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CONSTRUCTION LAW

Special Rules Govern Condo Mechanic's Liens

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Real Property Law §339-l prohibits, except in certain circumstances, the placement of any lien (including a mechanic's lien) against the common elements of a property that has been converted to condominium ownership. Because of the unique nature of the condominium form of ownership (and the unique rules applicable thereto), contractors, as well as condominium unit owners, boards of managers and even sponsors, should know the rights available to, and the limitations imposed upon, persons retained to supply labor and materials in the construction, renovation or repair of a property under or converted to condominium ownership.

Forms of Ownership

The condominium is a statutorily created form of real property ownership that enables several persons (or legal entities) to share ownership of a single parcel of real property. Although the term "condominium" is commonly used to refer to the physical property, it really refers to the form by which the real property is owned. The condominium form of ownership is a unique hybrid combining ownership in fee (of the condominium units) with ownership in common (of the land and other common elements).

In the case of a cooperative, the real property and its improvements are owned by a single entity; the cooperative corporation. The lessee of a co-op acquires the right to occupy a particular apartment by virtue of owning shares in the cooperative corporation. The co-op shares are allocated to an apartment and the tenant/shareholder occupies the apartment under a landlord-tenant relationship with the cooperative corporation pursuant to the terms of a proprietary lease. By contrast, in the case of a condominium, the real property and its improvements are owned by the individual unit owners. Each individual unit is treated as a separate parcel of real property. The condominium purchaser acquires title to his or her unit in fee simple absolute and also acquires an allocable share of the common elements (the land and all other elements of the property that are not expressly part of the units) which the unit owner owns under a tenancy in common with the other unit owners.

ISTOCK

The formation and management of the condominium is governed by the Condominium Act,[1] and the condominium form of ownership is established with respect to a particular piece of real property by the filing of a condominium "declaration." The act of filing the declaration divides the existing property into a number of distinct parcels that are described in the declaration. The individual parcels are designated as units and each unit may be owed separately as an individual parcel of real property. The filing of the declaration also results in the designation of new tax lot numbers (representing the several units) that supersede the tax lot number (or numbers, in the case of a building constructed upon more than one lot) that applied to the property historically.

In the context of a multi-family residential property converted to condominium ownership, the units are the individual apartment units (and may also include one or more commercial units designated for the operation of a business or professional office). The declaration may describe the units as the areas within existing apartment units (or individual commercial tenant spaces) in a building being "converted" to condominium ownership, or it may describe the individual units intended to be constructed as part of the construction of a new building (or the substantial modification of an existing building as in the case of the conversion of a former commercial or industrial property to residential use). The balance of the property that is not included in the description of the units constitutes the common elements (i.e., the land, hallways, stairways, lobbies, and all other parts of the structure not specifically included within the definition of the units). Section 339-i(3) of the Condominium Act provides, in part, that "[t]he common elements shall remain undivided and no right shall exist to partition or divide any thereof, except as otherwise provided in this article."

Rules of Condominiums

When it comes to mechanic's liens, cooperatives are treated no differently than any other parcel of privately owned real property.[2]

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Condominiums, on the other hand, are subject to unique rules that are designed to preserve the condominium form of ownership. Among those rules is §339-l of the Condominium Act, which reads as follows:

> 1. Subsequent to recording the declaration and while the property remains subject to this article, no lien of any nature shall thereafter arise or be created against the common elements except with the unanimous consent of the unit owners. During such period, liens may arise or be created only against the several units and their respective common interests.
>
> 2. Labor performed on or materials furnished to a unit shall not be the basis for the filing of a lien pursuant to article two of the lien law against the unit of any unit owner not expressly consenting to or requesting the same, except in the case of emergency repairs. No labor erformed on or materials furnished to the common elements shall be the basis for a lien thereon, but all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers, and the same shall be expended first for such purpose before expending any part of the same for any other purpose.

The purpose of Section 339-l is to prevent the manifest hardship that would occur if ownership of the common elements were "separated" from the units by virtue of the foreclosure of a security interest on the common elements.

The first paragraph of Section 339-l prohibits the encumbrance of the common elements except by express agreement of all of the unit owners. Thus, in the case of borrowing to finance repairs or renovations, the board of managers of the condominium is powerless to offer the common elements as collateral unless all unit owners consent.

