22. GENERAL MECHANICS' LIEN [Details]

Cross Reference Note:

For liens on motor vehicles, see article 6 of title 42 .

§ 38-22-101. Liens in favor of whom - when filed - definition of person

(1) Every person who furnishes or supplies laborers, machinery, tools, or equipment in the prosecution of the work, and mechanics, materialmen, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing directly to the owner or persons furnishing labor, laborers, or materials to be used in construction, alteration, improvement, addition to, or repair, either in whole or in part, of any building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway, or any other structure or improvement upon land, including adjacent curb, gutter, and sidewalk, and also architects, engineers, draftsmen, and artisans who have furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or who have rendered other professional or skilled service, or bestowed labor in whole or in part, describing or illustrating, or superintending such structure, or work done or to be done, or any part connected therewith, shall have a lien upon the property upon which they have furnished laborers or supplied machinery, tools, or equipment or rendered service or bestowed labor or for which they have furnished materials or mining or milling machinery or other fixtures, for the value of such laborers, machinery, tools, or equipment supplied, or services rendered or labor done or laborers or materials furnished, whether at the instance of the owner, or of any other person acting by the owner's authority or under the owner, as agent, contractor, or otherwise for the laborers, machinery, tools, or equipment supplied, or work or labor done or services rendered or laborers or materials furnished by each, respectively, whether supplied or done or furnished or rendered at the instance of the owner of the building or other improvement, or the owner's agent; and every contractor, architect, engineer, subcontractor, builder, agent, or other person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of said building or other improvement shall be held to be the agent of the owner for the purposes of this article.

(2) In case of a contract for the work, between the reputed owner and a contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons performing labor or services or furnishing laborers or materials under contract, express or implied, with said contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of such contract price in favor of the contractor.

(3) All such contracts shall be in writing when the amount to be paid thereunder exceeds five hundred dollars, and shall be subscribed by the parties thereto. The contract, or a memorandum thereof, setting forth the

names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the estimated total amount to be paid thereunder, together with the times or stages of the work for making payments, shall be filed by the owner or reputed owner, in the office of the county clerk and recorder of the county where the property, or the principal portion thereof, is situated before the work is commenced under and in accordance with the terms of the contract. In case such contract, or a memorandum thereof, is not so filed, the labor done and materials furnished by all persons shall be deemed to have been done and furnished at the personal instance of the owner, and such persons shall have a lien for the value thereof.

(4) For the purposes of this article, the value of labor done shall include, but not be limited to, the payments required under any labor contract to any trust established for the provision of any pension, profit-sharing, vacation, health and welfare, prepaid legal services, or apprentice training benefits for the use of the employees of any contractors, and the trustee of any such trust shall have a lien therefor.

(5) All claimants who establish the right to a lien or claim under any of the provisions of this article shall be entitled to receive interest on any such lien or claim at the rate provided for under the terms of any contract or agreement under which the laborers were furnished or the labor or material was supplied or, in the absence of an agreed rate, at the rate of twelve percent per annum.

(6) For purposes of this article, "person" means a natural person, firm, association, corporation, or other legal entity; except that it shall not include a labor organization as defined in section 24-34-401(6), C.R.S.

History:

L. 1899: p. 261, § 1. R.S. 08: § 4025. C.L. § 6442. CSA: C. 101, § 15. CRS 53: § 86-3-1. C.R.S. 1963: § 86-3-1. L. 65: p. 849, § 1. L. 69: p. 692, § 1. L. 75: (4) and (5) added, p. 1422, § 1, effective October 1. L. 2000: (1), (2), and (5) amended and (6) added, p. 204, § 1, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "An Introduction to Security", see 16 Rocky Mt. L. Rev. 27 (1943). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Statutory

Redemption in Colorado", see 30 Dicta 79 (1953). For article, "Property Law", see 32 Dicta 420 (1955). For article, "One Year Review of Contracts", see 36 Dicta 19 (1959). For article, "One Year Review of Contracts", see 37 Dicta 1 (1960). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For article, "Homestead v. Mechanic's Lien", see 40 Den. L. Ctr. J. 2 (1963). For article, "Problems of Buying a House Which Is To Be Constructed", see 37 U. Colo. L. Rev. 457 (1965). For note, "General Mechanics' Lien Laws in Colorado: 1965 Amendments", see 39 U. Colo. L. Rev. 105 (1966). For comment on constitutionality of mechanic's lien, see 49 U. Colo. L. Rev. 127 (1977). For case note, "Colorado Mechanic's Lien Statute: Is Due Process Provided?" see 49 U. Colo. L. Rev. 127 (1977). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982). For article, "Collecting Pre- and Post- Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For article, "An Update of Appendices from Collecting Pre- and Post-Judgement Interest in Colorado", see 15 Colo. Law. 990 (1986). For article, "The Mechanics' Lien Trust Fund Statute -- Theft or Not Theft", see 16 Colo. Law. 1968 (1987).

Annotator's note. Cases material to this section, decided prior to its earliest source L. 1899, p. 261, § 1, have been included in the annotations to this section.

Purpose of article. The purpose of the mechanics' lien law is to benefit and protect those who supply labor, materials, or services which enhance the value or condition of another's property. Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), aff'd, 940 P.2d 393 (Colo. 1997).

The underlying rationale and principle upon which the mechanic's lien is conferred by this article is to preclude unjust enrichment. 3190 Corp. v. Gould, 163 Colo. 356, 431 P.2d 466 (1967); Kobayashi v. Meehleis Steel Co., 28 Colo. App. 327, 472 P.2d 724 (1970); Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

The mechanics' lien laws are designed for the benefit and protection of mechanics and others and should be construed in favor of lien claimants. Barnard v. McKenzie, 4 Colo. 251 (1878); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903); Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959); 3190 Corp. v. Gould, 163 Colo. 356, 431 P.2d 466 (1967); Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

The right to a mechanic's lien given by this section is based upon considerations of natural justice, namely that one who has enhanced the

value of property by attaching thereto his materials or labor shall have a lien therefor. Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913); Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958); 3190 Corp. v. Gould, 163 Colo. 356, 431 P.2d 466 (1967); Kobayashi v. Meehleis Steel Co., 28 Colo. App. 327, 472 P.2d 724 (1970).

This section affords additional security to protect persons whose labor or materials enhance the value of real property. By granting to persons who fall within its provisions an in rem recovery against the land, this section creates an alternative remedy which is broader than an in personam contract action. C & W Elec., Inc. v. Casa Dorado Corp., 34 Colo. App. 117, 523 P.2d 137 (1974).

Applicability of section. This section confines its operation to the establishment of liens. Hayutin v. Gibbons, 139 Colo. 262 , 338 P.2d 1032 (1959).

The mechanics' lien law does not purport to create personal liability of a landowner for obligations incurred by a contractor in the performance of his contract, but only authorizes the creation of a lien for improvements upon the land of the owner. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

The provisions of this section do not apply to labor performed or material furnished upon or for public works, for the purpose of fastening a lien upon public property. Florman v. Sch. Dist. No. 11, 6 Colo. App. 319, 40 P. 469 (1895); W. Lumber & Pole Co. v. Golden, 23 Colo. App. 461, 130 P. 1027 (1913).

Under common law, public property not subject to foreclosure. The relation-back provisions of §38-22-106(1) do not abrogate the common law to allow a claimant to foreclose a lien after streets had been dedicated and accepted. City of Westminster v. Brannan Sand & Gravel Co., 940 P.2d 393 (Colo. 1997).

Section should be liberally construed in lien claimant's favor. This section should be construed in a most liberal and comprehensive manner in favor of lien claimants, but it cannot be judicially extended so as to be applied to cases which do not fall within its provisions. Barnard v. McKenzie, 4 Colo. 251 (1878); Rara Avis Gold & Silver Mining Co. v. Bouscher, 9 Colo. 385, 12 P. 433 (1886); Greeley, S.L. & P.R.R. v. Harris, 12 Colo. 226, 20 P. 764 (1888); Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P. 806 (1889); Rico Reduction & Mining Co. v. Musgrave, 14 Colo.

79, 23 P. 458 (1890); Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 P. 153 (1893); Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897); Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903); Kern v. Guiry Bros. Wall Paper Co., 60 Colo. 286, 153 P. 87 (1915); Consumers' Lumber & Inv. Co. v. Hayutin, 75 Colo. 483, 226 P. 860 (1924); Bushman Constr. Co. v. Air Force Academy Hous., Inc., 327 F.2d 481 (10th Cir. 1964); Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972); Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976); Tighe v. Kenyon, 681 P.2d 547 (Colo. App. 1984); Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987); Skillstaff of Colo. v. Centex Real Estate, 973 P.2d 674 (Colo. App. 1998).

Although the mechanic's lien statute is to be liberally construed in favor of lien claimants, it is to be strictly construed in determining whether the right to a lien exists. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. App. 1986); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997).

Those who wish to claim the benefits of the lien must prove compliance with all statutory requirements necessary to establishing entitlement thereto. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. 1986).

This section is to be construed liberally in favor of the creation of liens. Amco Elec. Co. v. First Nat'l Bank, 622 P.2d 608 (Colo. App. 1981); Woodcrest Homes, Inc. v. First Nat'l Bank, 15 B.R. 886 (D. Colo. 1981).

Article should be strictly construed to extent that no act required to be done and essential to constitute a lien may be omitted. Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P. 806 (1889); Cannon v. Williams, 14 Colo. 21 , 23 P. 456 (1890); Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 P. 153 (1893); Ark. River, Land, Reservoir & Canal Co. v. Flinn, 3 Colo. App. 381, 33 P. 1006 (1893); Rice v. Carmichael, 4 Colo. App. 84, 34 P. 1010 (1893); Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897); Maher v. Shull, 11 Colo. App. 322, 52 P. 1115 (1898).

Section must be strictly construed in determining the question as to whether the right to a lien exists. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 P. 752 (1903).

Where the inquiry relating to whether a person asserting a lien or the work for which he claims it comes within this section or whether the statutory requirements necessary to initiate the lien have been

complied with, this section must be strictly construed. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 P. 752 (1903).

Equitable rules govern mechanic's liens. The statutory proceedings to enforce rights under the mechanic's lien law are in their nature equitable, and equitable rules govern in their administration. Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P. 806 (1889).

Remedy is cumulative. The remedy provided by this section is cumulative and, notwithstanding the fact that a claimant has a right to a lien, he may pursue his remedy for a money judgment. Hayutin v. Gibbons, 139 Colo. 262 , 338 P.2d 1032 (1959).

Statutory remedy requires strict construction. The remedy by lien is purely statutory and is to be strictly construed. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Substantial compliance. Since this section gives a remedy unknown at common law or in equity, its provisions must be at least substantially complied with, otherwise no lien will attach. Greeley S.L. & P.R.R. v. Harris, 12 Colo. 226, 20 P. 764 (1888).

The remedial requirements of this section must be complied with; full compliance gives a claimant a legal right to enforce. Hanna v. Colo. Sav. Bank, 3 Colo. App. 28, 31 P. 1020 (1892).

Lien claimant may pursue his remedy for a money judgment notwithstanding his right to a lien. Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986).

This section and §38-22-104 to be construed together. Whether a lien is claimed under this section or §38-22-104 is immaterial because both sections are to be construed together. Smith v. Stroehle Mach. & Supply Co., 109 Colo. 460 , 126 P.2d 341 (1942).

Lien claimant is entitled to interest on valid judgment. Am. Factors Assocs. v. Triangle Heating & Sheet Metal Co., 31 Colo. App. 240, 503 P.2d 163 (1972).

Applicability of subsection (5). Subsection (5) is a special statute which is applicable to a mechanic lien claim only, and not to a claim grounded in the trust lien provision, §38-22-127 . First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

Subsection (5) prevails over §5-12-102. Subsection (5), which is applicable to mechanic's lien claims only, prevails over the general interest statute, §5-12-102 . Weather Eng'g & Mfg., Inc. v. Pinon Springs Condos., Inc., 192 Colo. 495 , 563 P.2d 346 (1977).

Claimant not charged with another's mistake resulting in noncompletion. The claimant is not to be charged with another's mistake in judgment which results in the noncompletion of the project. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

A water well more properly fits within article 24 of title 38 than article 22 of title 38, as article 24 specifically addresses sinking a hole into the earth to obtain a natural resource below it. Article 24 controls, because it has more specific provisions that supplement the general provisions of article 22. Aspen Drilling Co., Inc. v. Hayes, 876 P.2d 86 (Colo. App. 1994).

Statute as basis for jurisdiction. See Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724 (Colo. App. 1981).

Applied in Curtis v. Nunns, 54 Colo. 554, 131 P. 403 (1913); Laverents v. Craig, 74 Colo. 297, 225 P. 250 (1923); Protheroe v. Bonser, 94 Colo. 95, 28 P.2d 807 (1933); Kvols v. Lonsdale, 164 Colo. 125 , 433 P.2d 330 (1967); Trustees of Carpenters & Millwrights Health Benefit Trust Fund v. Angel-Haus Condo., Ltd., 36 Colo. App. 133, 535 P.2d 259 (1975); Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979); Trustees of Colo. Carpenters & Millwrights Health Benefits Trust Fund v. Pinkard Constr. Co., 199 Colo. 35 , 604 P.2d 683 (1979); Climax Molybdenum Co. v. Specialized Installers, Inc., 12 B.R. 546 (D. Colo. 1981); Everitt Lumber Co. v. Prudential Ins. Co. of Am., 660 P.2d 925 (Colo. App. 1983).

II. THE LIEN.

Principle established by subsection (1). In general, subsection (1) establishes the principle that where labor has been performed a lien shall be had for the value of that labor. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Subsection (1) provides that every person who supplies material or labor shall have a lien upon the property upon which they have supplied materials or labor. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

A mechanic's lien established under this section is based upon the principle that one who has enhanced the value of property by his labor or material is

entitled to a superior lien if he follows certain prescribed procedures. Amco Elec. Co. v. First Nat'l Bank, 622 P.2d 608 (Colo. App. 1981).

A "lien" is a claim on property by a person who has added value to that property. In re Regan, 151 P.3d 1281 (Colo. 2007).

Mechanic's lien is statutory creature. A mechanic's or miner's lien is the creature of the statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887); Rico Reduction & Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890); Davidson v. Jennings, 27 Colo. 187, 60 P. 354 (1900).

The right to a mechanic's lien has no existence except by virtue of the statute. Florman v. Sch. Dist. No. 11, 6 Colo. App. 319, 40 P. 469 (1895); Sayre-Newton Lumber Co. v. Union Bank, 6 Colo. App. 541, 41 P. 844 (1895); Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903); Grimm v. Yates, 58 Colo. 268 , 145 P. 696 (1914).

Section is direct lien statute. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

Direct lien statute expressly authorizes lien arising out of contract, either express or implied. Home Pub. Market Co. v. Fallis, 72 Colo. 48, 209 P. 641 (1922).

When right to lien created. The right to a lien must be created at the time or before material or labor is furnished. It cannot be created afterward. C & W Elec., Inc. v. Casa Dorado Corp., 34 Colo. App. 117, 523 P.2d 137 (1974).

A mechanic's lien is founded on contract with the owner, either directly or indirectly. Johnston v. Bennett, 6 Colo. App. 362, 40 P. 847 (1895); Wilkins v. Abell, 26 Colo. 462, 58 P. 612 (1899); Griffin v. Seymour, 15 Colo. App. 487, 63 P. 809 (1900).

There must be a contract with the owner, either directly or indirectly, before a lien may attach. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

It is the affirmative contractual relation of the owner of property to the improvement made or work performed upon which the claimant's right to the lien is based. C & W Elec., Inc. v. Casa Dorado Corp., 34 Colo. App. 117, 523 P.2d 137 (1974).

An owner is not subject to a lien under subsection (1) unless the owner or owner's agent has contracted for the architectural services. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

Section contains exhaustive list of lienable work. This section contains an express and exhaustive list of lienable work, and courts are not at liberty to add to it. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Labor performed or materials furnished for purposes other than those specified cannot be made the foundation of a lien. Ark. River Land, Reservoir & Canal Co. v. Nelson, 4 Colo. App. 438, 36 P. 307 (1894).

The provisions of this section do not authorize a lien upon property other than the property upon which services were rendered or for which fixtures were supplied, and only to the extent of the value of the labor, services, and materials rendered upon the property. Schmidt Const. Co. v. Fast, 776 P.2d 1175 (Colo. App. 1989).

Enforcement proceeding of liens deemed statutory. The proceeding to enforce liens of mechanics, laborers, and materialmen is purely statutory. Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

The procedure established for the perfection and foreclosure of a mechanic's lien is wholly statutory and was unknown at common law or equity. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Section limits mechanic's lien to: (1) The property upon which the labor, services, and material are bestowed or rendered; and (2) the extent of the value of the labor, services, and material rendered upon the property. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958); Bushman Constr. Co. v. Air Force Acad. Hous., Inc., 327 F.2d 481 (10th Cir. 1964); Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Where work intended to benefit development property was not performed upon such property but rather upon adjacent land, foreclosure of lien against development property not allowed. Beeman Bros. v. First Interstate Bank, 784 P.2d 836 (Colo. App. 1989).

Party asserting lien has burden of proving it; he must ascertain that the party with whom he deals holds such a relation to the work being done as will entitle him to claim a lien for the work or material which he furnishes. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887); Rico Reduction &

Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890); Davidson v. Jennings, 27 Colo. 187, 60 P. 354 (1900).

Proof required as basis for lien. In an action to enforce a mechanic's lien, it must be pleaded and affirmatively shown that the labor performed was for one or more of the purposes specified in this section, in order that it may be made the foundation of a lien. Ark. River, Land, Reservoir & Canal Co. v. Flinn, 3 Colo. App. 381, 33 P. 1006 (1893); Ark. River, Land, Reservoir & Canal Co. v. Nelson, 4 Colo. App. 438, 36 P. 307 (1894); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901).

