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CONSTRUCTION ALERT

Recent Developments in Ohio Mechanic's Lien and Bond Claim Law

By Daniel M. Haymond and William J. Hubbard

Two recent Ohio appellate cases that were decided this year highlight potential pitfalls that await contractors who attempt to enforce their mechanic's lien rights and bond claim rights. One case involves the procedural requirements for the filing and serving of a Notice of Furnishing (which is often required in order to preserve any potential mechanic's lien rights), and one case involves the necessity for complying with a bond's time limitations on bringing suit. Both cases highlight potential traps for the unwary that contractors should work to avoid.

In the first case, out of Warren County, the Twelfth Appellate District of Ohio held that a Notice of Furnishing that is served **before** construction actually commences is **not** effective. *Halsey, Inc. v. Robert J. Isbel*, 2010-Ohio-2052. Under Ohio law, once the owner records a Notice of Commencement, subcontractors and suppliers must serve a Notice of Furnishing upon the owner and original contractor in order to preserve any mechanic's lien rights (laborers are exempted from this requirement). In *Halsey*, Halsey, Inc. supplied materials for a residential construction project. On May 14, 2007, Halsey sent a notice of furnishing via certified mail to the financing bank. Thus, under the applicable Ohio statutes, service was deemed completed upon mailing on May 14, 2007. Halsey furnished the materials on the very next day, May 15, 2007, and the bank received the Notice of Furnishing on May 17, 2007. Because the applicable Ohio statute (R.C. 1311.05(A)) states that a notice of furnishing must be served "within 21 days **after** furnishing the first materials," the Court held that the Halsey Notice of Furnishing that was served the day before materials were furnished was not valid. Because the notice was not valid, Halsey could not recoup the close to \$12,000 that it was owed.

The moral of the story is that a subcontractor or supplier should not serve its Notice of Furnishing until after it starts work or furnishes material. As long as it is served within 21 days of the start of work or furnishing of materials, the contractor's mechanic's lien rights for the full amount will be preserved.

In the second case, out of Lake County, the Eleventh Appellate District of Ohio strictly enforced a two-year time limit for claims that was included in the applicable bond, despite strong equities in favor of the bond claimant. *The Monreal Funeral Home, Inc. v. Ohio Farmers Insurance Company*, 2010-Ohio-385. In that case, a performance bond was issued by Ohio Farmers as surety to ensure the general contractor's performance under the construction contract. A limitation of action clause in the bond stated that "any suit under this bond must be initiated before the expiration of two (2) years from the date which Contractor ceases work on the Contract." When the general contractor stopped work on the funeral home project in March

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of 2004, the owner submitted a claim on the performance bond. Ohio Farmers responded in writing and advised the owner that its obligations under the bond "have not arisen" for several reasons, including the contention that a breach on the part of the general contractor had not been established. The owner then initiated an arbitration against the general contractor, and ultimately obtained an arbitration award against the now-defunct general contractor in the amount of \$75,000 in April of 2006. When the owner presented the arbitration award to Ohio Farmers and demanded compensation under the bond, Ohio Farmers denied the claim on the basis of the bond's two-year limitation period for suit under the bond. In the subsequent lawsuit against Ohio Farmers, the court held that despite Ohio Farmers' previous written assertion that a claim against the bond had "not arisen" yet, the two-year limitation should be strictly enforced to deny any recovery against the bond. As a result, the owner could not collect the \$75,000 arbitration award from the bond surety.

The moral of this story is that bond claimants should strictly comply with any time limitations in the applicable bond, as they are likely to be strictly enforced regardless of the statements and conduct of the parties surrounding such time limitations.¹

These two highlighted cases are only controlling legal authority in their respective appellate districts. It remains to be seen if these cases simply represent isolated aberrations or signify an emerging trend in Ohio law. Nonetheless, since the outcome in these two cases can be avoided through a little due diligence and attention to detail, contractors would be well-served to ensure that the ounce of prevention called for by these cases is provided in order to ensure that any potential mechanic's lien or bond claims are properly preserved.

FOR MORE INFORMATION

For more information, please contact:

Daniel M. Haymond 216.566.5896
William J. Hubbard 216.566.5644

Dan.Haymond@ThompsonHine.com
Bill.Hubbard@ThompsonHine.com

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¹It is important to note that on public projects in Ohio, there are statutory time limitations that also must be complied with in addition to any time limitations that the bond itself may contain.