The second paragraph of Section 339-l concerns non-consensual liens sought to be imposed by persons providing labor and materials for the improvement of the condominium property. The Legislature made a distinction between the rights of persons providing labor and materials to individual condominium units and persons providing labor or materials to the common elements. *Country Village Heights Condominium (Group I) v. Mario Bonito Inc.*, 79 Misc. 2d 1088, 363 N.Y.S.2d 501 (Sup. Ct., Rockland Cty. 1975). Given the status of the condominium units as individual parcels of real property, the first sentence of §339-l(2) makes it clear that work performed on one unit, cannot form the basis of a lien on the unit of another owner who has not expressly consented to or requested the lien. RPL §339-l(2); *Country Village Heights Condominium*, 363 N.Y.S.2d at 504. The second sentence of §339-l(2) provides that no labor performed or materials supplied to the common elements can form the basis of a lien on the common elements. RPL §339-l(2). Accordingly, persons that might ordinarily have the protection of mechanic's lien rights under Section 3 of the Lien Law, do not have those protections in the case of work performed at the behest of the board of managers of a condominium.[3] That person is not without protection, however, since the second sentence of Section 339-l(2) provides that if the board of managers has requested or has consented to the performance of the work, all common charges collected and to be collected by the board of managers shall constitute trust funds that must be used for the payment of the labor and materials "before expending any part of same for any other purpose." RPL §339-l(2).

> Contractors not familiar with the rules can find themselves without security for the payment of work they have performed…. Unwary unit owners and boards of managers, on the other hand, may find themselves liable for the obligations of sponsors who have failed to pay contractors retained to perform work in connection with the construction, renovation or repair of the condominium property.

Sponsor's Contractors

There are times, however, when a contractor may supply labor and materials to the common elements without the express request of consent of the board of managers. The most common example would be a contractor hired by a sponsor for the construction or renovation of a building that is converted, either prior to or during the performance of the contractor's work, to condominium ownership.

In *Northeast Restoration Corp. v. K&J Construction Co.*, 757 N.Y.S.2d 542 (1st Dept. 2003), the plaintiff, a subcontractor hired to perform roofing and masonry work in connection with the renovation of a residential building, sought to foreclose a mechanic's lien for the balance of the amount alleged to be owed for the plaintiff's work. During the performance of the work, the owner of the property filed a condominium declaration by which the property's single, original tax lot was superseded by 23 new tax lots attributable to the individual condominium units.[4] Northeast filed its lien subsequent to the filing of the declaration; however, Northeast's notice of lien described the property by its original, superseded tax lot. The court cancelled Northeast's lien and dismissed the complaint holding that the lien constituted an improper "blanket lien," since it sought to encumber the entire property, including its common elements. Northeast thereafter brought another action. In the second iteration of *Northeast Restoration Corp. v. K&J Construction Co.*, 776 N.Y.S.2d 780 (Sup. Ct. New York Cty. 2004), Northeast sought to enforce the trust funds provisions of Section 339-l(2). Northeast argued that the condominium board of managers was under the control of the sponsor, therefore, the work was performed at the specific request of the board. The court held that while a literal reading of the statute would support Northeast's argument, the purpose of the statute was to protect the unit owners, therefore, the court interpreted the statute to apply only when the express request or consent comes from a board of managers elected by the unit owners.

In a case like *Northeast Restoration*, if the lien is canceled after the expiration of the statute of limitations for filing a mechanic's lien, the contractor is without security. Although section 12-a of the Lien Law permits the court, "in a proper case," to amend a lien nunc pro tunc, that section presupposes a valid lien. Courts have held consistently, that a blanket lien that does not limit the description of the property to the individual tax lots that are sought to be encumbered fails to describe the property adequately and is, therefore, invalid and subject to summary cancellation. *Matter of MME Power Enterprises Inc.*, 613 N.Y.S.2d 266 (2d Dept. 1994); *Country Village Heights Condominium (Group I) v. Mario Bonito Inc.*, 79 Misc. 2d 1088, 363 N.Y.S.2d 501 (Sup. Ct., Rockland Cty. 1975). As the Second Department wrote in *Advanced Alarm Technology Inc. v. Pavilion Associates*, 145 A.D.2d 582, 536 N.Y.S.2d 127, 130 (2nd Dept. 1988), "[a] court of equity cannot breathe life into a notice of lien that is insufficient."

What happens in the case where the sponsor retains ownership of some of the units at the time that the lien is filed? Again, the answer

depends upon how the property is described in the notice of lien. A blanket lien that describes the property by reference to a superseded tax lot, like the ones in *Northeast Restoration* and *Advanced Alarm Technology*, is invalid even against the sponsor's retained lots. *Application of Atlas Tile and Marble Works Inc. and Atamco Inc.*, 595 N.Y.S.2d 10 (1st Dept. 1993). As the court wrote in *Advanced Alarm Technology*, "the description of the property subject to the lien was inadequate since it failed to limit the lien to the particular units in the condominium, if any, which were claimed to be subject to the lien, but rather imposed a 'blanket lien' on the entire property." The contractor may, however, lien the individual units to which the sponsor retains title *and* the percentage interest in the common elements allocated to those units.