Mechanic's lien laws can be sustained only upon the theory that the lien is engrafted upon the interest of the owner because he has consented to the improvement in such a way as to permit a lien, and, in order for a lien to attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. Rico Reduction & Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890); Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Establishment of claimant as contractual agent required. The lien claimant of a valid lien must establish, by proper proof, that he is the contractual agent, either directly or indirectly, or such owner relative to the making of the improvement or furnishing the material for which the lien is claimed. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Proof that contracting party has unencumbered interest. If a contractor proposes erecting a building, and furnishing materials or putting labor on a lot it behooves him to examine and assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unencumbered as will enable him to avail himself of a valid or efficient lien. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887).

Ownership of the building, structure, or improvement, and the doing of the work thereon or the rendering services or furnishing material therefor at the instance of such owner or his agent, plus ownership in the same person of the land upon which such structure or improvement is erected or place, are essential, under this section, to the validity of a lien upon such land. Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 455, 59 P. 83 (1899); Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Establishment that indebtedness exists in claimant's favor required. A prime requisite to the establishment of a valid mechanic's lien is that an indebtedness exist in favor of a claimant for labor or materials, and where labor performed or materials furnished are in breach of a

contract and so unsatisfactory as to require that either or both be redone at equal or greater expense to a property owner, they are without value and do not constitute an indebtedness. Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958); Bushman Constr. Co. v. Air Force Acad. Hous., Inc., 327 F.2d 481 (10th Cir. 1964).

A prime requisite to the establishment of a valid lien is that an indebtedness exists in favor of the claimant for labor or materials. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

Where owner receives nothing of value subcontractor lacks right to lien. Where the owner receives nothing of value, a subcontractor has no right to a mechanic's lien, and this is so although he might not be responsible for the conditions resulting in the defective performance. Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958); Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Showing that materials delivered were actually used unnecessary. It is not necessary for the lien claimant to show that the materials delivered were actually used in the building against which the lien is sought because, where the statutory lien conferred is direct in its nature, one asserting an otherwise valid mechanic's lien will not have his lien defeated by the default of another party, even though such other party's default renders worthless the improvements for which the lien is claimed. Kobayashi v. Meehleis Steel Co., 28 Colo. App. 327, 472 P.2d 724 (1970); Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Services in planning and superintending work and erection of mill within section. Plaintiff's services in planning and superintending development work and the erection of the mill were labor upon the property within the meaning of this section. Bushman Constr. Co. v. Air Force Acad. Hous., Inc., 327 F.2d 481 (10th Cir. 1964).

Repair work and material included in claim for lien. If, during the progress of construction of a building, repairs become necessary to the completed portion, the work and material for repairs may be included in and made a part of the account for construction and for which a mechanic's lien is claimed. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Off-site improvements lienable. A mechanic's lien against an entire subdivision is valid when a portion of the materials supplied and labor performed was on land beneath publicly dedicated streets and outside of the formal boundaries of the subdivision property. Woodcrest Homes, Inc. v. First Nat'l Bank, 15 B.R. 886 (D. Colo. 1981).

Contractor's tools and appliances not with section. A contractor's aids, such as his tools and appliances, not intended to go into the structure or to be consumed, but to be taken away when the job is done, are not within this section. Bushman Constr. Co. v. Air Force Acad. Hous., Inc., 327 F.2d 481 (10th Cir. 1964).

Rental fees for equipment not basis for lien. Rental fees for equipment provided to a contractor did not serve as a basis for a lien. Bushman Constr. Co. v. Air Force Acad. Hous., Inc., 327 F.2d 481 (10th Cir. 1964).

The inquiry of trial court is limited to determining what labor, services, and material were rendered by a plaintiff to the property upon which a lien is claimed. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Plaintiff entitled to lien absent contract. Where the plaintiff furnished materials to contractor for a building, and there was neither a contract nor memorandum, the materials were deemed to have been furnished at the instance of the owner of the building to be improved, and the plaintiff is entitled to lien. Monks v. Searle, 118 Colo. 493 , 197 P.2d 158 (1948).

There can be no statutory agent until the owner, either directly or through some contractual agent thereunto authorized, has moved forward in the construction of the improvement. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771, 1916C Ann. Cas. 1116 (1915).

Owner's liability fixed by agent. Where the statutory agent of the owner employed the plaintiff to perform services and labor which he did perform, the liability of the owner to the plaintiff, for the purposes of a lien, was fixed, and the owner could not escape its liability upon the sole contention that, in bringing the suit, the plaintiff failed to allege that he was employed a part of the time by the agent, as principal contractor, and the remainder of the time by him, as subcontractor. Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co., 26 Colo. App. 135, 141 P. 144 (1914).

Property owner not bound by unauthorized act. The owner of property cannot be bound nor his property charged with a lien by the unauthorized act of a lessee in having improvements made on the leased property. Fisher v. McPhee & McGinnity Co., 24 Colo. App. 420, 135 P. 132 (1913).

Lessee as statutory agent. A lessee is not by virtue of the relationship alone the statutory agent of the lessor for the making of improvements. Terminal Drilling Co. v. Jones, 84 Colo. 279 , 269 P. 894 (1928).

Contract denying lessee's authority to bind lessor's interest valid. A contract expressly denying to a lessee the authority to bind the interest of the lessors with a mechanic's lien is valid. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Lien claim reduced by damages resulting from claimant's breach of contract. Damages suffered by property owners as a result of the general contractor's breach of his contract to build may be used to reduce the lien claim of that contractor even though his claim includes undisputed amounts which are owed to subcontractors where those subcontractors are not parties to the action and have not filed mechanic's liens. Barlow v. Staples, 28 Colo. App. 93, 470 P.2d 909 (1970).

Unpaid fringe benefit contributions are not part of the value of "labor done" for which a lien may be claimed under subsection (1). Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Later furnishing material and labor does not validate prematurely filed claim. Since there would be no debt until the materials had been furnished or labor performed, the fact that the materials were later furnished and labor was later performed would not validate a lien claim that had been prematurely filed when no debt existed. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

Lien statement inadequate under subsection (4). A lien statement which is defective as a matter of law because the name of each person who performed the labor which is the basis for the mechanic's lien does not appear on the lien statement would also be inadequate under the amendatory language of subsection (4). Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Wall-to-wall carpeting held to be improvement. See Amco Elec. Co. v. First Nat'l Bank, 622 P.2d 608 (Colo. App. 1981).

Architect's preliminary work constitutes the commencement of an improvement or a structure. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

III. PERSONS ENTITLED TO LIENS.

A. In General.

Section contains enumeration of classes of persons entitled to claim. This section contains an express and exhaustive enumeration of those classes of persons entitled to claim a mechanic's lien and those classes

of acts for which such a lien may be claimed. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Who may acquire liens. Only those persons in whose favor the right to liens is given can acquire them. Sayre-Newton Lumber Co. v. Union Bank, 6 Colo. App. 541, 41 P. 844 (1895); Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Grimm v. Yates, 58 Colo. 268 , 145 P. 696 (1914).

Under the plain language of subsection (1), "person" includes a corporation, without limitation. Nothing in the statute imposes a residency requirement, whether upon individuals or corporations. There is nothing in the context of the mechanic's lien statutes as a whole that indicates a legislative intent to exclude foreign corporations, whether authorized to do business in the state or not, from the class of persons that may claim a lien. Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859 (Colo. App. 2001).

Persons with ownership interest not included in scope of section. Persons with ownership interests in the property to which they attempt to claim a lien are not included within the protection of this section. Damrell v. Creagar, 42 Colo. App. 281, 599 P.2d 262 (1979).

This section does not include those who merely furnish labor for the benefit of the contractor. Kern v. Guiry Bros. Wall Paper Co., 60 Colo. 286, 153 P. 87 (1915); Skillstaff of Colo. v. Centex Real Estate, 973 P.2d 674 (Colo. App. 1998).

Although this section has been amended numerous times since 1915 but the language in subsection (1) has not changed significantly, it is presumed that the general assembly agreed with this interpretation. Skillstaff of Colo. v. Centex Real Estate, 973 P.2d 674 (Colo. App. 1998).

Applying this interpretation, the court did not err in finding this section inapplicable to a temporary personnel agency. Skillstaff of Colo. v. Centex Real Estate, 973 P.2d 674 (Colo. App. 1998).

Trustees have no lien claim for unpaid contributions to employee trusts. Conspicuously absent from the list of classes of persons entitled to claim a mechanic's lien and classes of acts for which such a lien may be claimed is the express grant of a lien claim to trustees for unpaid contributions to employee trusts. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Claimants must bring themselves within section's purview. Persons claiming the benefit of this section must bring themselves clearly within its purview, as belonging to some class in whose favor the remedy is allowed, because outside of the terms of this section, no lien can attach. Groth v. Stahl, 3 Colo. App. 8, 30 P. 1051 (1892); Pitschke v. Pope, 20 Colo. App. 328, 78 P. 1077 (1904).

This section is to be construed liberally in favor of lien claimants. However, it is incumbent upon the claimant to prove that he is entitled to the benefits of the section. C & W Elec., Inc. v. Casa Dorado Corp., 34 Colo. 117, 523 P.2d 137 (1974).

Lien failed absent owner's request for work done. Where claimant was employed by defendant to perform labor on modular homes in defendant's factory, claimant's mechanic's lien failed because at the time claimant's labor was performed no owner of real property had requested either directly or indirectly that the work be done. C & W Elec., Inc. v. Casa Dorado Corp., 34 Colo. App. 117, 523 P.2d 137 (1974).

When third-party's lien attaches. When a third-party lien claimant is involved, the vital question is whether the improvement was affixed to the property with the intention that it should become part of the premises. If it was, then the lien may attach to the owner's property. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

B. Materialmen.

Section gives to materialmen direct lien, regardless of the state of the account between the owner and the contractor. Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913).

Materialman must prove knowledge of use of material. The materialman must, at the time when he furnishes his material, know that it is to be used in some particular building; in the absence of proof of this character, he has failed to establish his right to maintain a lien. Tabor-Pierce Lumber Co. v. Int'l Trust Co., 19 Colo. App. 108, 75 P. 150 (1903); Salzer Lumber Co. v. Lindenmeier, 54 Colo. 491, 131 P. 442 (1913); Beco Equip. Co. v. Box, 44 Colo. App. 88, 608 P.2d 850 (1980).

It is necessary to prove that at the time the material was furnished there was a mutual understanding between the materialman and the contractor that the material was furnished to be used in the construction of a particular building or the improvement of certain property; or, at least, that there was such understanding upon the part of the materialman, and, in the absence of

such proof, the lien cannot be sustained. Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co., 26 Colo. App. 155, 141 P. 527 (1914).

Material must be furnished to be actually used and wrought into the structure to become a part thereof, or to be directly consumed to its betterment, and be of the kind called for in the contract between the owner and contractor, or between the contractor and subcontractor, before a lien will lie therefor; it is unnecessary that the material, in all cases, shall be actually used and wrought into the structure. Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913).

In order to give a materialman a lien, material must be furnished to be used in the construction in the sense that it is to be wrought up in the structure so as to become a part of it when completed, or that the material is to be directly consumed in the structure so as to improve it. Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913).

No lien existed for materials furnished to be used as aids. No lien existed for materials furnished to be used about the construction, as an aid to the contractor in the performance of his work, as his tools and appliances are aids, and which were not intended to go into the structure, or to be directly consumed in its betterment, but were to be taken away when the work was completed, as the tools and appliances are taken away. Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913).

It is the duty of the materialman to ascertain whether or not such material is of the kind required by the subcontractor under his contract to put into the structure, for an agent constituted for a particular purpose and under a limited and circumscribed power cannot bind his principal by any act beyond his authority. Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913).

Where materialman knows materials to be used elsewhere, lien unenforceable. If the materialman furnished material with knowledge that some of it was to be used in the construction of other buildings, it could not, as against a mortgage, enforce a lien for the material it knew was to be so used, because such material could not be said to have been furnished for the purpose of being used in the construction of the building upon which a lien is claimed. Mortgage Brokerage Co. v. Barr Lumber Co., 91 Colo. 445, 16 P.2d 32 (1932).

Lien of materialman is independent of contract between the owner and the principal contractor. Lewis v. Martin, 30 Colo. App. 342, 492 P.2d 877 (1971).

Privity of contract obviates necessity of materialmen contacting owner. Privity of contract between owners of the property and materialmen is created by this section wherein the contractor is made the agent of the owner, and obviates the necessity of the materialmen contacting the owner in any manner whatsoever. W.B. Barr Lumber Co. v. Thompson, 131 Colo. 347 , 281 P.2d 1016 (1955).

Materialman's right to lien not deprived by contractor's defective work. Defective work done by the general contractor or his employees, which results in damage or a lack of benefit to the owners, does not deprive a materialman of his right to a lien. Lewis v. Martin, 30 Colo. App. 342, 492 P.2d 877 (1971).

Because the rule that where the labor or materials furnished are in breach of the contract and so unsatisfactory as to require that either or both be redone at equal or greater expense, clearly they are without value to the property owner and do not constitute an indebtedness, has no application in dealing with the lien of materialmen for materials supplied for the construction of a building if there has been neither claim nor proof that the materials provided at the request of the general contractor were either defective, unsuitable, or not required for the building, and there is no allegation of any wrongdoing on the part of the materialmen. Lewis v. Martin, 30 Colo. App. 342, 492 P.2d 877 (1971).

Lumber company had no contractual relationship with homeowners who purchased prefabricated kit to construct a log home where lumber company merely wholesaled materials to seller of kits and delivered them at its arrangement. Schneider v. J.W. Metz Lumber Co., 715 P.2d 329 (Colo. 1986).

Lumber company not entitled to mechanics' lien on homeowners' property because log home company which sold prefabricated kits not considered as principal contractor nor considered as agent of lumber company. Schneider v. J.W. Metz Lumber Co., 715 P.2d 329 (Colo. 1986).

C. Subcontractors.

"Subcontractor". Any person who agrees to perform a substantial, specified portion of the work of construction of a given building which is the subject of a general construction contract in accordance with the plans and specifications of such contract is a subcontractor or an owner's statutory agent within the meaning of this article, and this applies even though he does not undertake to incorporate such portion of the projected structure into the building itself. Kobayashi v. Meehleis Steel Co., 28 Colo. App. 327, 472 P.2d 724 (1970).

Where steel products were furnished to one who admittedly was engaged in the construction of significant components of the building, which components, if acceptable, were destined for incorporation into the building structure, the fact that the party constructing the building components was away from the jobsite and in effect a subcontractor is without significance since, as a matter of statutory construction, such a person would be a subcontractor within the meaning of this article. Kobayashi v. Meehleis Steel Co., 28 Colo. App. 327, 472 P.2d 724 (1970).

One contracting to do particular part of work entitled to lien. Where one contracts with the principal contractor to do some particular part of the work and to furnish material and labor for that purpose, he may be entitled to a lien for the value of both. Kern v. Guiry Bros. Wall Paper Co., 60 Colo. 286, 153 P. 87 (1915).

Agency between subcontractor and owner is special. While this section makes the subcontractor the agent of the owner, the agency thus created is a special one and the authority is limited to the procurement of material reasonably sufficient and necessary to go into the structure in accordance with the terms of the contract. Farmer's Irrigation Co. v. Kamm, 55 Colo. 440, 135 P. 766 (1913).

Section gives to subcontractors direct lien, regardless of the state of the account between the owner and the contractor. Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913).

Conceptions of right to subcontractor's lien. There are two distinct conceptions of the right to a subcontractor's lien recognized by the statutes of the various states: (1) That such liens are allowed by statute through a species of equitable subrogation to the contract between the owner and his contractor; and (2) that such liens are allowed because of the enhanced value of the property caused by the labor and material so contributed to it by the consent of the owner through his contractor, made his agent by this section; the latter is the conception adopted in this state. Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913).

Protected claimants are those who have a direct relationship with the contractor or one whose acts in purchasing labor and materials are imputed to him. Although subcontractors are not in privity of contract with the owner of the property they are in privity with the general contractor. W. Metal v. Acoustical & Const., 851 P.2d 875 (Colo. 1993).

Amount for which subcontractor is entitled to his statutory lien and action is not always to be measured by the extent of his valid claim against the principal contractor because, where, by the default or neglect of the

principal contractor, the subcontractor is obliged to remain idle, and suffers loss in consequence, he may undoubtedly recover of the contractor; but such damages could constitute no valid claim against the owner. Tabor v. Armstrong, 9 Colo. 285, 12 P. 157 (1886).

Subcontractors not paid by contractor entitled to lien. By agreeing to make check payable to both contractor and subcontractor jointly, the project owner ratified the account between the contractor and subcontractor. This is sufficient basis for a personal judgment against the project owner. Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986).

D. Others.

Subsection (1) expressly includes architects and engineers in the class of those eligible for mechanic's liens. Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977).

An architect who, pursuant to a contract with the owner of real property, prepares plans and specifications for construction of improvements upon that property may assert a mechanic's lien even though the improvements are not subsequently erected. James H. Stewart & Assoc. v. Naredel of Colo., Inc., 39 Colo. App. 552, 571 P.2d 738 (1977).

An owner who directly authorizes another to hire an architect to draft plans for improvements on the owner's property may be subject to an architect's lien. Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

An architect who provides plans for proposed property improvements at a property owner's request, is permitted to file a lien against the owner's property. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

An architect who performs work which constitutes basic services under a contract and at the request of the owner is entitled to impose a mechanics lien for such work. Sheldon v. Platte Valley Sav., 794 P.2d 1083 (Colo. App. 1990).

Initial architects entitled to lien for preparation of original plans. Where architects prepared plans for the construction of a building and thereafter other architects prepared plans which were used, but in which were incorporated fundamental principles, features, and treatment contained in the original plans, the first architects, having rendered their services upon the faith and credit of the real property and building to be

erected thereon, were entitled to a lien for their services. Park Lane Props. v. Fisher, 89 Colo. 591 , 5 P.2d 577 (1931).

Superintendence of building construction lienable. The superintendence of the construction of a building is work for which this section gives a lien, but going to distant places to hurry up the parties who had contracted to furnish material for the building was not superintending the work of construction, nor is it embraced in any of the classes of service for which a lien is given by this section. Pitschke v. Pope, 20 Colo. App. 328, 78 P. 1077 (1904).

