements of section 7." Id. 666 N.E.2d 725.

Similarly, in *Ronning Engineering Co., Inc. v. Adams Pride Alfalfa Corp.*, 537 N.E.2d 1032, (Ill. App. 4 Dist., 1989), the plaintiff's complaint alleged a contract between the plaintiff and "Adams County Joint Venture." However, the lien itself described a contract between the plaintiff and "Adams Pride." As a result of this incongruity, the plaintiff's lien was deemed invalid because it incorrectly named the parties to the Plaintiff's own contract, i.e., it described the "wrong contract."

Finally, in *Bale v. Barnhart*, 798 N.E.2d 750 (4th Dist. 2003), the lien identified two different lien claimants, i.e., Martin L. Bale, d/b/a Bale Excavating and Farm Drainage and Carla S. Bale. The court properly determined that this conflict, "creates an ambiguity that results in an inaccurate description of the contract." Id at 755.

In light of these cases, it is of paramount importance that your lien claim not only describe your client's entity, but the lien claim must also accurately identify the entity with whom your client contracted. This is not always as clear cut as you may think, particularly when the entity with whom you contracted is no longer in business.

Factual Set Up

Let's assume your client is a materials supply company called Materials Supply, Inc..("MSI") A contractor named Joe Builder forms a sole proprietorship called Phantom Builders and submits a credit application to MSI so that he, doing business as Phantom Builders, can purchase materials from MSI on a credit basis. The credit application is accepted.

A short time later, Joe Builder decides to incorporate his business, so he forms Phantom Builders, Inc. The problem is, Joe Builder never informs MSI that he is now doing business under the corporate name. Instead, Joe simply requests and receives quotes (which MSI addresses to the old company name), and then calls in his orders. He never tells his MSI sales rep that he had incorporated. The sales rep thinks he is just filling orders for the sole proprietorship named on the credit application that Joe submitted. Joe never tells MSI to modify the credit agreement to reflect the new entity as the customer. The delivery tickets and invoices sent by MSI are all addressed to the old company name. Joe pays for materials by issuing checks from his new entity.

One day Phantom Builders, Inc. enters into a construction contract with property owned by "Slippery Slopes, LLC." ("Slippery Slopes"). As usual, Joe requests a quote from MSI. MSI addresses the quote to Phantom Builders, not Phantom Builders, Inc. Based on this quote, Joe then calls his sales manager at MSI and places an order for materials to be delivered to the Slippery Slopes property. MSI delivers the materials to the Slippery Slopes job site. All delivery tickets and invoices are directed to Phantom Builders. They do not mention Phantom Builders, Inc.

MSI's invoice is not paid. MSI asserts a lien claim asserting that it has a contract with Phantom Builders for the materials delivered to the job site. Slippery Slopes defends against the lien claiming that Phantom Builders is not in the chain of contracts on its job, that Joe Builder was no longer doing business as Phantom Builders, that MSI has mis-described its contract, and therefore that MSI's lien is invalid under *Candice*, *Ronning*, and *Bale*. At his deposition, Joe Builder will testify that he ordered materials for the Slippery Slopes job pursuant to the credit agreement in place between MSI and Phantom Builders, and he will admit that he never informed MSI about the change in company name, nor did he submit a new credit application under the new company name.

What a mess.

The questions are 1) whether MSI properly identified who it contracted with and 2) whether that entity is in the chain of contracts to the owner thus permitting enforcement of a lien.

The Illinois Mechanic's Lien Act provides some guidance. Section 1 of the Act provides in relevant part:

> Any person who shall by any contract...*express or implied*...with the owner of a lot...or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot...is known ...as a contractor...

(770 ILCS 60/1(a)) (emphasis added).

Section 21(a) of the Mechanics Lien Act permits a lien to a subcontractor as follows:

> every...person who shall furnish any labor, services, material... for the contractor… shall be known under this Act as a sub-contractor, and shall have a lien for the value thereof, with interest on such amount from the date the same is due.

770 ILCS 60/21(a).

With that law in mind, let's turn to the questions.

Question #1: Did MSI have a contract with Phantom Builders?