The situation often occurs where a mechanic's lien is filed when the sponsor is trying to sell units in the condominium. The existence of the lien may frustrate the sale of the units, even if the lien is an invalid blanket lien. If the sponsor does not have the luxury of time to petition the court to declare the lien invalid, the sponsor may be forced to bond the lien in order to permit the sale. One might conclude that by bonding the lien, the sponsor has, in effect, cured the fatal defect. Since the defect in the lien is based upon the fact that it improperly purports to impose a "blanket lien," by substituting the bond for the property, the "blanket lien" is removed. However, in *Advanced Alarm Technology Inc.*, the court ruled that the filing of an undertaking to discharge a blanket lien does not cure the defect in the lien. In that case, a blanket lien filed against the condominium property was discharged by the filing of an undertaking. The court noted that the surety on the undertaking agreed "'to pay any judgment which may be rendered against the property for the enforcement of said lien.'" 536 N.Y.S.2d at 129. Since the lien was declared invalid, the court ruled that the surety's obligation to pay would never arise.

A notice of lien that is overly inclusive may also be amended, so long as the property to which the sponsor retains ownership is properly described. *Metro Masonry Inc. v. West 56th Street Assoc.*, 558 N.Y.S.2d 470 (1st Dep't 1990). For example, when only a portion of a single tract of land is converted to condominium ownership and a number of the units are sold, a mechanic's lien filed against the entire unified tract by a contractor who performed work in connection with the development of the property will be dismissed as invalid against the condominium portion of the tract, but it is nevertheless valid against the portions of the property retained by the developer/sponsor. *United Brotherhood of Carpenters and Joiners of America v. Nyack Waterfront Associates*, 182 AD 2d 16, 586 N.Y.S. 2d 665 (3rd Dept. 1992).

The term "blanket lien" may be somewhat misleading since a notice of lien that purports to lien every unit in a condominium by reference to its correct tax lot number would also technically constitute a "blanket lien." However, such a notice of lien is consistent with the language of RPL §339-l(1), which permits a lien "against the several units and their respective common interests," and it is consistent with the rule of cases such as *Advanced Alarm Technology Inc. v. Pavilion Associates*, 536 N.Y.S.2d 127 (2d Dept. 1988) and *Gateway III, LLC v. Action Elevator Inc.*, 2007 WL 281 5197 (Sup.Ct. N.Y. 2007), since the notice adequately describes the property sought to be encumbered. The fact that some of the units may have been sold should simply mean that the lien is invalid as against those lots; however, it should still be valid against the retained units.

What happens if the contractor hired by the sponsor performs work after a board of managers has been elected by the unit owners? It would follow logically that the contractor would be able to pursue a trust claim so long as the contractor can establish that the board of managers consented to the performance of the work. The sponsor owes an obligation to the unit owners to deliver the units and the common elements in the condition represented in the condominium declaration. Therefore, even after a majority of the units have sold, the sponsor may have to retain contractors to perform finish work or additional or corrective work on the building in order to meet those obligations. If control of the condominium has already been turned over to a board of managers elected by the unit owners, and the board is aware that the work is being performed, one would conclude that the board has consented to the performance of the work. Therefore, although the contractor would not be able to lien the common elements, it should be able to pursue a trust claim against the common charges.

Similarly, work performed on an individual unit from and after the date that the unit is sold, to the extent that it can be demonstrated that the work was performed with the consent of the unit owner, would form the basis of a lien on that unit.

Conclusion

The law of mechanic's liens as it applies to condominiums presents unique issues that can result in problems for contractors, as well as condominium unit owners and boards of managers. Contractors not familiar with the rules can find themselves without security for the payment of work they have performed on the condominium property. Unwary unit owners and boards of managers, on the other hand, may find themselves liable for the obligations of sponsors who have failed to pay contractors retained to perform work in connection with the construction, renovation or repair of the condominium property.

The preparation and filing of a mechanic's lien requires, among other things, appropriate due diligence regarding proper identification of the property and the status and nature of ownership. Purchasers of new condominiums, especially where the sponsor's work is still ongoing, would be well served to understand the value of the work yet to be paid for and to demand adequate security for the performance of the sponsor's obligations with respect to such work.

1. New York Real Property Law sections 339-d through 339-kk.

2. Section 3 of the New York Lien Law provides, in part, that "[a] contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman…who performs labor or furnishes material for the improvement of real property with the consent or at the request of the owner thereof, or his agent, contractor or subcontractor, …shall have a lien for the principal and interest, of the value, or the agreed price, of such labor…or materials upon the real property improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter."

3. Although not expressly set forth in paragraph 2 of §339.1, paragraph 1 of §339.1 would seem to allow the unit owners unanimously to consent to the placement of a mechanic's line on the common elements.

4. The declaration was later amended to make the total of new tax lots 28.