Services performed by attorney for a developer are not lienable items under the mechanics' lien statute. Laurence J. Rich v. First Interstate, 807 P.2d 1199 (Colo. App. 1990).

Engineers who perform professional services have a lien against the property upon which they rendered services if the services are performed at the request of the owner or a person acting under the owner's authority, even though no building or improvement is ever constructed. Such professional services constitute work done on a building, structure, or other improvements. Merrick & Co. v. Estate of Verzuh, 987 P.2d 950 (Colo. App. 1999).

IV. CONTRACTS BETWEEN OWNER AND CONTRACTOR.

Subsections (2) and (3) must be strictly construed, and the claimant must be held to a strict compliance with these provisions before the lien can be held to attach. Maher v. Shull, 11 Colo. App. 322, 52 P. 1115 (1898).

These provisions cannot be extended by implication so as to embrace within them and render liable a person who was in no sense a party to the contract under which the work was done. Maher v. Shull, 11 Colo. App. 322, 52 P. 1115 (1898).

Contracts which must be recorded are those entered into between the reputed owner and a contractor, in which certain work is contracted to be done and a certain price is contracted to be paid. Maher v. Shull, 11 Colo. App. 322, 52 P. 1115 (1898).

Written contract filed to establish lien not required of architect. It is not necessary that an architect, in order to have a lien on property for services rendered in preparing plans, specifications, and estimates for a building, have a written contract filed of record, covering such services. Home Pub. Mkt. Co. v. Fallis, 72 Colo. 48, 209 P. 641 (1922).

Filing of copy of contract shall be complete. The statutory filing of a copy of a building contract or memorandum thereof to protect the owner against certain liens, requires that the substance of the contract, including plans and specifications, if they are made a part thereof, shall be incorporated in the statement that is filed, because this section is imperative and requires that the filing shall not be partial, but complete. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

Contracts in excess of $500, provided for in subsection (3), refer only to a contract for work to be done or materials furnished in which a "contract price" is to be paid by the owner to the contractor, and not to the contract contained in an ordinary lease in which all payments provided for are to be made by the lessee to the owner. Empire Coal Co. v. Rosa, 26 Colo. App. 230, 142 P. 192 (1914).

Object in requiring filing of contract where contract price exceeds $500. The object in requiring the contract to be filed, where the contract price exceeds $500 under this section, is to protect the owner against liens over and above his contract price and to give general information to all persons who may desire to furnish materials or perform labor on the structure. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

A purpose of the requirement as to filing the contract or a memorandum is to give notice to a claimant so that he may act intelligently in reference to serving the notice on the owner. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903); Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913).

No right to lien exists where contractor fails to perform. Where a contractor fails to perform his contract, no right to a lien, either of the contractor or of the subcontractor, exists. Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958).

Effect of owner's failure to file. Because of the owner's failure to file with the county recorder the contract or a memorandum thereof, all claims for materials furnished and labor done are deemed to have been furnished and done at the instance of the owner and the lien attaches to the full value of such labor and material, irrespective of the state of the account between the owner and the principal contractor. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903); Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

Status of lien claimant changed for failure to file contract. Where the contract is not filed for record, the lien claimant's status is changed with

respect to the time for filing a lien, that is, it becomes a principal contractor and therefore by statute is given three (now four) months from the completion of the work within which to file the lien statement. W.B. Barr Lumber Co. v. Thompson, 131 Colo. 347 , 281 P.2d 1016 (1955).

Lessor's liability not enlarged by failure to record contract. Failure to record a contract between lessee and contractor does not enlarge liability of lessor who was not a party to the contract. Terminal Drilling Co. v. Jones, 84 Colo. 279 , 269 P. 894 (1928).

Personal liability imposed for entire amount of contract. This section does not impose a personal liability for the entire amount of a contract involved in a mechanic's lien claim upon a landowner where no privity of contract is shown between him and the lien claimant; the landowner's liability in such case is limited to the value of the labor or materials incorporated in the improvements upon his property. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Subsection (2) does not enlarge the lien rights of the contractor beyond the reasonable value of the materials, labor, and services furnished by it, as provided in this section when construed in its entirety. Rather, if a contract is timely recorded, its price represents the maximum value of all liens that can be asserted. Heating & Plumbing Engineers v. H.J. Wilson, 698 P.2d 1364 (Colo. App. 1984).

Proof required to relieve owner from contractual liability. If the owner of the premises wishes to relieve itself from liability for the labor performed under such contracts, it is necessary that it should show that the contracts were in writing, and that such contracts, or a memorandum thereof, were filed for record, because it is a matter of defense. Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co., 26 Colo. App. 135, 141 P. 144 (1914).

Contractual interest rate applies to lien. The general assembly, by using the clause "any contract or agreement", in subsection (5), has evidenced an intent that the contractual interest rate agreed upon between the claimant and the tenant will apply to a lien against the owner's property. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

The contract price is the maximum amount which can be encumbered by a mechanics' lien and late charges are not lienable pursuant to this section. Indep. Trust v. Stan Miller, Inc., 796 P.2d 483 (Colo. 1990).

Contract price is the maximum lien amount that can be filed even if the contract services performed by the contractor exceeded that value. Byerly v. Bank of Colo., 2013 COA 35, 411 P.3d 732 .

Cross Reference Note:

For liens for surveyors and civil and mining engineers, see §38-22-121 .

§ 38-22-102. Payments - effect

(1) No part of the contract price, by the terms of any such contract, shall be made payable, nor shall the same, or any part thereof, be paid in advance of the commencement of the work, but the contract price, by the terms of the contract, shall be made payable in installments, or upon estimates, at specified times after the commencement of the work, or on the completion of the whole work; but at least the following percentages of the total contract price shall be made payable at least thirty-five days after the final completion of the contract:

(a) Fifteen percent of the first two hundred fifty thousand dollars of the contract price;

(b) Ten percent of the contract price in excess of two hundred fifty thousand dollars up to and including five hundred thousand dollars;

(c) Five percent of the contract price in excess of five hundred thousand dollars up to and including seven hundred fifty thousand dollars;

(d) Two percent of the contract price in excess of seven hundred fifty thousand dollars.

(2) No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor or other person to or for whom the payment is made, but as to such liens, such payment shall be deemed as if not made and shall be applicable to such liens, notwithstanding that the contractor or other person to or for whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise or for nonperformance of his contract or otherwise.

(3) As to all liens, except those of principal contractors, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the principal contractor, and no alteration of such contract shall affect any lien acquired under the provisions of this article. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and laborers or materials furnished by all persons other than the principal contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the principal contractor, they shall have a lien for the value thereof.

(3.5) Any provisions of this section to the contrary notwithstanding, it shall be an affirmative defense in any action to enforce a lien pursuant to this article that the owner or some person acting on the owner's behalf has paid an amount sufficient to satisfy the contractual and legal obligations of the owner, including the initial purchase price or contract amount plus any additions or change orders, to the principal contractor or any subcontractor for the purpose of payment to the subcontractors or suppliers of laborers, materials, or services to the job, when:

(a) The property is an existing single-family dwelling unit;

(b) The property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as the owner's primary residence; or

(c) The property is a single-family, owner-occupied dwelling unit, including a residence constructed and sold for occupancy as a primary residence. This paragraph (c) shall not apply to a developer or builder of multiple residences except for the residence that is occupied as the primary residence of the developer or builder.

(4) Any of the persons mentioned in section 38-22-101, except a principal contractor, at any time may give to the owner, or reputed owner, or to the superintendent of construction, agent, architect, or to the financing institution or other person disbursing construction funds, a written notice that they have performed labor or furnished laborers or materials to or for a principal contractor, or any person acting by authority of the owner or reputed owner, or that they have agreed to and will do so, stating in general terms the kind of labor, laborers, or materials and the name of the person to or for whom the same was or is to be done, or performed, or both, and the estimated or agreed amount in value, as near as may be, of that already done or furnished, or both, and also of the whole agreed to be done or furnished, or both.

(5) Such notice may be given by delivering the same to the owner or reputed owner personally, or by leaving it at his residence or place of business with some person in charge; or by delivering it either to his superintendent of construction, agent, architect, or to the financing institution or other person disbursing construction funds, or by leaving it either at their residence or place of business with some person in charge. No such notice shall be invalid or insufficient by reason of any defect of form, provided it is sufficient to inform the owner or reputed owner of the substantial matters provided for in this section, or to put him upon inquiry as to such matters.

(6) Upon such notice being given, it is the duty of the person who contracted with the principal contractor to withhold from such principal contractor, or from any other person acting under such owner or reputed owner, and to whom, by said notice, the said labor, laborers, or materials, have been furnished or agreed to be furnished, sufficient money due or that may become due to said principal contractor, or other persons, to satisfy such claim and any lien that may be filed therefor for record under this article, including reasonable costs provided for in this article.

(7) The payment of any such lien, which has been acknowledged by such principal contractor, or other person acting under such owner or reputed owner in writing to be correct, or which has been established by judicial determination, shall be taken and allowed as an offset against any moneys which may be due from the owner, or reputed owner to such principal contractor, or the person for whom such work and labor was performed or furnished.

History:

L. 1899: p. 263, § 2. R.S. 08: § 4026. C.L. § 6443. CSA: C. 101, § 16. CRS 53: § 86-3-2. C.R.S. 1963: § 86-3-2. L. 65: p. 850, § 2. L. 69: p. 692, § 2. L. 87: (3.5) added, p. 1336, § 1, effective May 25. L. 2000: (3), IP(3.5), (3.5)(b), (4), (6), and (7) amended, p. 205, § 2, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Property Law", see 32 Dicta 420 (1955). For article, "Mechanics' Liens Relative to Oil and Gas Operations -- Part II", see 34 Dicta 373 (1957).

Section relates to manner of making payments. Hayutin v. Gibbons, 139 Colo. 262 , 338 P.2d 1032 (1959).

Sections provide contract form between owner and principal contractor. This section and §38-22-101 provide the form of a contract which may be entered into by the owner and the principal contractor to enable the latter to secure a lien for himself and to enable the former to confine the liabilities to which his property may be subjected to the contract price. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903).

Parties not prohibited from entering into different contract. This section and §38-22-101 , do not prohibit the parties from entering into

another and different contract, and there is no interference with, or abridgment of, their right to contract as they may see fit. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903).

Agency of principal contractor limited. The agency of a principal contractor, under §38-22-101 and this section, is a limited agency for the purpose of creating a lien only. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Payment of debt constitutes bar to enforcement of lien. Where the debt for which a lien is claimed has been paid in a manner which is binding upon the party asserting the lien, payment of such debt constitutes a bar to the enforcement of the lien. Am. Irrigation Co. v. Fadenrecht, 30 Colo. App. 28, 489 P.2d 1060 (1971).

For purposes of this section, a lien arises on the date it was perfected rather than the date materials were provided. Wholesale Specialties v. Vill. Homes, 820 P.2d 1170 (Colo. App. 1991).

Regardless of contractor's status as an owner, payment of purchase price or contract amount by homeowner to contractor triggered a complete affirmative defense thereby barring enforcement of plumber's mechanic lien against the homeowner. Koch Plumbing and Heating v. Brown, 835 P.2d 610 (Colo. App. 1992).

Affirmative defense of payment does not require proof of a specific intent on the part of homeowners that the purchase price paid for homes be "for the purpose of payment to the subcontractors and new suppliers". Wholesale Specialties v. Vill. Homes, 820 P.2d 1170 (Colo. App. 1991).

Subsection (3.5) was enacted to protect homeowners from paying for their home twice simply because a general contractor had not paid its subcontractors, and once the homeowner pays the general contractor the full purchase price, the protections in subsection (3.5) immediately apply. Wholesale Specialties v. Vill. Homes, Ltd., 820 P.2d 1170 (Colo. App. 1991); Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

Under the plain language of subsection (3.5), where mechanics' liens are recorded prior to full payment by the homeowner, the homeowner cannot assert the defense of full payment because the initial purchase price had not been paid prior to recordation of the liens. Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

Because the homeowners had paid their original contractor only part of the purchase price before the liens were recorded, the circumstances did not trigger the intended protection of subsection (3.5) against liens filed after the payment of the full purchase price. Crissey Fowler Lumber v. FCIB, 8 P.3d 536 (Colo. App. 2000).

Applied in Ditto v. Jackson, 3 Colo. App. 281, 33 P. 81 (1893); Aste v. Wilson, 14 Colo. App. 323, 59 P. 846 (1900); Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 P. 553 (1913); First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

II. NOTICE.

Notice provision of subsection (4) deemed permissive. Subsection (4) which provides for giving personal notice to the owner of claims against the principal contractor is not a mandatory, but it is a permissive, provision. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

§ 38-22-103. Attaching of lien - enforcement

(1) The liens granted by this article shall extend to and cover so much of the lands whereon such building, structure, or improvement is made as may be necessary for the convenient use and occupation of such building, structure, or improvement, and the same shall be subject to such liens. In case any such building occupies two or more lots or other subdivisions of land, such several lots or other subdivisions shall be deemed one lot for the purposes of this article, and the same rule shall hold in cases of any other such improvements that are practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures, or improvements.

(2) When the lien is for work done or labor or material furnished for any entire structure, erection, or improvement, such lien shall attach to such building, erection, or improvement for or upon which the work was done, or laborers or materials furnished in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or improvement sold under execution and the purchaser at any such sale may remove the same within thirty days after such sale.

(3) Any lien provided for by this article shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the making of the contract or the commencement of the work upon such structure and before the establishment of such lien by process of law, and shall extend to any assignable, transferable, or conveyable interest of such owner or reputed owner in the land upon which such building, structure, or other improvement is erected or placed.

(4) Whenever any person furnishes any laborers or materials or performs any labor, for the erection, construction, addition to, alteration, or repair of two or more buildings, structures, or other improvements, when they are built and constructed by the same person and under the same contract, it is lawful for the person so furnishing such laborers or materials or performing such labor to divide and apportion the same among the buildings, structures, or other improvements in proportion to the value of the laborers or materials furnished for and the labor performed upon or for each of said buildings, structures, or other improvements and to file with his or her lien claim therefor a statement of the amount so apportioned to each building, structure, or other improvement. This lien claim when so filed may be enforced under the provisions of this article in the same manner as if said laborers or materials had been furnished and labor performed for each of said buildings, structures, or other improvements separately; but if the cost or value of such labor, laborers, or materials cannot be readily and definitely

divided and apportioned among the several buildings, structures, or other improvements, then one lien claim may be made, established, and enforced against all such buildings, structures, or other improvements, together with the ground upon which the same may be situated, and in such case for the purposes of this article, all such buildings, structures, and improvements shall be deemed one building, structure, or improvement, and the land on which the same are situated as one tract of land.

History:

L. 1899: p. 265, § 3. R.S. 08: § 4027. C.L. § 6444. CSA: C. 101, § 17. CRS 53: § 86-3-3. C.R.S. 1963: § 86-3-3. L. 2000: (2) and (4) amended, p. 206, § 3, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Purposes of mechanics' lien laws. Mechanics' lien laws are designed for the benefit and protection of mechanics and materialmen, and should be construed in favor of lien claimants. Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956); Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Section applies to construction of new improvements as distinguished from expansion, repair, and remodeling of existing improvements. Lew Hammer, Inc. v. Dash, Inc., 42 Colo. App. 414, 599 P.2d 948 (1979).

Section does not create a lien separate and distinct from §38-22-101 but merely defines the scope and extent of such liens. F.M. Hall & Co. v. Southwest Props., 747 P.2d 688 (Colo. App. 1987).

Inception of right to lien arises from estoppel. The inception of a right to a lien under this section, coupled with §38-22-105 , arises from estoppel. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Mechanics' lien is prior lien upon improvement. This section and §§38-22-105 and 38-22-106 make a mechanic's lien a prior lien upon the improvement, while an existing mortgage remains a prior lien upon the land. Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915); Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956); Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Mechanics' liens are not entitled to priority under this section over a pre-existing deed of trust expressly intended to secure a loan for construction if: (1) The deed is recorded prior to attachment of the mechanics' liens and (2) the loan proceeds are used for construction purposes. 1st Choice Bank v. Fisher Mech. Contractors, Inc., 15 P.3d 1100 (Colo. App. 2000).

Mechanics' liens are junior and subordinate to an existing deed of trust on the land occupied by the improved building. Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956).

Mechanic's lien filed to secure payment for labor and materials furnished to remodel an existing structure is subordinate to the lien of a trust deed which was in no manner connected with such remodeling, but was recorded more than two years prior thereto and covered the land and all improvements thereon. Stinnett v. Modern Homes, 142 Colo. 176, 350 P.2d 197 (1960).

Where a deed of trust was given for a loan with the understanding that the loan was to be used for the construction of a building, and the deed of trust, recorded before work on the building was begun, expressly covered the building to be erected the lien of the deed of trust took priority over mechanics' liens to the extent that the loan was actually applied to payment of labor and materials used in the construction of the building. Joralman v. McPhee, 31 Colo. 26, 71 P. 419 (1903).

When lien not held subordinate to deed of trust. Where a portion of money borrowed and secured by a deed of trust is by agreement to be used in improvement of the property, it is unjust to hold that lien claimants furnishing labor and material for such improvements should be relegated to the position of subordinate lien holders. Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956).

Absent language which clearly indicates an intention to waive a mechanics' lien, it will not be supposed that the laborer or materialman intended to relinquish absolutely his statutory right to claim a lien beyond the amount of consideration received. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Mechanics' liens are an exception to the general rule that priorities under the recording statute are established based on the order in which they are recorded. Mechanics' liens are granted priority over the previously recorded interests in specific circumstances. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Applied in Sayre-Newton Lumber Co. v. Union Bank, 6 Colo. App. 541, 41 P. 844 (1895); State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912); Terminal Drilling Co. v. Jones, 84 Colo. 279 , 269 P. 894 (1928); In re Ben Boldt, Jr., Floral Co., 37 F.2d 499 (10th Cir. 1930); Jones v. Mawson-Peterson Lumber Co., 112 Colo. 493, 150 P.2d 795 (1944); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); Climax Molybdenum Co. v. Specialized Installers, Inc., 12 B.R. 546 (D. Colo. 1981).

