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# Best in Law: Mechanics Liens and Arbitration Rights

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By Victor Wolf

Contrary to the old adage, a mechanics lien claimant that also has a contractual right to seek binding arbitration of disputes can have it both ways — provided they take action to preserve their

arbitration rights.

Mechanics liens are among the remedies available to a contractor, subcontractor, laborer or a material supplier to ensure payment for work performed on a private construction project. In California, people furnishing labor or materials for a project on a property have a constitutional right to file a mechanics' lien as a security interest against that property until the debt owed is paid.

A mechanics lien claimant enforces their rights by timely recording the lien on the real property benefited by the work, followed by the filing of a lawsuit to foreclose the lien within 90 days after recording. On a successful suit, the property can be sold to pay the claimant for the labor, service or equipment provided.

However, if an action to foreclose the lien is not filed within 90 days after recording the lien, the lien expires and is unenforceable.

For contractors who prefer binding arbitration over going to court to handle disputes, this can be a particularly confusing and frustrating situation. After all, isn't the purpose of having a binding arbitration provision in the contract to ensure a process that is generally faster, simpler and more efficient and flexible than litigation? So, does a contractor have to give up these potential advantages to enforce their mechanics lien rights? The short answer is "no." However, as a recent appellate court decision tells us, in such situations, lien claimants must comply with specific requirements to maintain their arbitration rights.

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*Von Becelaere Ventures LLC v. James Zenovic* involved a construction contract to build a single-family residence in Laguna Beach. The contract contained a binding arbitration provision. Disputes arose that led to the contractor recording a mechanics lien.

The owner filed a construction defect complaint alleging breach of contract, as well as other claims. In response, the contractor filed an action for breach of contract to recover money due on the contract and to foreclose on the mechanics lien.

About a month later, the contractor filed a petition to compel binding arbitration, contending all of the claims raised by the owner fell within the arbitration clause of the contract. The trial court denied the petition because the contractor failed to comply with the requirements of Code of Civil Procedure section 1281.5. Section 1281.5(a), which provides that a claimant can file an action to enforce a mechanics lien but still maintain their arbitration rights under a written agreement PROVIDED that, when filing to enforce the lien, the complaint alleges the claimant does not intend to waive their arbitration rights and, within 30 days after the complaint is served, will request that the litigation be suspended to pursue arbitration — or makes the request to suspend the litigation and pursue arbitration at the same time the complaint is filed.

On appeal, among other things, the contractor argued the requirements of section 1281.5 only applied to the mechanics liens' claim and he was free to require arbitration of any other claims. The appellate court disagreed and held that, by failing to comply with section 1281.5, the contractor had waived his arbitration rights as to ANY of the issues raised in the litigation.

*Von Becelaere Ventures, LLC v. James Zenovic* makes it clear that if a contractor or other lien claimant wants to both enforce a mechanics lien AND preserve the ability to compel binding arbitration of any claims arising from the contract, the requirements of section 1281.5 must be strictly adhered to. Such requirements can be overlooked, especially in the scramble to file an action before the expiration of the 90-day deadline to preserve the lien.

By contrast, both statutory and case law suggests the provisions of section 1281.5 would not apply to an arbitration clause in a contract that provides that arbitration shall be governed by the Federal Arbitration Act. In general, the mere filing of a lawsuit does not result in a waiver of a right to arbitration under the FAA. However, federal courts have held that arbitration may be waived when a party actively litigates the case prior to seeking arbitration. The point at which involvement in litigation may be deemed a waiver is determined on a case-by-case basis and may turn on the party's delay in taking action to enforce their arbitration rights.

Consequently, even under arbitrations governed by the FAA, a contractor or other lien claimant cannot simply sit on their rights indefinitely. Timely action must be taken to enforce the arbitration provision or risk losing such rights and

the advantages that may be enjoyed by avoiding the time and expense of litigation.

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