The elements of a contract are "an offer, an acceptance and consideration." *Zinni v. Royal Lincoln-Mercury, Inc.*, 406 N.E.2d 212, 214 (Ill.App. 1st Dist. 1980) As far as MSI knew, Joe Builder was still doing business under his credit agreement which was in the name of Phantom Builders. However, Joe had come to believe that he no longer was operating that company, and he testified at his deposition that he intended to place the order under the name of his new company. However, all the paperwork (credit agreement, quote, delivery tickets and invoices) indicates the existence of an agreement between MSI and Joe Builder d/b/a Phantom Builders. Joe also admits that the order was placed under Phantom Builder's credit agreement.

Slippery Slopes argues that since Joe Believed he was no longer operating under the d/b/a of Phantom Builders, then he could not have caused that entity to contract with MSI. In other words, how could he have "accepted" an offer on behalf of a company he no longer thought existed? The answer is that conduct speaks louder than words.

If Joe did not expressly enter into a contract with MSI, then he certainly did so under an implied contract. As per 770 ILCS 60/1(a) cited above, an implied contract can give rise to a lien. Indeed, the Illinois Supreme Court defines a Subcontractor as "[o]ne who has entered into a contract, *express or implied*, for the performance of an act with the person who has already contracted for its performance." *Gunthorp v. Golan*, 704 N.E.2d 370, 374 (Ill., 1998) (emphasis added).

Under Illinois law, "The only difference between an implied contract and an express contract is that an express agreement is derived from an actual agreement, either verbal or written, and a contract implied in fact is inferred by consideration of the facts and conduct of the parties." *In re Marriage of Bennett*, 587 N.E.2d 577, 580 (Ill. App. 4 Dist., 1992).

The cases examining implied contracts in the context of a mechanic's lien case are not plentiful, but they do exist. In *Harwood v. Brownell*, 32 N.E. 347 (3rd Dist., 1890), the court determined that an implied contract existed where "the materials were to be furnished from time to time as ordered, and charged for at reasonable prices." Under this test, MSI most certainly had an implied contract because it furnished materials as ordered and charged reasonable prices. Whether or not Joe Builder intended to order materials under his old company name cannot change the fact that the order was admittedly placed under the credit agreement for that company. If Joe wanted to order materials on credit for his new company, he was obligated to submit a new credit application for that new company which would then have to be examined and approved by MSI before orders could be placed under the new company name.

Question #2: Is Phantom Builders in the chain of contracts flowing from the Slippery slopes contract with Phantom, Inc.?

Here is where Slippery Slopes lives up to its name. It argues that while there may be a contract between MSI and Phantom Builders, there is no contract between Phantom Builders and Phantom Builders, Inc. Essentially, the argument is that Joe Builder did not have a contract existing between his two companies for the Slippery Slopes job and therefore, there can be no lien.

The problem again is that Joe Builder testifies that he thought he was no longer doing business under the Phantom Builders name. If that was the case then how could he have a contract between the two companies?

Once again, MSI has to argue that the contract that exists between Phantom Builders and Phantom Builders, Inc. is an implied contract. Basically, it is argued that Joe Builders used both of his companies to facilitate the transaction. He used his credit agreement through Phantom Builders to obtain materials from MSI to be used for the Slippery Slopes job he contracted through Phantom Builders, Inc. In other words, it is the conduct that proves the contract.

From a policy perspective, if the court denies a contract under these circumstances, then any individual could effectively prevent the existence of a mechanic's lien by simply forming two different companies for each job, with one ordering the materials and one using those materials to do the work.

The Take Away

The above-state scenario really happened. The names have been changed to protect the innocent. A settlement was reached in case you are wondering. But there is something to glean from the scenario.

First, the paucity of law on implied contracts as regards mechanic's liens is surprising in light of the plentitude of case law interpreting the Act. The only explanation can be that while the Act gives lip service to recognizing a lien for an implied contract, not many attorneys want to test this theory in the courts. I can tell you from first hand experience, it can be difficult to convince a judge that the circumstances warrant the imposition of an implied contract. A judge is far

more comfortably treading the familiar path of express oral and written contracts.

Next, be sure your client knows who they are dealing with. It sounds like a simple question, "who are you contracting with?" but the facts can reveal a confusing answer. Contractors can form a number of different companies in order to carry out their jobs. Some are intended for union jobs, some for non-union jobs, and sometimes, they just shutter a business and start a new one. Business owners do not always follow protocol in documenting their agreements, and they do not always provide notices of dissolution. In the end, an entity you thought you were contracting with might in fact turn out to be nothing but a phantom. Be careful out there. ■

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