II. ESTATE OR INTEREST SUBJECT TO LIEN.

Section gives lien upon whatever interest owner had when work was begun, and to another or greater interest whenever acquired before the lien is enforced. Home Pub. Mkt. Co. v. Fallis, 72 Colo. 48, 209 P. 641 (1922); Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Lien which attaches is not limited to estate in fee, but extends to any interest of the person that is transferable, assignable, or conveyable in the real estate at whose instance and upon which a building, structure, or improvement is erected. Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405, 45 L.R.A. (n.s.) 100 (1913).

Leasehold interest may be subjected to lien. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897); Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

One may be "owner" without legal title. That one who does not have legal title may be the "owner", within the meaning of §38-22-105 , is recognized in subsection (3), which provides that the lien shall extend to any assignable, transferable, or conveyable interest of such owner in the land upon which such building, structure or other improvement shall be erected or placed. Home Pub. Mkt. Co. v. Fallis, 72 Colo. 48, 209 P. 641 (1922); Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928); Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Extension of lien to property jointly owned. Whether or not a mechanic's lien may ever be extended to or decreed upon property not embraced in the lien statement, it cannot be extended to and decreed upon such property owned jointly by the owner of the property, included in the statement, and her husband, where no facts were shown to exist which would entitle the lien claimant to a lien upon the husband's interest. Perkins v. Boyd, 16 Colo. App. 266, 65 P. 350 (1901).

Improvement as joint undertaking of lessor and lessee. Where the facts and circumstances disclose that the improvement is the joint undertaking of both the lessor and lessee, the interest in the land of both

may be held under the mechanics' lien law for the improvements so made, but in the absence of such proof only the interest of the lessee is liable. Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

When optionee deemed owner of real estate within article's purview. Where the holder of an option to purchase real estate causes building materials to be delivered thereon to thereafter be used in the construction of improvements on the land, and where the option thereafter ripens into fee ownership, the optionee is an owner of real estate within the coverage of this article, and, as such, empowered to impress such a lien upon the real estate to which he directs the delivery of building materials. Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Liens attach to interest acquired at foreclosure sale. Mechanics' liens attach to the interest acquired by the purchaser at a foreclosure sale through the public trustee's deed. Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

Lien for work done under streets and outside subdivision permitted. A mechanic's lien against an entire subdivision is valid when a portion of the materials supplied and labor performed was on land beneath publicly dedicated streets and outside of the formal boundaries of the subdivision property. Woodcrest Homes, Inc. v. First Nat'l Bank, 15 B.R. 886 (D. Colo. 1981).

III. LIEN ON LAND NECESSARY FOR BUILDING.

Land and building subject to lien. When a vendor requires the construction of a building upon the land contracted to be conveyed, and it is built, the land as well as the building is subject to a lien. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915); Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co., 60 Colo. 412, 153 P. 765 (1915).

Lien is granted on as much land as is necessary for the use and occupation of the building, that is, all the land which is benefitted and whose value is increased by the improvement. Hess Flume Co. v. La Junta Sub. Land Co., 63 Colo. 236 , 166 P. 246 (1917).

Lots need not be contiguous to be liened together. There is no provision that lots must be contiguous, nor any requirement, except that there must be one contract for all the lots and that the lien must be such as not to be readily and definitely apportioned, because it is the entirety of the contract, not of the lands, that determines the right. Buerger Inv. Co. v. B.F. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925).

Quantity of land necessary for convenient use presumable. Although the lienor is only entitled to the quantity of land necessary for the convenient use and occupancy of the buildings erected, it will be presumed that, in the absence of pleading or proof to the contrary, when the complaint described the land by legal subdivisions and avers that the buildings were erected thereon, the land described is necessary for the convenient use and occupancy of the buildings. Seely v. Neill, 37 Colo. 198, 86 P. 334 (1906).

IV. LIEN ON "ENTIRE STRUCTURE".

Construction of "for any entire structure". The phrase, "for any entire structure", in subsection (2), is not used to designate a completed from an uncompleted building, but to distinguish new structures not before existing, from betterments, repairs, improvements, and the like on previously constructed or existing improvements. Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915); Stinnett v. Modern Homes, 142 Colo. 176, 350 P.2d 197 (1960); Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

Word "entire", found in subsection (2), is not to be limited to those cases where the lienor may have contracted for or put up the whole structure. Church v. Smithea, 4 Colo. App. 175, 35 P. 267 (1893).

Structure lienable even if never completed. Labor performed and material furnished for an entire structure gives a lien upon such structure, though it is never completed. Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915).

Lien on entire structure superior to prior executed deed of trust. The lien of a mechanic for work done in the construction of an entire building on unimproved property is, as to the structure, superior to that of a deed of trust executed prior to the performance of the work. Church v. Smithea, 4 Colo. App. 175, 35 P. 267 (1893).

Lienors' rights where entire structure placed on property subject to prior encumbrance. Where an entire structure is put on the property subject to a prior encumbrance, this section gives the contractor or the lienors, separately or conjointly, the privilege to assert their rights against the newly erected building, and the prior encumbrancer loses nothing to which his security has affixed itself, nor does the lienor get anything beyond that which he may have put on the land. Church v. Smithea, 4 Colo. App. 175, 35 P. 267 (1893).

Enforcement of lien where improvement consists of walls and foundations. In enforcing the lien on an improvement where the

improvement consists of basement walls and foundations which cannot be removed and continue to retain any value, this article does not contemplate a course that will destroy the value of the improvement; the only way the improvement can be effectively reached to satisfy the lien against it is to sell the entire property as a whole and pursue some equitable course with the fund realized from the sale which will afford the greatest protection to the rights of all the parties. Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915).

Landscaping may constitute expansion of existing improvement. Where landscaping is added to land upon which other improvements have already been erected, the landscaping constitutes the expansion of an existing improvement. Lew Hammer, Inc. v. Dash, Inc., 42 Colo. App. 414, 599 P.2d 948 (1979).

Lien filed against entire project for partial work deemed proper. Where the work is done as a part of an entire project, and could not be readily and definitely divided, it is proper to file a lien against the entire project. Plateau Supply Co. v. Bison Meadows Corp., 31 Colo. App. 205, 500 P.2d 162 (1972).

Allegation or proof of portion of road upon which material used unnecessary. Since subsection (3) gives a lien upon the entire structure for which work or materials are furnished, hence it is unnecessary, in proceedings to enforce a lien for materials furnished in the construction of a railroad, for plaintiffs to allege or prove upon what portion of the road the material was used. Barnes v. Colo. Springs & C.C.D. Ry., 42 Colo. 461, 94 P. 570 (1908).

V. BLANKET LIENS.

The term "blanket lien" is commonly used to refer to "a single lien . . . made, established, and enforced against two or more improvements," although the statute does not specify a name for such liens. Brickman Group, Ltd. v. Compass Bank, 83 P.3d 1167 (Colo. App. 2003), aff'd, 107 P.3d 955 (Colo. 2005).

Claimant has choice of apportionment or blanket lien where former cannot readily be made. Buerger Inv. Co. v. B.F. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925).

Lien extends to multiple buildings where treated as one building. Where several buildings are erected upon a tract of land but are all designated for a united enjoyment or common use, they are to be treated as one building in relation to a mechanic's lien claim; thus, although the lien

claimant may have performed work on, or furnished materials for, only one of such buildings, his lien extends to the whole. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

When sales to different parties covered by single lien. Where material was sold partly to the owner, and partly to the contractor or agent of the owner, but it appeared sufficiently, however, in evidence that it was sold for one purpose on one contract, on one set of buildings, one lien was permitted. Buerger Inv. Co. v. B.F. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925).

When materialman may file claim on different property as one claim. Where material was furnished for the building of three houses and was used indiscriminately in three buildings, and the houses were built crosswise on four platted lots so that each house occupied part of the four lots without any segregation or division of the lots or description of the land on which the different houses were built, the materialman was not required at his peril to subdivide his claim and assign to each house as built the proportion of the debt which it ought in equity to bear, but might file his entire claim on all the houses and lots as one claim. Sprague Inv. Co. v. Mouat Lumber & Inv. Co., 14 Colo. App. 107, 60 P. 179 (1899).

Lien not invalidated by omission of owner's name in statement for lien. The omission of the name of one owner in a statement for a blanket lien does not invalidate the whole lien. Buerger Inv. Co. v. B.F. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925).

A blanket lien that omits property that benefitted from the mechanics' materials and work is valid against the property that is included in the lien statement. Brickman Group, Ltd. v. Compass Bank, 83 P.3d 1167 (Colo. App. 2003), aff'd, 107 P.3d 955 (Colo. 2005).

Effect of release of part of property covered by blanket lien. The mere release of a part of the property covered by a blanket lien does not effect a release of the remainder. Buerger Inv. Co. v. B.F. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925); Brickman Group, Ltd. v. Compass Bank, 83 P.3d 1167 (Colo. App. 2003), aff'd, 107 P.3d 955 (Colo. 2005).

When amount allowable under lien to be prorated. Where the value of the labor and material can be readily divided and apportioned and the lien is asserted against only a portion of the lienable property, then the amount to be allowed under the lien must be prorated according to the apportionment. Plateau Supply Co. v. Bison Meadows Corp., 31 Colo. App. 205, 500 P.2d 162 (1972).

A trial court's refusal to award pre-sale apportionment of lien, if supported by evidence, must stand. Court did not abuse its discretion in refusing apportionment where trust corporation's request for apportionment was based solely on the relative land holdings of parcel owners and presented no evidence that labor and material provided by lienors could be readily and equitably divided between land owners. Miller, Inc. v. Breckenridge Resort, 779 P.2d 1365 (Colo. App. 1989), aff'd in part and rev'd in part on other grounds sub nom. Indep. Trust v. Stan Miller, Inc., 796 P.2d 483 (Colo. 1990).

VI. LIEN ON FIXTURES.

Fixtures of leasehold estate lienable. A leasehold estate may be the subject of a lien, and logically, it must follow that whatever is a fixture of that estate can be subjected to the same lien. Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

Article need not be fastened to freehold. It is not now considered as absolutely necessary that an article be actually fastened to the freehold in order to make it a part thereof. Dawson v. Scruggs-Vandervoort Barney Realty Co., 84 Colo. 152 , 268 P. 584 (1928).

All-important questions concerning lien of fixtures are the intention of the person who brings the fixture upon the land, the use to which it is to be applied, and its fitness for that use. Dawson v. Scruggs-Vandervoort Barney Realty Co., 84 Colo. 152 , 268 P. 584 (1928).

Installation of electric lighting and wiring system lienable. The installation of a complete new electric lighting and wiring system in a hotel building constituted one entire improvement and entitled plaintiff to a lien by virtue of the provisions of this section. Longton v. Husung, 91 Colo. 501 , 16 P.2d 423 (1932).

Refrigerator plant connected to building subject to lien. A refrigerating plant, connected to a building by brine pipes and brackets, is part of the freehold, and one furnishing new brine pipes is entitled to a mechanic's lien thereon. Dawson v. Scruggs-Vandervoort Barney Realty Co., 84 Colo. 152 , 268 P. 584 (1928).

§ 38-22-104. Lien on mining property

The provisions of this article shall apply to all persons who do work or furnish laborers or materials, or mining, milling, or other machinery or other fixtures, as provided in section 38-22-101, for the working, preservation, prospecting, or development of any mine, lode, or mining claim or deposit yielding metals or minerals of any kind, or for the working, preservation, or development of any such mine, lode, or deposit, in search of any such metals or minerals; and to all persons who do work upon or furnish laborers or materials, mining, milling, and other machinery or other fixtures, as provided in section 38-22-101, upon, in, or for any shaft, tunnel, mill, or tunnel site, incline, adit, drift, or any draining or other improvement of or upon any such mine, lode, deposit, or tunnel site; and to every miner or other person who does work upon or furnishes any laborers, coal, power, provisions, timber, powder, rope, nails, candles, fuse, caps, rails, spikes, or iron, or other materials whatever, as provided in section 38-22-101, upon any mine, lode, deposit, mill, or tunnel site. But when two or more lodes, mines, or deposits owned or claimed by the same person are worked through a common shaft, tunnel, incline, adit, drift, or other excavation, then all the mines, mining claims, lodes, deposits, and tunnel and mill sites so owned and worked or developed, for the purpose of this article shall be deemed one mine. This section is not applicable to the owner of any mine, lode, mining claim, deposit, mill, or tunnel where the work or labor has been performed for or the laborers or materials furnished to a lessee.

History:

L. 1899: p. 266, § 4. R.S. 08: § 4028. L. 15: p. 332, § 1. C.L. § 6445. CSA: C. 101, § 18. CRS 53: § 86-3-4. C.R.S. 1963: § 86-3-4. L. 2000: Entire section amended, p. 207, § 4, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Mechanics' Liens Relative to Oil and Gas Operations", see 34 Dicta 207 (1957).

Purpose of section is to broaden and not to restrict the scope of this article. Chain O'Mines v. Lewison, 100 Colo. 186 , 66 P.2d 802 (1937).

Provisions of section are governed by the same rules that apply to a lien upon other property. Wilkins v. Abell, 26 Colo. 462, 58 P. 612 (1899);

Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co., 26 Colo. App. 155, 141 P. 527 (1914).

Services rendered must be at owner's instance. The services rendered, for which a lien is provided thereby, must be such as were rendered at the instance of the owner, or some one of the enumerated persons acting for him. Wilkins v. Abell, 26 Colo. 462, 58 P. 612 (1899).

Work for which lien on mine is given is that which is performed in the development and conservation of the mine and the results of which become incorporated with the mine so as to constitute a part of its value. Barnard v. McKenzie, 4 Colo. 251 (1878); Int'l Trust Co. v. Lowe, 66 Colo. 131, 180 P. 579 (1919); Climax Molybdenum Co. v. Specialized Installers, Inc., 12 B.R. 546 (D. Colo. 1981).

Planning and superintending development work upon the mines and in planning and supervising the erection of the mill and machinery are services for which a lien on a mine are given. Rara Avis Gold & Silver Mining Co. v. Bouscher, 9 Colo. 385, 12 P. 433 (1886).

Dredge for operation of placer is improvement of the land within the meaning of this section. Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co., 60 Colo. 412, 153 P. 765 (1915); Tiger Placers Co. v. Fisher, 98 Colo. 221 , 54 P.2d 891 (1936).

No lien permitted where lienable and nonlienable items confused. Where proper services are so confused with nonlienable items that the value thereof cannot be ascertained, no lien can be allowed. Empire Coal Co. v. Rosa, 26 Colo. App. 230, 142 P. 192 (1914).

Extraction work done for mine not lienable. Work done in the extraction of coal, from a coal mine, does not give a lien. Empire Coal Co. v. Rosa, 26 Colo. 230, 142 P. 192 (1899).

Words "deposit yielding metals or minerals" include gold bearing sands or gravels, which are commonly known as placers. Colo. Gold Dredging Co. v. Stearns-Roger Mfg. Co., 60 Colo. 412, 153 P. 765 (1915).

Applied in Folsom v. Cragen, 11 Colo. 205, 17 P. 515 (1887); Davidson v. Jennings, 27 Colo. 187, 60 P. 354 (1900); Schweizer v. Mansfield, 14 Colo. App. 236, 59 P. 843 (1900); Antlers Park Regent Mining Co. v. Cunningham, 29 Colo. 284, 68 P. 226 (1902); Ontario-Colo. Gold Mining Co. v. MacKenzie, 19 Colo. App. 298, 74 P. 791 (1903); Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912); Grimm v. Yates, 58 Colo. 268 , 145 P. 696 (1914).

II. PERSONS ENTITLED TO LIEN.

Right to lien is given only to those who work or furnish material for the working, preservation, or development of the property, or who should do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or draining of a mine, lode, or deposit. Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901); Chain O'Mines v. Lewison, 100 Colo. 186 , 66 P.2d 802 (1937).

No mention is made of architects, engineers, or of any professional service at all as is the case in §38-22-101 ; if, therefore, under its terms, anyone could acquire a lien for professional services, it must be clearly of that character of service which could be properly denominated work actually done for the working, preservation, or development of the property. Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901).

Professional mining expert and geologist not entitled to mechanic's lien on a mine for work done in exploring, examining, and considering a mine with reference to its mineral character and capacity to produce valuable and precious metals, and with reference to the quantity of ore in such mine and its value, and for making a report thereon, done under a contract with the owner. Lindemann v. Belden Consol. Mining & Milling Co., 16 Colo. App. 342, 65 P. 403 (1901).

Disbursing agent and accountant not entitled to lien. Rara Avis Gold & Silver Mining Co. v. Bouscher, 9 Colo. 385, 12 P. 433 (1886).

When general manager of mining company not entitled to lien for salary. Where the general manager of a mining company serving at a salary, under employment for a term of years, took an active part in the framing and issue of a series of bonds, secured by mortgage of the company's properties, he is not entitled to a lien for his salary, as against the bondholder. Int'l Trust Co. v. Lowe, 66 Colo. 131, 180 P. 579 (1919).

Those performing work for mine's development entitled to lien. Those, who under contract with the purchaser of a mining claim, perform work for its development, or for discharging the annual assessment required by an act of congress in case of an unpatented claim, are, under this section, entitled to a lien for the value of their labor. Pike v. Empfield, 21 Colo. App. 161, 120 P. 1054 (1912).

Mining engineer entitled to lien for professional service about mine. A mining engineer is entitled to a lien for surveys, superintendence,

or other professional services about the mine under §38-22-101 . Int'l Trust Co. v. Lowe, 66 Colo. 131 , 180 P. 579 (1919).

