

An Appealing Approach To Mechanic's Lien Searches



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SEARCHING TITLE FOR MECHANIC'S LIENS is usually a routine matter. The examiner finds a mechanic's lien and then goes to the court's file to determine if an enforcement action has been filed within six months of the date the lien was filed and issues the report. However, the title search may not stop there. Recent mechanic's lien claims litigated in circuit courts included issues beyond the ordinary mechanic's lien search. This article will analyze those issues and the Virginia Supreme Court case that provides guidance on how a thorough search should be handled to ensure that the status of the mechanic's lien is reported accurately.

In 1994, the Virginia Supreme Court issued its opinion in *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994), in which the trial court sustained a demurrer to a subcontractor's enforcement action on the grounds that it failed to name a necessary party. The trial court released the lien of the subcontractor, Air Power, Inc. ("Air Power"), and dismissed its enforcement action. Counsel for Air Power endorsed the Order "Seen and excepted to." The order releasing the lien along with a certificate of release was then filed in the land records. Air Power appealed the ruling, but did not seek a stay of the proceedings or request other relief to prevent execution of the trial court's judgment and Air Power therefore had no mechanic's lien of record. While the appeal was pending, and while the mechanic's lien was released of record, a third party, Virgun A Corporation ("Virgun"), purchased the property at foreclosure.

The Supreme Court of Virginia reversed the trial court's ruling, and remanded the case. On remand, the trial court reinstated Air Power's mechanic's lien, ruled that it was valid and gave it retroactive effect. These rulings were then appealed by the owner of the property. In this second appeal, the Supreme Court of Virginia ruled that the trial court correctly reinstated the lien, but that it erred when it gave the mechanic's lien retroactive effect. The Court reasoned that Virgun was a bona fide purchaser without notice

because when Virgun acquired the property there was nothing in the land records that indicated that the property was subject to Air Power's lien. The Court noted the testimony of the owner's expert title examiner who testified that based on the certificate of release, the order filed in the land records and on the fact that the 30-day period for appealing the demurrer ruling had expired, a prudent title examiner would not have looked back to the records of the trial court.

Similar issues were raised in two recent lien enforcement actions in York County Circuit Court. In the first matter, a general contractor sought to enforce two liens in one action, one for approximately \$3.8 million and the other for approximately \$800,000. The trial court ruled that the \$3.8 million mechanic's lien was invalid because it violated the 150 day rule contained in Virginia Code § 43-4. Citing *Air Power*, the owner requested that the order invalidating the lien also release it of record. The general contractor argued that the lien should not be released of record because there were matters still pending and the order was interlocutory. The trial court agreed with the general contractor and an order was entered invalidating the lien but not releasing it of record. Under those circumstances a title examination would have shown that the lien was not released and the general contractor maintained that it had a claim against the property.

In the second matter litigated in York County, a subcontractor's mechanic's lien was invalidated because its subcontract contained a pay if paid clause and there was evidence that its general contractor would never be paid because the former owner who contracted with the general contractor was insolvent. In this case, the lien claimant was concerned that the final order include language that it was appealable. Had an order been entered containing such language it would have alerted an examiner that lien claimant may have continued to maintain that it had a valid lien against the property. However, the parties settled and an order was presented to the court dismissing the lawsuit and releasing the lien.

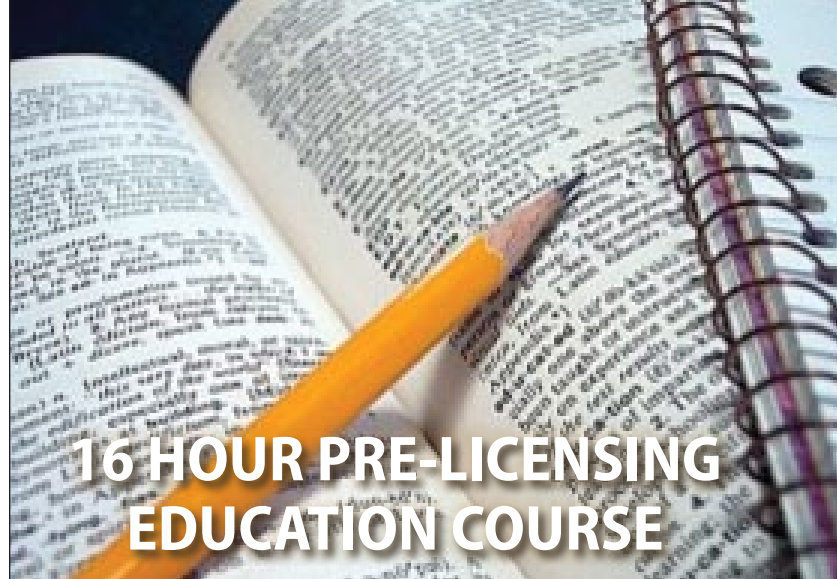
In a mechanic's lien action recently litigated in Loudoun County Circuit Court, a mechanic's lien was invalidated because it overburdened one of the three lots to which the contractor provided labor and materials. The final order released the lien and was recorded and indexed in the land records. The contractor then recorded a Notice Affecting Real Estate, stating that the contractor will file a Notice of Appeal, and that "In accordance with the Supreme Court's Opinion of *Thompson v. Air Power*, 248 Va. 364 (1994), notice is hereby given of the potential reinstatement of said lien."

These cases illustrate the importance of determining whether, in a mechanic's lien enforcement action, there is evidence in the title records that the lien claimant continues to assert that it has an interest in the property after its lien has been declared invalid. In *Air Power*, the Court held that a mechanic's lien can be reinstated, but that it will not affect the rights of a bona fide purchaser for value without notice. A contractor or supplier who is appealing a ruling invalidating its lien may decide to preserve its lien rights against third parties by ensuring that there is record notice of the fact that it is appealing the adverse ruling. The contractor may choose to record a memorandum of lis pendens, include specific language in the exceptions to the final order stating that it intends to appeal, record an order staying execution of the judgment or utilize some other means of providing record notice. Regardless of what form of record notice the lien claimant selects, it is important that a title examiner thoroughly review all recorded documents relating to lien enforcement actions and report all matters which indicate that a contractor whose lien has been declared invalid has not abandoned its lien rights and is pursuing them on appeal. ☁

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