III. LABOR OR MATERIALS FURNISHED LESSEES.

No lien attaches to mine owner's interest for material furnished lessee. A mechanic's lien will not attach to the interest of the owner of a mine, for work done or material furnished a lessee in working or developing the mine, where the work is done or material furnished at the instance of, or under contract with, one whose only interest is that of lessee. Wilkins v. Abell, 26 Colo. 462 , 58 P. 612 (1899); Williams v. Eldora-Enterprise Gold Mining Co., 35 Colo. 127, 83 P. 780 (1905); Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co., 26 Colo. App. 155, 141 P. 527 (1914); Empire Coal Co. v. Rosa, 26 Colo. App. 230, 142 P. 192 (1914).

Proof required to establish lien for lessees' miners. Miners who work for lessees may not have a lien on the property of the lessor simply because they were hired by the lessee and worked on the property, because there must be some showing to the point that the owner of the realty was in some manner obligated, either because he was a privy and party to the contract of employment or because in some other way than by the lease, he authorized the lessee to contract or because the agreement by its terms gave the lessee authority. Little Valeria Mining & Milling Co. v. Ingersoll, 14 Colo. App. 240, 59 P. 970 (1900); Empire Coal Co. v. Rosa, 26 Colo. App. 230, 142 P. 192 (1914).

§ 38-22-105. Property subject to lien - notice

(1) Any building, mill, manufactory, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway, and every structure or other improvement mentioned in this article, constructed, altered, added to, removed to, or repaired, either in whole or in part, upon or in any land with the knowledge of the owner or reputed owner of such land, or of any person having or claiming an interest therein, otherwise than under a bona fide prior recorded mortgage, deed of trust, or other encumbrance, or prior lien shall be held to have been erected, constructed, altered, removed, repaired, or done at the instance and request of such owner or person, including landlord or vendor, who by lease or contract has authorized such improvements, but so far only as to subject his interest to a lien therefor as provided in this section.

(2) Such interest so owned or claimed shall be subject to any lien given by the provisions of this article, unless such owner or person within five days after obtaining notice of the erection, construction, alteration, removal, addition, repair, or other improvement, gives notice that his or her interests shall not be subject to any lien for the same by serving a written or printed notice to that effect, personally, upon all persons performing labor or furnishing laborers, materials, machinery, or other fixtures therefor, or within five days after such owner or person has obtained notice of the erection, construction, alteration, removal, addition, repair, or other improvement, or notice of the intended erection, construction, alteration, removal, addition, repair, or other improvement gives such notice by posting and keeping posted a written or printed notice in some conspicuous place upon said land or upon the building or other improvements situate thereon.

(3) This section shall not apply to coowners of unincorporated canals, ditches, flumes, aqueducts, and reservoirs nor to the enforcement of article 23 of this title. The provisions of this section shall not be construed to apply to any owner or person claiming any interest in such property, the interest of whom is subject to a lien pursuant to the provisions of section 38-22-101.

History:

L. 1899: p. 267, § 5. R.S. 08: § 4029. C.L. § 6446. CSA: C. 101, § 19. CRS 53: § 86-3-5. C.R.S. 1963: § 86-3-5. L. 65: p. 851, § 3. L. 2000: (2) amended, p. 207, § 5, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For note, "Uranium Mining Lease", see 27 Rocky Mt. L. Rev. 425 (1955). For article, "Mechanics' Liens Relative to Oil and Gas Operations -- Part II", see 34 Dicta 373 (1957). For comment on Lierz v. Cook (cited below), see 30 Rocky Mt. L. Rev. 220 (1958).

Section has no application to improvements made pursuant to contract, direct or indirect, with the owner of the land. Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P. 806 (1889); Miller v. Davis, 26 Colo. App. 483, 145 P. 714 (1914); Stapp v. Carb-Ice Corp., 122 Colo. 526 , 224 P. 2 d 935 (1950).

Section gives lien for improvements not authorized by any contract between the owner and the person at whose instance they are being constructed, when by his seeming acquiescence through silence, it would be inequitable to relieve his property from a lien for such improvements. Fisher v. McPhee & McGinnity Co., 24 Colo. App. 420, 135 P. 132 (1913); Grimm v. Yates, 58 Colo. 268 , 145 P. 696 (1914).

A mechanics' lien may attach to property pursuant to this section, though the owner did not contract for the architectural services. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

Equitable ownership sufficient to come within section. It is not necessary that the owner shall have the legal title in order to come within the provisions of this section; equitable ownership is sufficient. Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

One joint tenant may create lien on his own interest in land in favor of a mechanic. Rico Reduction & Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890).

Lien claimants not required to investigate tenant's authority. This section does not impose a duty upon lien claimants to investigate the authority of the tenant to contract for improvements. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

Architect who does not participate in activities enumerated in this section is not authorized to file a lien pursuant to this section. Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

Claimant not charged with another's mistake resulting in noncompletion. The claimant is not to be charged with another's mistake in judgment which results in the noncompletion of the project. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

Colorado's mechanics' lien statute does not impose any personal liability upon a landowner for work done on the property. Personal liability is permitted only if a contract is proved on which a party may recover regardless of the lien statute. DCB Const. v. Central City Devel. Co., 940 P.2d 958 (Colo. App. 1996), aff'd on other grounds, 965 P.2d 115 (Colo. 1998).

Applied in O'Byrne v. Stirn, 106 Colo. 167, 103 P.2d 13 (1940); Samett v. Whelan, 147 Colo. 41 , 362 P.2d 559 (1961); Denver Decorators, Inc. v. Twin Teepee Lodge, Inc., 163 Colo. 343, 431 P.2d 8 (1967).

II. IMPROVEMENTS MADE WITH KNOWLEDGE OF OWNER.

Purpose of knowledge provision of subsection (1) is to provide a lien for improvements when by the owner's seeming acquiescence through silence it would be inequitable to relieve his property from a lien for such improvements. A-1 Plumbing & Heating Co. v. Thirteenth St. Corp., 44 Colo. App. 13, 616 P.2d 141 (1980), aff'd in part and rev'd on other grounds, 640 P.2d 1130 (Colo. 1982).

"Knowledge" means notice. "Knowledge", as it is used in subsection (1), is virtually synonymous with notice. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

Landlord need not have actual knowledge of possible lien. Section requires only that landlord have notice that materials or labor are being furnished to provide improvements to his property; he need not have actual knowledge that his interests will be subjected to mechanics' liens. A-1 Plumbing & Heating Co. v. Thirteenth St. Corp., 44 Colo. App. 13, 616 P.2d 141 (1980) aff'd in part and rev'd on other grounds, 640 P.2d 1130 (Colo. 1982).

Owner's knowingly permitting improvement fastens lien. This section fastens the lien on the owner's land by his knowingly permitting the property to be improved. Johnson v. Stover, 71 Colo. 445, 207 P. 595 (1922).

III. NOTICE BY OWNER.

Purpose of the posting provision of subsection (2) is to protect suppliers or laborers who enter upon a job site without knowledge of the owner's nonliability. Uni-Build Corp. v. Colo. Sem., 650 P.2d 1300 (Colo. App. 1982).

Burden of giving notice is on owner. The burden of notifying the lien claimant that the owner's interest will not be subject to a mechanic's lien is

on the owner. Thirteenth St. Corp. v. A-1 Plumbing & Heating Co., 640 P.2d 1130 (Colo. 1982).

Section provides for actual or constructive notice at owner's option. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Section does not expressly or impliedly exclude other actual notice which may be given. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Once received, notice effective for entire period of construction. Once a person receives notice, whether it be by personal service or by posting, the notice is effective as to that person for the entire period of construction. Uni-Build Corp. v. Colo. Sem., 650 P.2d 1300 (Colo. App. 1982).

Owner's notice not inconsistent with recording statute. That an owner can give notice that his interest is not to be subjected to a lien is not at all inconsistent with the recording statute, article 35 of this title, under whose provisions the same notice can be given in another way; the two statutes can and should be read together and both permitted to stand. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Vendor may relieve premises of lien by posting notice. The vendor of a mining claim may, by posting the proper notice, relieve the premises of any lien on behalf of those who perform development work under contract with the purchaser. Pike v. Empfield, 21 Colo. App. 161, 120 P. 1054 (1912).

Purchaser at foreclosure sale required to give notice. The purchaser at a foreclosure sale becomes the owner, within the meaning of this section, and when it failed to give the statutory notice after it obtained notice of the improvement, its interest is subject to a mechanic's lien. Bankers' Bldg. & Loan Ass'n v. Fleming Bros. Lumber Co., 83 Colo. 335, 264 P. 1087 (1928).

Purchaser as vendor's agent may be required to post notice. If the contract of sale provides that the purchaser shall post and maintain the notice, he is thereby made the agent of the vendor for this purpose, and his neglect to post the notice is the neglect of the vendor so that the premises are chargeable with the lien. Pike v. Empfield, 21 Colo. App. 161, 120 P. 1054 (1912).

Owner of property leased for oil-well drilling not within section. Where a lease of property authorizes the drilling of an oil well thereon, the owner of the land is not within subsection (2), requiring the giving of notice

to prevent liens attaching to his estate occasioned by drilling operations. Terminal Drilling Co. v. Jones, 84 Colo. 279 , 269 P. 894 (1928).

Owner not required to post notice where lessee authorized to make improvements. Where a lessee in possession is authorized by the terms of his lease to make alterations or improvements to the leasehold and the same is done by the lien claimant solely at the request of the lessee, no lien will be sustained upon the property of the lessor, and no notice of nonliability need be posted by the property owner. Lierz v. Cook, 136 Colo. 221 , 315 P.2d 535 (1957).

Prior lienor not required to give notice. A vendor having a lien for balance due on purchase price is a prior lienor within the meaning of this section, and thus is not required to give notice to a lumber company furnishing materials to the vendee. Baughman v. Foster Lumber Co., 108 Colo. 37 , 113 P.2d 423 (1941).

Effect of failure of tenant in common to give required notice. The effect of the failure of a tenant in common to give the notice required by this section is to make a lien for materials furnished prior to a sale of the land superior to her portion of an incumbrance given to secure the purchase price. Seely v. Neill, 37 Colo. 198, 86 P. 334 (1906).

Where estate not chargeable by landowner's failure to give notice. Where work done is such as is authorized by agreement between the landowner and the person at whose instance such work is performed, and is not such as entitles those performing it to a lien, the estate of the landowner does not become chargeable by his failure to give the notice required by this subsection (2). Grimm v. Yates, 58 Colo. 268 , 145 P. 696 (1914).

Posting of nonliability notice insufficient to preclude liability under theory of unjust enrichment. F.M. Hall & Co. v. Southwest Props., 747 P.2d 688 (Colo. App. 1987).

Section does not preclude posting of nonliability notice before notice of intended construction is received. F.M. Hall & Co. v. Southwest Props., 747 P.2d 688 (Colo. App. 1987).

Filing a notice of nonliability under Colorado's lien statute, thereby preventing a lien from attaching to an owner's interest in property, does not foreclose a direct claim against a landowner under some contractual theory of liability. DCB Const. v. Central City Devel. Co., 940 P.2d 958 (Colo. App. 1996), aff'd on other grounds, 965 P.2d 115 (Colo. 1998).

IV. PLEADING AND PRACTICE.

Section furnishes rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien; to overcome this presumption that the owner consented that his property be subject to a lien, the owner must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice or such constructive notice as would be given by recording a lease with a provision that the lessor's interest should not be subject to a lien. Stewart v. Talbott, 58 Colo. 563 , 146 P. 771 (1915).

Subsection (3) constitutes affirmative defense which, in order to be availed of, must be pleaded by defendant. Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912).

Facts bringing case within section must be specifically alleged. Where the party seeking enforcement of a lien relies upon the failure of the landowner to give the notice required by this section, his complaint must specifically allege facts which bring the case within the terms of this section. Empire Coal Co. v. Rosa, 26 Colo. App. 230, 142 P. 192 (1914).

Allegations and proof required to enforce lien. One seeking to enforce a lien under this section for improvements made, with the knowledge of the owner, must both allege and prove such knowledge and, further must allege and prove that the materials for which the lien is claimed were furnished to be used in the particular improvement in question. Milwaukee Gold Mining Co. v. Tomkins-Cristy Hdwe. Co., 26 Colo. App. 155, 141 P. 527 (1914).

When allegation or proof of owner's failure to give notice unnecessary. Where it was alleged that an improvement was made with the owner's knowledge, it is not necessary to further allege or prove that the owner did not give the notice of nonliability provided for in this section. Fisher v. McPhee & McGinnity Co., 24 Colo. App. 420, 135 P. 132 (1913).

Architect's preliminary work constitutes the commencement of an improvement or a structure. Seracuse Lawler & Partners, Inc. v. Copper Mt., 654 P.2d 1328 (Colo. App. 1982).

§ 38-22-105.5. Notice of lien law

(1) Upon issuing a building permit for the improvement, restoration, remodeling, or repair of or the construction of improvements or additions to residential property, the agency or other authority issuing the permit shall send a written notice, as set forth in subsection (2) of this section, by first-class mail addressed to the property for which the permit was issued.

(2) The notice shall be in at least ten-point bold-faced type, if printed, or in capital letters, if typewritten, shall identify the contractor by name and address, and shall state substantially as follows:

IMPORTANT NOTICE TO OWNERS: UNDER COLORADO LAW, SUPPLIERS, SUBCONTRACTORS, OR OTHER PERSONS FURNISHING LABORERS OR PROVIDING LABOR OR MATERIALS FOR WORK ON YOUR RESIDENTIAL PROPERTY MAY HAVE A RIGHT TO COLLECT THEIR MONEY FROM YOU BY FILING A LIEN AGAINST YOUR PROPERTY. A LIEN CAN BE FILED AGAINST YOUR RESIDENCE WHEN A SUPPLIER, SUBCONTRACTOR, OR OTHER PERSON IS NOT PAID BY YOUR CONTRACTOR FOR SUCH LABORERS, LABOR, OR MATERIALS. HOWEVER, IN ACCORDANCE WITH THE COLORADO GENERAL MECHANICS' LIEN LAW, SECTIONS 38-22-102 (3.5) AND 38-22-113(4), COLORADO REVISED STATUTES, YOU HAVE AN AFFIRMATIVE DEFENSE IN ANY ACTION TO ENFORCE A LIEN IF YOU OR SOME PERSON ACTING ON YOUR BEHALF HAS PAID YOUR CONTRACTOR AND SATISFIED YOUR LEGAL OBLIGATIONS.

YOU MAY ALSO WANT TO DISCUSS WITH YOUR CONTRACTOR, YOUR ATTORNEY, OR YOUR LENDER POSSIBLE PRECAUTIONS, INCLUDING THE USE OF LIEN WAIVERS OR REQUIRING THAT EVERY CHECK ISSUED BY YOU OR ON YOUR BEHALF IS MADE PAYABLE TO THE CONTRACTOR, THE SUBCONTRACTOR, AND THE SUPPLIER FOR AVOIDING DOUBLE PAYMENTS IF YOUR PROPERTY DOES NOT SATISFY THE REQUIREMENTS OF SECTIONS 38-22-102 (3.5) AND 38-22-113(4), COLORADO REVISED STATUTES.

YOU SHOULD TAKE WHATEVER STEPS NECESSARY TO PROTECT YOUR PROPERTY.

(3) The notice prescribed by this section shall not be required when a building permit is issued for new residential construction or for residential property containing more than four living units.

(4) As used in this section:

(a) "New residential construction" means the construction or addition of living units on real property that was previously unimproved or was used for nonresidential purposes.

(b) "Residential property" means any real property, including improvements, containing living units used for human habitation.

(5) To offset the cost of issuing the notice required by this section, the appropriate authority may raise the fee for a building permit by one dollar.

(6) The failure of the agency or other authority which issues building permits to provide the notice required by this section shall not be an affirmative defense to any lien claimed pursuant to the provisions of this article; nor shall the agency or any employee of the agency incur liability as a result of such failure.

(7) The agency or other authority which issues building permits may deliver the notice required by this section personally to the owner of the property, in lieu of mailing the notice as provided by subsection (1) of this section.

History:

L. 79: Entire section added, p. 1389, § 1, effective January 1, 1980. L. 81: Entire section R&RE, p. 1822, § 1, effective July 1. L. 88: (2) R&RE, p. 1253, § 1, effective April 14. L. 2000: (2) amended, p. 208, § 6, effective August 2.

§ 38-22-106. Priority of lien - attachments

(1) All liens established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or, if said contract is not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any lien or encumbrance subsequently intervening, or which may have been created prior thereto but which was not then recorded and of which the lienor, under this article, did not have actual notice. Nothing contained in this section, however, shall be construed as impairing any valid encumbrance upon any such land duly made and recorded prior to the signing of such contract or the commencement of work upon such improvements or structure.

(2) No attachment, garnishment, or levy under an execution upon any money due or to become due to a contractor from the owner or reputed owner of any such property subject to any such lien shall be valid as against such lien of a subcontractor or materialmen, and no such attachment, garnishment, or levy upon any money due to a subcontractor or materialmen of the second class, as provided in section 38-22-108(1)(b), from the contractor shall be valid as against any lien of a laborer employed by the day or piece, who does not furnish any material as classified in this article.

History:

L. 1899: p. 268, § 6. R.S. 08: § 4030. C.L. § 6447. CSA: C. 101, § 20. CRS 53: § 86-3-6. C.R.S. 1963: § 86-3-6.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Perennial Problem of Security Priority and Recordation", see 24 Rocky Mt. L. Rev. 180 (1952). For note, "Real Property Relative Priority of Liens -- Federal Tax Lien Priority: A Judicial Frankenstein", see 34 Dicta 186 (1957). For article, "One Year Review of Property", see 37 Dicta 89 (1960).

Lien for paving of streets may not relate back prior to dedication and acceptance of streets by city. Section does not abrogate common law rule that public property not subject to foreclosure. City of Westminster v. Brannan Sand & Gravel Co., 940 P.2d 393 (Colo. 1997).

Mechanics' lien laws are designed for the benefit and protection of mechanics and materialmen and should be construed in favor of lien claimants. Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956).

Lien on building and improvements is given preference over any prior lien or encumbrance upon the land on which it is erected. Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co., 26 Colo. App. 135, 141 P. 144 (1914); Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956).

Liens or encumbrances subject to recording act. This section subjects every lien or encumbrance to the effect of the recording act, except such of which the mechanic lienors had actual notice as of the date of the commencement of the work, and they are rendered noneffective as against such lienors and are subordinate to their rights. Credit Fin. Corp. v. Hale & Perry, Inc., 66 F.2d 357 (10th Cir. 1933).

Rule of caveat emptor applies against mechanic as well as in the case of a vendee. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887).

Contractor must ascertain interest of other contracting party. If a contractor proposes to erect a building or to put labor or materials on a piece of ground, it behooves him to assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid lien. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887).

Effect of garnishment. This section does not say that a garnishment of money due a contractor shall be invalid as against the claim of a subcontractor, but only as against the lien of a subcontractor, and when a subcontractor's lien is perfected, a garnishment made while the lien was still inchoate would become invalid by reason of the relation back of the perfected lien; but, if there should never be a perfected lien, the garnishment would be effectual. Schradsky v. Dunklee, 9 Colo. App. 394, 48 P. 666 (1897).

Applied in Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Chicago Lumber Co. v. Dillon, 13 Colo. App. 196, 56 P. 989 (1899); State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912); Park Lane Props. v. Fisher, 89 Colo. 591 , 5 P.2d 577 (1931); 3190 Corp. v. Gould, 163 Colo. 356, 431 P.2d 466 (1967); Lew Hammer, Inc. v. Dash, Inc., 42 Colo. App. 414, 599 P.2d 948 (1979); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724 (Colo. App. 1981).

II. TIME WHEN LIEN ATTACHES.

When lien begins. The lien of the mechanic or materialman begins with the commencement of the work or furnishing of the material under an express or implied contract with the employer and attaches upon whatever estate the latter may have at the commencement of such work or the furnishing of such materials. Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887); Chain O'Mines v. Lewison, 100 Colo. 186 , 66 P.2d 802 (1937); Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Lien relates to date first item furnished. Where it is fairly inferable from the evidence that supplies furnished for the operation of a mine, at different times during a series of months, were furnished under a single contract, the transaction will be regarded as a single one, and the lien allowed therefor will relate to the date of the first item furnished. Int'l Trust Co. v. Clark Hdwe. Co., 6 6 Colo. 21 0, 180 P. 300 (1919); Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Architect's lien relates back to time of commencement of his work on his plans and drawings for the proposed building and is not limited to the time of commencement of actual work on a structure. Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

The services of an architectural firm and an engineering firm in preparing preliminary plans and drawings for a project and in performing engineering work, respectively, constituted "commencement of the work upon the structure or improvement" under subsection (1). Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977); Weather Eng'g & Mfg., Inc. v. Pinon Springs Condos., Inc., 192 Colo. 495 , 563 P.2d 346 (1977).

Mechanics' lien not avoided under federal bankruptcy code section which allows the trustee to avoid a lien not perfected or enforceable on the date the petition is filed since, under this section, a mechanics' lien, once perfected, relates back to time of commencement of work. In re Cantrup, 38 B.R. 148 (Bankr. D. Colo. 1984).

Mechanics' lien relates back to the commencement of the work which in this case was the date on which the subcontractor received notice that it won the contract and began performance. Gen. Growth Dev. v. A & P Steel, Inc., 678 F. Supp. 243 (D. Colo. 1988).

Failure to perfect lien relates back. As a perfected lien has relation backward and holds the land from the time of the commencement of the work, so a failure to perfect the lien also relates back; and, if there is finally

no lien, there was none from the beginning. Schradsky v. Dunklee, 9 Colo. App. 394, 48 P. 666 (1897).

The term "owner" as used in this section cannot be interpreted to mean only a current owner because that would mean that mechanics' liens could never relate back to work done for prior owners. Landowners could avoid mechanics' liens simply by transferring the property during construction and contend that work the original landowner commissioned from contractors was not lienable because it was not done at the behest of the current owner. Ferguson Enters. v. Keybuild Solutions, 275 P.3d 741 (Colo. App. 2011).

Statute presupposes the existence of either a written or oral communication between the first contractor and the owner or lessee in order for a lien to attach. Printz Servs. Corp. v. Main Elect., Ltd., 949 P.2d 77 (Colo. App. 1997).

Whether one is "first contractor" depends on time contract entered. Whether one is a "first contractor" does not depend upon whether the contract is in writing, but rather, at what time the contract, either express or implied, is entered into with the owner. Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977).

III. PRIORITY OF LIENS.

Priority provisions strictly construed. Priority relates to perfection of the lien, not to the remedial portions of the mechanics' lien statute, and therefore, the statute's provisions governing priority should be strictly construed. Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

This section makes subsequent mortgages junior to valid prior mechanics' liens. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Mechanics' liens subordinate to prior deed of trust on land. Mechanics' liens are junior and subordinate to an existing deed of trust on the land occupied by the building. Darien v. Hudson, 134 Colo. 213 , 302 P.2d 519 (1956).

A deed or mortgage, recorded before a contract to perform labor was made, or work commenced thereunder, would take precedence over a mechanic's lien. Folsom v. Cragen, 11 Colo. 205, 17 P. 515 (1887); Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887).

Mechanics' liens subordinate to prior deed of trust on land and future building. Where a deed of trust was given for a loan with the

understanding that the loan was to be used for the construction of a building, and the deed of trust expressly covered the building to be erected, and where it was recorded before work on the building was begun, the lien of the deed of trust took priority over mechanics' liens to the extent that the money advanced under the deed was actually applied to payment of labor and materials used in the construction of the building. Joralmon v. McPhee, 31 Colo. 26, 71 P. 419 (1903).

Purchase money lien is not entitled to preference over those asserted by mechanics' lien claimants. Sontag v. Abbott, 140 Colo. 351 , 344 P.2d 961 (1959).

Priority of federal tax liens. United States v. Vorreiter, 134 Colo. 543, 307 P.2d 475, rev'd, 355 U.S. 15, 78 S. Ct. 19, 2 L. Ed. 2d 23 (1957).

Purchaser's title paramount to later encumbrances upon property. The title of a purchaser at a sale foreclosing a mechanic's lien is paramount to all encumbrances upon the property after the commencement of the building. Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

Plaintiff must prove encumbrance is inferior to lien. Where the complaint alleged that an encumbrance was subject to and inferior to the rights and lien of plaintiff, it was necessary for plaintiff to prove that the encumbrance was inferior to its lien. Kennicott-Patterson Transf. Co. v. Modern Smelting & Ref. Co., 26 Colo. App. 135, 141 P. 144 (1914).

"Actual notice" defined. "Actual notice", as used in subsection (1), is such notice as is positively proved to have been given to a party directly and personally, or such as the party is presumed to have received personally because the evidence within the party's knowledge was sufficient to put the party upon inquiry. Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

§ 38-22-107. Lien attaches to water rights and franchises

Such liens likewise shall attach to rights of water and rights-of-way that may pertain in any manner to any kind of property specified in this article and to which such liens attach. In the case of corporations such liens shall attach to all the franchises and charter privileges that may pertain in any manner to said specified property.

History:

L. 1899: p. 269, § 7. R.S. 08: § 4031. C.L. § 6448. CSA: C. 101, § 21. CRS 53: § 86-3-7. C.R.S. 1963: § 86-3-7.

§ 38-22-108. Rank of liens

(1) Every person given a lien by this article whose contract, either express or implied, is with the owner or reputed owner or owner's agent or other representative, is a principal contractor and all others are subcontractors; and in every case in which different liens are claimed against the same property, the rank of each lien, or class of liens, as between the different lien claimants, shall be declared and ordered to be satisfied in the decree or judgment in the following order named:

(a) The liens of all those who were laborers or mechanics working by the day or piece, but without furnishing material therefor, either as principal or subcontractors;

(b) The liens of all other subcontractors and of all materialmen whose claims are either entirely or principally for laborers, materials, machinery, or other fixtures, furnished either as principal contractors or subcontractors;

(c) The liens of all other principal contractors and all moneys realized in any actions for the satisfaction of liens against the same improvements or structures shall be paid out in the order above designated.

History:

L. 1899: p. 269, § 8. R.S. 08: § 4032. C.L. § 6449. CSA: C. 101, § 22. CRS 53: § 86-3-8. C.R.S. 1963: § 86-3-8. L. 2000: IP(1), (1)(b), and (1)(c) amended, p. 208, § 7, effective August 2.

Case Note:

ANNOTATION

Materialmen includes a company furnishing steel to be used in the erection of a building. Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915).

Materialman furnishing materials directly to owner treated as principal contractor. A materialman furnishing materials directly to the owner is treated as a principal contractor under this article. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Applied in Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977); Weather Eng'g & Mfg., Inc. v. Pinon Springs Condominiums, Inc., 192 Colo. 495 , 563 P.2d 346 (1977).

§ 38-22-109. Lien statement

(1) Any person wishing to use the provisions of this article shall file for record, in the office of the county clerk and recorder of the county wherein the property, or the principal part thereof, to be affected by the lien is situated, a statement containing:

(a) The name of the owner or reputed owner of such property, or in case such name is not known to him, a statement to that effect;

(b) The name of the person claiming the lien, the name of the person who furnished the laborers or materials or performed the labor for which the lien is claimed, and the name of the contractor when the lien is claimed by a subcontractor or by the assignee of a subcontractor, or, in case the name of such contractor is not known to a lien claimant, a statement to that effect;

(c) A description of the property to be charged with the lien, sufficient to identify the same; and

(d) A statement of the amount due or owing such claimant.

(2) Such statement shall be signed and sworn to by the party, or by one of the parties, claiming such lien, or by some other person in his or their behalf, to the best knowledge, information, and belief of the affiant; and the signature of any such affiant to any such verification shall be a sufficient signing of the statement.

(3) In order to preserve any lien for work performed or laborers or materials furnished, there must be a notice of intent to file a lien statement served upon the owner or reputed owner of the property or the owner's agent and the principal or prime contractor or his or her agent at least ten days before the time of filing the lien statement with the county clerk and recorder. Such notice of intent shall be served by personal service or by registered or certified mail, return receipt requested, addressed to the last known address of such persons, and an affidavit of such service or mailing at least ten days before filing of the lien statement with the county clerk and recorder shall be filed for record with said statement and shall constitute proof of such service.

(4) All such lien statements claimed for labor and work by the day or piece, but without furnishing laborers or materials therefor, must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of two months next after the completion of the building, structure, or other improvement.

(5) Except as provided in subsections (10) and (11) of this section, the lien statements of all other lien claimants must be filed for record at any time before the expiration of four months after the day on which the last labor is performed or the last laborers or materials are furnished by such lien claimant.

(6) New or amended statements may be filed within the periods provided in this section for the purpose of curing any mistake or for the purpose of more fully complying with the provisions of this article.

(7) No trivial imperfection in or omission from the said work or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall be deemed a lack of completion, nor shall such imperfection or omission prevent the filing of any lien statement or filing of or giving notice, nor postpone the running of any time limit within which any lien statement shall be filed for record or served upon the owner or reputed owner of the property or such owner's agent and the principal or prime contractor or his or her agent, or within which any notice shall be given. For the purposes of this section, abandonment of all labor, work, services, and furnishing of laborers or materials under any unfinished contract or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof. For the purposes of this section, "abandonment" means discontinuance of all labor, work, services, and furnishing of laborers or materials for a three-month period.

(8) Subject to the prior termination of the lien under the provisions of section 38-22-110, no lien claimed by virtue of this article shall hold the property, or remain effective longer than one year from the filing of such lien, unless within thirty days after each annual anniversary of the filing of said lien statement there is filed in the office of the county clerk and recorder of the county wherein the property is located an affidavit by the person or one of the persons claiming the lien, or by some person in his behalf, stating that the improvements on said property have not been completed.

(9) Upon the filing of the notice required and the commencement of an action, within the time and in the manner required by said section 38-22-110, no annual affidavit need be filed thereafter.

(10) Within the applicable time period provided in subsections (4) and (5) of this section and subject to the provisions of section 38-22-125, any lien claimant granted a lien pursuant to section 38-22-101 may file with the county clerk and recorder of the county in which the real property is situated a notice stating the legal description or address or such other description as

will identify the real property; the name of the person with whom he has contracted; and the claimant's name, address, and telephone number. One such notice may be filed upon more than one property, and, in the case of a subdivision, one notice may describe only the part thereof upon which the claimant has or will obtain a lien pursuant to section 38-22-101. The filing of said notice shall serve as notice that said person may thereafter file a lien statement and shall extend the time for filing of the mechanic's lien statement to four months after completion of the structure or other improvement or six months after the date of filing of said notice, whichever occurs first. Unless sooner terminated as provided in subsection (11) of this section, the notice provided for in this subsection (10) shall automatically terminate six months after the date said notice is filed. In the event that said structure or other improvements have not been completed prior to the termination of said notice, a claimant, prior to said termination date, may file a new or amended notice which shall remain effective for an additional period of six months after the date of filing or four months after the date of completion of said structure or other improvements, whichever occurs first.

(11) Upon termination of agreement to provide labor, laborers, or materials, the owner, or someone in such owner's behalf, may demand from the person filing said notice a termination of said notice, which termination shall identify the properties upon which labor has not been performed or to which laborers or materials have not been furnished and as to which said notice is terminated. Upon the filing of said termination in the office of the county clerk and recorder in the county wherein said property is situated, such notice no longer constitutes notice as provided in subsection (10) of this section as to the property described in said termination.

(12) The notices provided for in subsections (10) and (11) of this section shall be recorded in the office of the county clerk and recorder of the county wherein the real property is located.

History:

L. 1899: p. 269, § 9. R.S. 08: § 4033. C.L. § 6450. CSA: C. 101, § 23. CRS 53: § 86-3-9. L. 55: p. 537, § 1. C.R.S. 1963: § 86-3-9. L. 65: pp. 851, 856, §§ 4, 6. L. 75: (3) R&RE and (4), (5), (7), and (10) amended, pp. 1420, 1422, 1423, §§ 1, 2, 3, effective October 1. L. 79: (8), (10), and (11) amended and (12) R&RE, pp. 1390, 1391, §§ 2, 3, effective January 1, 1980. L. 83: (10) amended, p. 1229, § 16, effective July 1. L. 2000: IP(1), (1)(b), (3) to (5), (7), and (11) amended, p. 209, § 8, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Property Law", see 32 Dicta 420 (1955). For article, "Highlights of the 1955 Colorado Legislative Session -- Security Transactions", see 28 Rocky Mt. L. Rev. 76 (1955). For article, "Mechanic's Liens -- The 'Intent' Provisions Explored", see 11 Colo. Law. 1492 (1982). For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982). For article, "The Mechanics' Lien Trust Fund Statute -- Theft or Not Theft", see 16 Colo. Law. 1968 (1987).

Construction lenders not deprived of due process. This article does not deprive construction lenders of property without due process of law, even though lien statements are filed ex parte, without prior hearing, and contain conclusory allegations of entitlement to a lien, and the lien may be extended indefinitely by filing an affidavit stating that the improvement has not been completed. Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977).

To require the full panoply of due process protections before filing a lien statement would impair the notice function of the lien statements. Bankers Trust Co. v. El Paso Pre-Cast Co., 192 Colo. 468 , 560 P.2d 457 (1977).

Purpose of this section is to assure that the owner is given notice of liens filed by persons with whom he has not dealt directly. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967); Tighe v. Kenyon, 681 P.2d 547 (Colo. App. 1984).

Where the charges at issue are in the nature of taxes, the lien is already perfected. Pursuant to §32-1-1001(1)(j)(I) , a district's fees constitute a perpetual lien on and against the property served; therefore, it was unnecessary for a special district to serve a notice of intent to file a lien statement because the district's lien was perpetual and perfected. Skyland Metro. Dist. v. Mtn. W. Enter., LLC, 184 P.3d 106 (Colo. App. 2007).

Materialman furnishing materials directly to owner treated as principal contractor. A materialman furnishing materials directly to the owner is treated as a principal contractor under the mechanics' lien statutes. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Filing of lien notice in county where land located. The party who claims a lien shall file his notice in every county wherein the land or property is located, on which the lien is claimed to cover. Arkansas River, Land, Reservoir & Canal Co. v. Flinn, 3 Colo. App. 381, 33 P. 1006 (1893).

No additional notice of intent to file required for amended lien when amended lien only corrects the lien amount. Sure-Shock Elec. v. Diamond Lofts Venture, 2014 COA 111, 356 P.3d 931 .

Claimant's status changes where contract not filed as required. Where the contract is not filed for record as required by this section, the lien claimant's status is changed with respect to the time for filing a lien, that is, it becomes a principal contractor and therefore by subsection (5) is given three (now four) months from the completion of the work within which to file the lien statement. W.B. Barr Lumber Co. v. Thompson, 131 Colo. 347 , 281 P.2d 1016 (1955).

Indebtedness must exist in favor of claimant. A prime requisite to the establishment of a valid lien is that an indebtedness exists in favor of the claimant for labor or materials. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

Assignment of lien claim. Med. Arts Bldg., Inc. v. Ervin, 127 Colo. 458 , 257 P.2d 969 (1953).

Applied in Rico Reduction & Mining Co. v. Musgrave, 14 Colo. 79, 23 P. 458 (1890); Branham v. Nye, 9 Colo. App. 19, 47 P. 402 (1896); Perkins v. Boyd, 16 Colo. App. 266, 65 P. 350 (1901); Sickman v. Wollett, 31 Colo. 58, 71 P. 1107 (1903); Tabor-Pierce Lumber Co. v. Int'l Trust Co., 19 Colo. App. 108, 75 P. 150 (1903); Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912); Curtis v. Nunns, 54 Colo. 554, 131 P. 403 (1913); Atkinson v. Colo. Title & Trust Co., 59 Colo. 528, 151 P. 457 (1915); Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929); Chain O'Mines v. Lewison, 100 Colo. 186 , 66 P.2d 802 (1937); Trustee Co. v. Bresnahan, 119 Colo. 311 , 203 P.2d 499 (1949); Lierz v. Cook, 136 Colo. 221 , 315 P.2d 535 (1957); Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964); Am. Factors Assocs. v. Triangle Heating & Sheet Metal Co., 31 Colo. App. 240, 503 P.2d 163 (1972); Meurer, Serafini & Meurer, Inc. v. Skiland Corp., 38 Colo. App. 61, 551 P.2d 1089 (1976); Jordan v. Lone Pines, Ltd., 41 Colo. App. 152, 580 P.2d 1273 (1978); Amco Elec. Co. v. First Nat'l Bank, 42 Colo. App. 124, 596 P.2d 70 (1979).

II. CONTENTS OF LIEN STATEMENT.

A. In General.

Statement of completion time not required. The statement is not required to state the time of the completion of the work, and a recital of the time of such completion in the statement is not binding on the lienor; he may show by other evidence that the work was completed at a later date.

Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 455, 59 P. 83 (1899).

Showing of dates material furnished permissible. Lienor may show when either the first or the last material was furnished. Mouat Lumber & Inv. Co. v. Freeman, 7 Colo. App. 152, 42 P. 1040 (1895).

Statement not avoided by misstatement of unrequired material. A statement which contains everything required will not be avoided because it contains a statement or a misstatement of something not required and not material. Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 P. 519 (1897), aff'd, 27 Colo. 120, 59 P. 403 (1899).

A statement in part for articles not the subject of lien will not vitiate the claim if it was not wilfully false, and the court will permit the claimant by proof to make the necessary segregation, throw out the value of such articles, and declare a lien for the remainder. Barnes v. Colo. Springs & C.C.D. Ry., 42 Colo. 461 , 94 P. 570 (1908); Lowell Hdwe. Co. v. May, 59 Colo. 475 , 149 P. 831 (1915).

Nondeceptive mistakes overlooked. Mistakes that do not tend to deceive parties interested may be overlooked. Cannon v. Williams, 14 Colo. 21, 23 P. 456 (1890); Wigham Excavating v. Colo. Fed. S & L, 796 P.2d 23 (Colo. App. 1990).

When an account embraced in a lien statement includes items which cannot be made the subject of the lien claimed, it will not defeat the right thereto for the value of those items which are properly chargeable as a lien. Rice v. Rhone, 49 Colo. 41, 111 P. 585 (1910).

The requirement of subsection (1)(a) that a subcontractor on filing a lien statement shall give the name of the contractor to whom material was sold or work performed is for the benefit of the owner, and where a party named in the statement as the contractor was in fact the agent of the owner of the property and purchased the material as such agent, the owner could not be misled. Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 P. 519 (1897), aff'd, 27 Colo. 120, 59 P. 403 (1899).

Proof of identification not precluded by prior misidentification. That a claimant identified itself as a subcontractor in the lien statement does not preclude it from pleading and proving facts showing it to be a principal contractor. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

B. Name of Owner or Reputed Owner.

Failure to name the true owner does not void the lien statement. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 , 94 A.L.R.2d 1165 (1960).

Lien statement is not void because it fails to name the actual owners of the property. McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978).

"Reputed owner" is defined as one who has to all appearances the title to, and possession of, the property. Moore Elec. Co. v. Ambassador Bldr. Corp., 653 P.2d 90 (Colo. App. 1982).

"Reputed" construed. The word "reputed", referred to in subsection (1)(a), has a much weaker sense than its derivation would appear to warrant, importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact, and the term "reputed owner" is frequently employed in this sense. Lowell Hdwe. Co. v. May, 59 Colo. 475 , 149 P. 831 (1915).

If name of owner is not known, it need not be given and an affidavit to that effect is sufficient, and where the name of the reputed owner is given, no such affidavit is required. Lowell Hdwe. Co. v. May, 59 Colo. 475 , 149 P. 831 (1915).

It is sufficient to designate a particular person in the conjunctive as owner and reputed owner, or in the alternative as owner or reputed owner where a statement of the name of the owner or reputed owner is required. Lowell Hdwe. Co. v. May, 59 Colo. 475 , 149 P. 831 (1915).

Owner at date lien filed deemed person charged. The owner at the date the lien is filed is the owner who is to be named as the person charged. Rice v. Carmichael, 4 Colo. App. 84, 34 P. 1010 (1893); Sprague Inv. Co. v. Mouat Lumber & Inv. Co., 14 Colo. App. 107, 60 P. 179 . (1899).

Lien claimant only chargeable with knowledge of property ownership. A lien claimant can only be charged with knowledge of the ownership of property as apparent upon the public records. Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 P. 519 (1897), aff'd, 27 Colo. 120, 59 P. 403 (1899).

Statement incorrectly designating owner defective against subsequent lienors. Statement designating owner of an equitable title instead of the owner of the legal title is defective and invalid as against subsequent encumbrancers and lienors although good as against the equitable owner. Sprague Inv. Co. v. Mouat Lumber & Inv. Co., 14 Colo. App. 107, 60 P. 179 (1899).

C. Name of Claimant.

Name of each person performing labor must be set out. There can be no substantial compliance with the requirements of subsection (1)(b) unless the name of each person who performed the labor which is the basis for a mechanic's lien appears on the lien statement. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

It was not necessary for contractor to name in the statement of lien each subcontractor hired to perform the contract or to list the amounts owed to those subcontractors individually in order to fulfill the requirements of this section where the contractor dealt directly with the developer and thus was the "person" who furnished the labor. FCC Constr., Inc. v. Casino Creek Holdings, 916 P.2d 1196 (Colo. App. 1996).

Where contracts were made with person who held an interest which was part of the "labor done" claimable under §38-22-101(1), the person has standing to claim a lien under this section and the names of the persons who actually performed the labor were not required. Tighe v. Kenyon, 681 P.2d 547 (Colo. App. 1984).

A verification and second signature is only required when the notice of lien form is signed on behalf of the claimant by another, and is not required when the lien claimant personally signs the form. Sheldon v. Platte Valley Sav., 794 P.2d 1083 (Colo. App. 1990).

D. Description of Property.

Object of a description of the land is to give notice to creditors of, and purchasers from the owners of the property, hence, it is permissible in determining the sufficiency of a description, to consider the interest of the parties to the suit and the rights to be affected. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Property must be mentioned in statement for lien to attach. No lien can attach to property other than that mentioned in the lien statement. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Property descriptions in lien statements are adequate so long as they are "sufficient to identify" the property. McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978).

Sufficient identification is constituted by description which distinguishes the property sought to be charged from every other piece of property and a notice which gives the numbers of the lots, block, and addition, regardless of the fact that there is no mention of the city, county, or

state in which the property is located. Sayre-Newton Lumber Co. v. Park, 4 Colo. App. 482, 36 P. 445 (1894); Pacific Lumber Co. v. Watters, 74 Colo. 147, 219 P. 782 (1923).

Description enabling party familiar with locality to identify premises sufficient. If there is enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it is sufficient. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Description of property by metes and bounds sufficient. A legal description of property by metes and bounds in a lien statement serves the function of accurate identification of the property. McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978).

Effect of variance in description. A variance between the description set forth in the lien statement and the actual description is of no consequence where the street address was given. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 , 94 A.L.R.2d 1165 (1960).

Courts reluctant to set aside claim for looseness of description. Courts are reluctant to set aside a claim of mechanic's lien for looseness of description, and it is not necessary that the description shall be either full or precise. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Lien should not fail because claimant described too large a tract of land, if the land properly subject to the lien was embraced in the tract described, especially where it does not appear that any innocent party has been misled and prejudiced thereby. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Over-broad property description in lien statement does not invalidate an otherwise valid lien. The notice of intent to file a lien sent to defendant, the lien statement identifying defendant as the property owner, and the over-broad, but satisfactorily inclusive, property description were sufficient to identify the units owned by defendant to the exclusion of others. Sure-Shock Elec. v. Diamond Lofts Venture, 2014 COA 111, 356 P.3d 931 .

E. Amount of Indebtedness.

Purpose of subsection (1)(d) is to have the statement inform any interested party to the actual condition of the account and the amount for which a lien is claimed. Harris v. Harris, 9 Colo. App. 211, 47 P. 841 (1897).

Merely stating balance due is not substantial compliance with this section. Cannon v. Williams, 14 Colo. 21, 23 P. 456 (1890).

Discrepancy by mistake in claim would not affect standing lien. In the enforcement of a mechanics' lien a small discrepancy between the statement in the lien claim and the evidence as to the amount due, which was purely the result of mistake and did not mislead or injure anyone, would not affect the standing of the lien. Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 P. 786 (1903).

Contents of lien statement including numerous claims. A lien statement which includes a number of assigned claims should set forth each separate indebtedness with credits thereon, but an omission to mention credits is equivalent to a statement that the claim is not entitled to one, and it need not show credit for amounts paid after assignment except as against the gross amount claimed. Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896).

A lien statement filed by one who is claiming as the assignee of numerous claims must show the balance due with respect to each separate claim; a lien statement which merely states the aggregate amount of indebtedness is defective and insufficient. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

Statement of claims which fails to show balance is defective. A statement filed by one claiming to be the assignee of numerous demands which sets forth the aggregate amount of indebtedness, but does not show the balance due with respect to each separate claim, was held defective and insufficient. Hanna v. Colo. Sav. Bank, 3 Colo. App. 28, 31 P. 1020 (1892).

A lien statement filed by assignees which contained only the aggregate amount claimed as due and owing to the assignees was inadequate and ineffectual to assert a lien. Ridge Erection Co. v. Mtn. States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976).

F. Verification.

Filing of an unverified statement is void and of no effect. Rice v. Carmichael, 4 Colo. App. 84, 34 P. 1010 (1893).

Absence of statement in verification deemed not fatal. The fact that in a verification there is no statement that the affidavit was made in behalf of the claimant is not fatal to its validity. Consumers' Lumber & Inv. Co. v. Hayutin, 75 Colo. 483, 226 P. 860 (1924).

Verification held in substantial compliance with subsection (2). The verification of a claimant to his lien statement that "he has read the

same and is familiar with the contents thereof, and that the same is true, as he verily believes, and that the amount therein stated as due is due", and one to the effect that the statement "is true and that the amount of indebtedness therein stated as due is due and unpaid", are in substantial compliance with the requirement of subsection (2). Gutshall v. Kornaley, 38 Colo. 195, 88 P. 158 (1906).

G. Service of Notice.

Statutory notice required to perfect valid lien. The 1975 amendment to subsection (3) demonstrates a clear legislative intent to require statutory notice in order to perfect a valid lien. Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979); Moore Elec. Co. v. Ambassador Bldr. Corp., 653 P.2d 90 (Colo. App. 1982).

Service of notice under this section is effected when the notice is delivered in person or, in the alternative, when notice is property addressed, registered, and mailed. No requirement exists that a mailed notice must be received in order to be effective. 6S Corp. v. Martinez, 831 P.2d 509 (Colo. App. 1992).

Service of notice essential for jurisdiction. The service of the statutory notice is essential to give the court jurisdiction to charge the property. Sayre-Newton Lumber Co. v. Park, 4 Colo. App. 482, 36 P. 445 (1894).

Party improving leased premises not required to make service. Party improving leased premises for the tenant was not a subcontractor, and was not required to serve a copy of the statement. Fisher v. McPhee & McGinnity Co., 24 Colo. App. 420, 135 P. 132 (1913).

Averment of service and filing in complaint with separate causes of actions unnecessary. Where several causes of action are declared upon in one complaint in favor of one and the same plaintiff, whether the liens are possessed by him as assignee, or in his own right, and where, after the assignment, he has served the written notice and filed the statement required by this section, and whether he has included therein all of said claims owned by him, and for which he has brought suit, it is not necessary to aver in each separate cause of action arising out of said liens that he served the written notice and filed the statement; but it is sufficient if, either at the beginning or the end of the complaint relating to said causes of action, there is a general statement or averment of the service of the notice and filing of the statement. Rialto Mining & Milling Co. v. Lowell, 23 Colo. 253, 47 P. 263 (1896).

Notice served upon purchaser deemed notice to vendor. Under a contract of sale of real estate that requires the purchaser to make certain improvements, the purchaser is the agent of the vendor for the purpose of making the improvements, so that a notice of an intention to file a mechanic's lien for labor and materials furnished in making the improvements, served upon the purchaser, was notice to the vendor. Colo. Iron Works v. Taylor, 12 Colo. App. 451, 55 P. 942 (1899), appeal dismissed, 27 Colo. 310, 61 P. 233 (1900).

Service of corporation upon cashier and bookkeeper held sufficient. The defendant being a foreign corporation, service of the statement of the lien required by this section upon its cashier and bookkeeper, at the factory in the town where the building was erected, was held sufficient. Great W. Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 24, 136 P. 562 (1913).

Service upon agent's owner sufficient. Service upon the agent of the owner of the premises in charge of the erection of the building held sufficient. Curtis v. McCarthy, 53 Colo. 284, 125 P. 109 (1912).

Service upon clerk of superintendent of company insufficient. Service upon a clerk of the superintendent of the defendant company, the owner, was not such service as this section prescribes. Union Pac. Ry. v. Davidson, 21 Colo. 93, 39 P. 1095 (1895).

Lien claimant has burden of proving his right to lien under this section and this burden includes the requirement of giving statutory notice. Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979).

Defense of lack of notice. The owners' failure to raise in their pleadings the defense of lack of notice is not material, and they need not establish prejudice resulting from a lack of notice. Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979).

Failure to record an affidavit of service of notice of intent upon the principal contractor invalidates the lien. Everitt Lumber Co. v. Prudential Ins. Co. of Am., 660 P.2d 925 (Colo. App. 1983).

H. Time of Filing.

Claimants not required to wait for property's completion. This section does not require that the lien claimants wait until the property is completed, because that time might never arrive. State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912).

Lien filed from time changes in work completed. Where after a building is turned over to the owner by the contractor it is insisted by the owner that certain parts of the work are not according to contract and changes are made to make the work comply with the contract, the changes are a part of the construction and the time within which a mechanic's lien must be filed would date from the time the changes were completed. Stidger v. McPhee, 15 Colo. App. 252, 62 P. 332 (1900).

Unnecessary addition to smelter does not extend filing period. The addition to a smelter, after it is put in operation, of conveniences which are not a necessary part of the plant, and without which it can be operated, e.g., trackage facilities for handling ore, buckets and screw conveyors, or a refinery, does not extend the period within which the lien statement must be filed. Mine & Smelter Supply Co. v. Kuenzel Process Smelter Co., 56 Colo. 326, 138 P. 31 (1914).

It is necessary that seasonable filing of lien statements be shown and, unless the evidence shows that the liens were filed within the time required, they are too late. John F. Rice Lumber Co. v. Chipeta Mining, Milling & Smelting Co., 77 Colo. 133, 234 P. 1066 (1925).

Plaintiff must prove statement filed within statutory period. The burden is on the plaintiff to prove that he filed his lien statement within the prescribed statutory period. Stiger v. McPhee, 15 Colo. App. 252, 62 P. 332 (1900); Foley v. Coon, 41 Colo. 432, 93 P. 13 (1907); First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

"Blanket lien" subject to filing within time limits. Hill Development Corp. v. Cordova, 714 P.2d 927 (Colo. App. 1986).

Time for filing statements commences upon laborers' completion of work. As to laborers working directly for the owner of the property, time for filing lien statements does not commence to run until the completion of the work on which they are engaged. Tiger Placers Co. v. Fisher, 98 Colo. 221 , 54 P.2d 891 (1936).

Principal contractor has four months to file lien statement. One who furnishes materials to the owner is a principal contractor, and has three (now four) months after completion of the building within which to file his lien statement. Park Lane Props. v. Fisher, 89 Colo. 591 , 5 P.2d 577 (1931); Mortgage Brokerage Co. v. Barr Lumber Co., 91 Colo. 445, 16 P.2d 32 (1932).

Where the contract to furnish material for the construction of a house is between the lien claimant and the owner, the claimant is, in virtue of section 38-22-108(1)(b) , a principal contractor and has three (now four) months

after the completion of the building in which to file his lien statement. Platte Valley Lumber Co. v. Courtright, 70 Colo. 57, 197 P. 235 (1921).

A mechanics' lien secures in rem recovery against property, and generally, a party claiming for labor and materials must perfect its lien by filing within four months "after the day on which the last labor was performed or the last material furnished by such lien claimant". Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. App. 1986).

Subcontractor deemed principal contractor for filing time of statement. A subcontractor under a building contract which is not filed for record, is a principal contractor with respect to the time for filing a lien statement. W. Elaterite Roofing Co. v. Fisher, 85 Colo. 5, 273 P. 19 (1928).

Prematurely filed claim. Since there would be no debt until the materials had been furnished or labor performed, the fact that the materials were later furnished and labor was later performed would not validate a lien claim that had been prematurely filed when no debt existed. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

Liens held partially valid. Although mechanics' lien claims for the entire cost of a job were filed more than three months after some of the work had been performed, where there was a time lag of over three months during which plaintiff furnished neither material nor labor and plaintiff subsequently furnished labor and material, the statutorily designated period had not commenced at the time of the filing of the lien claim statements, and the liens were valid and enforceable to the extent of the value of the material furnished and labor performed prior to the filing thereof. Sperry & Mock, Inc. v. Sec. Sav. & Loan Ass'n, 37 Colo. App. 357, 549 P.2d 412 (1976).

It is the date of mailing of the notice, not of its receipt, which establishes the commencement of the 10-day waiting period under subsection (3) before the lien statement itself may be recorded. Weyerhauser Co. v. Colo. Quality Research, Inc., 778 P.2d 290 (Colo. App. 1989).

Notice of intent and related affidavit of service must be served upon the owner not less than ten days before the lien statement is filed with the county clerk and recorder, but a copy of the lien may be served on the owner at the same time as the notice of intent without affecting the perfection of the lien. Manguso v. Am. Sav. & Loan Ass'n, 782 P.2d 866 (Colo. App. 1989); United Floor Co. v. Eigel, 807 P.2d 1209 (Colo. App. 1990).

A mechanics' lien statement with accompanying affidavit of service is perfected if it has actually been filed not less than 10 days

following proper service of notice of intent to file that lien statement. United Floor Co. v. Eigel, 807 P.2d 1209 (Colo. App. 1990).

III. COMPLETION OF WORK OR CONTRACT.

A. In General.

"Completion" construed. In the absence of any statutory qualifications or definition of the term "completion", it should be construed to mean actual completion, dating from the time when the last work was done. Lichty v. Houston Lumber Co., 39 Colo. 53, 88 P. 846 (1907).

Work completed when essential parts of job completed. Where in a mechanic's lien case involving repairs to a roof, labor of laying the roofing material was completed May 6, but mopping of the seams, which was an essential part of the work, was not done until July 5, following, it was held, under the attending circumstances, that for the purposes of a mechanic's lien, the work was completed on the latter date. W. Elaterite Roofing Co. v. Fisher, 85 Colo. 5, 273 P. 19 (1928).

B. Abandonment of Work.

Section creates a conclusive presumption of completion on proof of 30 days (now 90 days) cessation (now abandonment) from labor. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Labor performed in furtherance of completion not abandonment from labor. Whenever any labor, whatever its character, is performed on a building (or improvement) in furtherance of its completion, there is no cessation (now abandonment) from labor. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Affirmative showing of no abandonment not required. Cases do not require an affirmative showing on the part of the lien claimant that there was no cessation (now abandonment) from labor of 30 days (now 90 days) or more. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Abandonment provisions in subsection (7) are applicable in situations where: (1) Work is abandoned pursuant to an unfinished contract for work on a building, improvement, or structure; or (2) the entire project is abandoned and the building, improvement, or structure goes unfinished. Abandonment occurs at the end of the three-month period, not at the beginning. Merrick & Co. v. Estate of Verzuh, 987 P.2d 950 (Colo. App. 1999).

Burden is upon owner to take advantage of statutory presumption. If the owner wishes to take advantage of this statutory presumption in order to be relieved of liability, the burden is upon him to come forward with sufficient evidence to justify raising the presumption. First Nat'l Bank v. Sam McClure & Son, 163 Colo. 473 , 431 P.2d 460 (1967).

Trial court determines abandonment of work. In an action to foreclose a mechanic's lien, whether or not certain work was done during a period when it was alleged there was a cessation (now abandonment) of work for 30 days (now 90 days), is a question to be determined by the trial court. Farmers' Life Ins. Co. v. Connor, 82 Colo. 81, 257 P. 260 (1927).

Engineering services contract constituted work on a building or improvement and, consequently, subsection (7) would extend the filing period if the engineering firm had abandoned work on the project before its completion. Because the trial court found a genuine issue of material fact as to whether the firm had abandoned its contract before completion, summary judgment should not have been entered. Merrick & Co. v. Estate of Verzuh, 987 P.2d 950 (Colo. App. 1999).

C. Trivial Imperfections or Omissions.

Subsection (7) applies to all lien claimants. Kehn v. Spring Creek Vill. I, 38 Colo. App. 550, 563 P.2d 969 (1977).

Subsection (7) applies when project completed. It only comes into play when a project is deemed completed. Kehn v. Spring Creek Vill. I, 38 Colo. App. 550, 563 P.2d 969 (1977).

Extension of filing time by trivial alterations prohibited. It is not competent for mechanics by trivial work and trivial alterations to extend the time within which the lien may be filed. Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 455, 59 P. 83 (1899).

A lien claimant may not extend the filing period by doing work related to a trivial imperfection in or omission from work or construction performed on a project deemed completed. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. 1986).

However, all repairs and shakedown work following the construction of a house need not precede completion. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. 1986).

Determination of completion date is within the province of the trier of fact and will not be overturned on appeal where the evidence supports its

finding. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. 1986).

All repairs need not precede completion. All repairs and "fixing of bugs" following the construction of a house need not precede "completion". Kaibab Lumber Co. v. Osburne, 171 Colo. 49, 464 P.2d 294 (1970).

Incomplete mantel and fireplace not trivial imperfection. The lack of completion of a mantel and fireplace is not a trivial imperfection or omission from the work. Lichty v. Houston Lumber Co., 39 Colo. 53, 88 P. 846 (1907).

Insignificant plumber's labor months after completion of plumbing trivial. Labor performed by a plumber, of the value of $6.75, months after he had practically completed the plumbing in a building, is "trivial" under this subsection (7). Boise-Payette Lumber Co. v. Longwedel, 88 Colo. 233, 295 P. 791 (1930).

Where the contract was not completed and the architect was performing tasks at the request of the owner pursuant to a contract which had not been terminated, the concept of "triviality" of the work has no applicability. Sheldon v. Platte Valley Sav., 794 P.2d 1083 (Colo. App. 1990).

§ 38-22-110. Action commenced within six months

No lien claimed by virtue of this article, as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property nor one primarily liable for such debt, shall hold the property longer than six months after the last work or labor is performed, or laborers or materials are furnished, or after the completion of the building, structure, or other improvement, or the completion of the alteration, addition to, or repair thereof, as prescribed in section 38-22-109, unless an action has been commenced within that time to enforce the same, and unless also a notice stating that such action has been commenced is filed for record within that time in the office of the county clerk and recorder of the county in which said property is situate. Where two or more liens are claimed of record against the same property, the commencement of any action and the filing of the notice of the commencement of such action within that time by any one or more of such lien claimants in which action all the lien claimants as appear of record are made parties, either plaintiff or defendant shall be sufficient.

History:

L. 1899: p. 271, § 10. R.S. 08: § 4034. L. 15: p. 333, § 2. C.L. § 6451. CSA: C. 101, § 24. L. 37: p. 481, § 4. CRS 53: § 86-3-10. C.R.S. 1963: § 86-3-10. L. 2000: Entire section amended, p. 210, § 9, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

No presumption of performance necessary to lien's acquisition. No act necessary to the acquisition of a lien can be presumed to have been performed in the absence of proof that it was performed. Kalamath Inv. Co. v. Asphalt Paving Co., 153 Colo. 109 , 384 P.2d 938 (1963).

Lien claimant has burden of proving its right to a lien on property. Kalamath Inv. Co. v. Asphalt Paving Co., 153 Colo. 109 , 384 P.2d 938 (1963).

This section and §38-22-109 must be construed together. Pacific Lumber Co. v. Lieberman, 76 Colo. 332 , 231 P. 673 (1924).

Applied in Weiner v. Rumble, 11 Colo. 607, 19 P. 760 (1888); Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 P. 519 (1897); Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 455, 59 P. 83 (1899); Ferguson v. Christensen, 59 Colo. 42, 147 P. 352 (1915); Hawkins v. Grisham, 6 9 Colo. 1 56, 170 P. 187 (1918); Laverents v. Craig, 74 Colo. 297, 225 P. 250 (1923); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519 , 427 P.2d 861 (1967); First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

II. SIX MONTHS LIMITATION.

Time when suit should be brought procedural matter. The time when a suit should be brought is a matter of procedure and within the control of the general assembly so long as reasonable time was provided. Orman v. Crystal River Ry., 5 Colo. App. 493, 39 P. 434 (1895); Chicago Lumber Co. v. Dillon, 13 Colo. App. 196, 56 P. 989 (1899).

Applicability of section. This statute of limitations applies to the joinder of additional parties by amendment. McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Materialman may begin his suit at any time within six months after the last material furnished by him or within six months after the completion of the building. Pac. Lumber Co. v. Lieberman, 76 Colo. 332 , 231 P. 673 (1924); Meurer, Serafini & Meurer, Inc. v. Skiland Corp., 38 Colo. App. 61, 551 P.2d 1089 (1976).

Right to enforce lien is lost by the failure to commence suit within the time limited. Orman v. Crystal River Ry., 5 Colo. App. 493, 39 P. 434 (1895); Johnston v. Bennett, 6 Colo. App. 362, 40 P. 847 (1895).

A mechanics' lien is extinguished upon the claimant's failure to initiate an action within the statutory six-month period. Where there is no notice of commencement of the action filed, there can be no cloud upon the plaintiffs' title. Schlosky v. Mobile Premix Concrete, Inc., 656 P.2d 1321 (Colo. App. 1982).

Strict limitation makes titles more safe and marketable. Strictly limiting the time during which property is encumbered renders titles to real property and to interests and estates therein more safe, secure and marketable. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Only one claimant required to begin action within limitation period. This section and §38-22-111 read together require only that one of the lien claimants begins the action within six months of the completion of the work, and that the filing of such action by one lien claimant is sufficient to meet the six-month time limitation as to all lien claimants, as appear of record, who are made parties either plaintiff or defendant within the six-month limitation period. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

Intervention order relates back to filing date of motion. Order of intervention properly relates back to date of filing of motion to intervene in a mechanic's lien foreclosure action. Franklin Contract Sales Co. v. First Nat'l Bank, 200 Colo. 370, 615 P.2d 684 (1980).

Trial court lacks jurisdiction over intervention granted after limitation expired. Intervention by a mechanic's lien claimant in a pending foreclosure action sought and granted after expiration of the six-month period prescribed by this section does not vest the trial court with jurisdiction to decree foreclosure of that lien and to assign it priority over a deed of trust recorded after the work for which such lien was asserted, had commenced. Cox v. Bankers Trust Co., 39 Colo. App. 303, 570 P.2d 6 (1977).

Late joinder not allowed. Joinder of one lien claimant after the statutory period in an action initiated by another claimant within the time limit is not allowed under this section, nor is tardy joinder of an additional defendant allowed in an action timely brought. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Six-month period may not be tolled. The mechanics' lien statute contains no specific provisions allowing the six-month period to be tolled. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Strict application of the six-month limit is based on the principle that extending the lifetime of a perfected lien would vest a lien creditor with greater rights than were granted by the statutory provision creating the right. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Six-month period may be tolled.11 U.S.C. §108 in the federal bankruptcy code tolls the running of the period until 30 days after relief from stay is granted or the underlying bankruptcy case is terminated. In re Cantrup, 38 B.R. 148 (Bankr. D. Colo. 1984); In re Nash Phillips/Copus, Inc., 78 B.R. 798 (Bankr. W.D. Tex. 1987).

Where complaint amended after statutory period. Complaint against the owner and principal contractor within the statutory six-month

period, followed by an amendment joining a mortgage company and a plumbing and heating company after the expiration of the statutory period, is not sufficient to satisfy the requirements of this section and preserve the enforceability of the claims of both the original plaintiff company and the plumbing and heating company against the mortgage company. Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976).

III. NOTICE OF LIS PENDENS.

Purpose of lis pendens is to give notice to those interested in the property in question that a suit to foreclose a mechanic's lien is on file. Only one such notice is necessary. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

The purpose of recording the lis pendens notice is to give notice of the pendency of an action to persons who may subsequently acquire or seek to acquire rights in the property. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Filing of one lis pendens is sufficient notice to subsequent purchasers of pending litigation against property. Abrams v. Colo. Seal & Stripe, Inc., 702 P.2d 765 (Colo. App. 1985).

Notice of lis pendens prerequisite to establishment of lien right. A notice of lis pendens is a prerequisite to the establishment of a lien right as against the owner of property or one primarily liable for the debt upon which the lien is based and, where no such lis pendens is filed, it is error to hold that no such notice is necessary as against the owner of the property involved. Kalamath Inv. Co. v. Asphalt Paving Co., 153 Colo. 109 , 384 P.2d 938 (1963).

Bonding pursuant to §38-22-131 does not excuse failure to record a notice of lis pendens. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

Failure to file notice not fatal to claimant's lien. Failure to file notice of lis pendens by one of several lien claimants is not fatal to the lien of the nonfiling claimant when the notice that has been filed discloses the existence and nature of the claim of the nonfiling claimant. Amco Elec. Co. v. First Nat'l Bank, 622 P.2d 608 (Colo. App. 1981).

Notice sufficient even though proprietorship incorrectly identified. Where a proprietorship is incorrectly identified as a corporation in the caption of the lis pendens, but the error is remedied by amendment

and the defendants are not prejudiced thereby, the notice is sufficient under this section. Fasso v. Straten, 640 P.2d 272 (Colo. App. 1982).

Cross Reference Note:

For filing notice of lis pendens, see C.R.C.P. 105(f).

§ 38-22-111. Joinder of parties - consolidation of actions

(1) Any number of persons claiming liens against the same property and not contesting the claims of each other may join as plaintiffs in the same action, and when separate actions are commenced, the court may consolidate them upon motion of any party in interest or upon its own motion.

(2) Upon such procedure for consolidation, one case shall be selected with which the other cases shall be incorporated, and all the parties to such other cases shall be made parties plaintiff or defendant as the court may designate in said case so selected. All persons having claims for liens, the statements of which have been filed as provided in this article, shall be made parties to the action.

(3) Those claiming liens who fail or refuse to become parties plaintiff, or for any reason have not been made such parties, shall be made parties defendant. Any party claiming a lien, not made a party to such action, at any time within the period provided in section 38-22-109, may be allowed to intervene by motion, upon cause shown, and may be made a party defendant on the order of the court, which shall fix by such order the time for such intervenor to plead or otherwise proceed. The pleadings and other proceedings of such intervenor thus made a party shall be the same as though he had been an original party. Any defendant who claims a lien, in answering, shall set forth by cross complaint his claim and lien. Likewise such defendant may set forth in said answer defensive matter to any claim or lien of any plaintiff or codefendant or otherwise deny such claim or lien. The owner of the property to which such lien has attached, and all other parties claiming of record any right, title, interest, or equity therein, whose title or interests are to be charged with or affected by such lien, shall be made parties to the action.

History:

L. 1899: p. 272, § 11. R.S. 08: § 4035. C.L. § 6452. CSA: C. 101, § 25. CRS 53: § 86-3-11. C.R.S. 1963: § 86-3-11.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Court's jurisdiction to consolidate actions resolved in Rule 21, C.A.R. proceeding. Contention that district court had no power under subsection (1) to consolidate one action which was pending with another action which had been dismissed with prejudice, and thus, was proceeding

without in personam jurisdiction, is a proper matter to be resolved in a Rule 21, C.A.R. proceeding for a writ of mandamus. Columbia Sav. & Loan Ass'n v. District Court, 18 6 Colo. 21 2, 526 P.2d 661 (1974).

Applied in Orman v. Crystal River Ry., 5 Colo. App. 493, 39 P. 434 (1895); Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912); McClung v. Griffith, 127 Colo. 315 , 255 P.2d 973 (1953); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519 , 427 P.2d 861 (1967); Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

II. NECESSARY PARTIES.

Action must be against all persons against whom priority of lien is claimed. Johnston v. Bennett, 6 Colo. App. 362, 40 P. 847 (1895).

Contractor and lien claimants are parties to action. The mechanics' lien act clearly contemplates that the contractor and all claimants of liens shall be made parties to an action brought to enforce a lien, and that all shall have their rights adjudicated in one action and protected and enforced in one judgment. Union Pac. Ry. v. Davidson, 21 Colo. 93, 39 P. 1095 (1895); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519 , 427 P.2d 861 (1967).

In an action by a materialman or subcontractor to foreclose his lien, the original contractor must be made a party. State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912).

The mechanics' lien law contemplates that all lien claimants be made parties to an action to foreclose. Franklin Contract Sales Co. v. First Nat'l Bank, 200 Colo. 370 , 615 P.2d 684 (1980).

"Owner" defined. The "owner", referred to in subsection (3), is the person upon whose interest in the property the lien is claimed and sought to be established. Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

Owner made party if mortgagee joined. If a mortgagee is joined, the owner must also be made a party. State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912).

Section places other claimants in category with owner. This section places other claimants of record in the same category as the owner. San Juan Hdwe. Co. v. Carrothers, 7 Colo. App. 413, 43 P. 1053 (1896); Hawkins v. Grisham, 6 9 Colo. 1 56, 170 P. 187 (1918).

Lessee as "owner". Where the liens asserted and sought to be established by claimants are limited to the interest of the lessee, he is the "owner" of the property, as contemplated by subsection (3). Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

Holder of note secured by deed of trust not "owner". The holder of a promissory note secured by a deed of trust is not the "owner" of the land within the meaning of subsection (3). Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

Subsequent or junior encumbrances deemed indispensable parties. Subsequent or junior encumbrancers, of record at the time an action is brought to enforce a mechanic's lien, are indispensable parties in order to establish the validity of the lien against the property. Hawkins v. Grisham, 6 9 Colo. 1 56, 170 P. 187 (1918).

A mortgagee of record, whose lien is junior to that of mechanics, being interested in objecting to invalid lien claims, is a necessary party to a suit to foreclose mechanic's liens on the property. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Purchaser pendente lite is proper party. A purchaser pendente lite of property involved in a mechanic's lien suit is a proper party. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Only one claimant required to begin action within limitation period. Section 38-22-110 and this section, read together, require only that one of the lien claimants begins the action within six months of the completion of the work, and that the filing of such action by one lien claimant is sufficient to meet the six-month time limitation as to all lien claimants, as appear of record, who are made parties either plaintiff or defendant within the six-month limitation period. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

Parties other than owner and claimants not required for lien's enforcement. This section requires no parties to a suit for the enforcement to a mechanic's lien, except the owner and persons having claims for liens; any number of lien claimants may join as plaintiffs, and those who are not made parties plaintiff may be made parties defendant, but persons claiming interests of some other kind in the property involved need not be made defendants. Branham v. Nye, 9 Colo. App. 19, 47 P. 402 (1896).

Holder of note not indispensable party to an action to foreclose a mechanic's lien against the property. Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897).

Beneficiary in deed of trust not necessary party. The beneficiary in a deed of trust is not a necessary party to the foreclosure of a mechanic's lien on the premises conveyed by the deed of trust, but where such foreclosure is had without making such beneficiary a party, his interest is not bound thereby, and he may attack the validity of such lien and foreclosure in a subsequent action. Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 P. 752 (1903).

Mortgagee not obligated to intervene. The holder of a mortgage or trust deed on property is under no obligation to intervene in an action to foreclose a mechanic's lien involving the mortgaged premises. Stark Lumber Co. v. Keystone Inv. Co., 92 Colo. 259, 20 P.2d 306 (1933).

§ 38-22-112. Allegations of complaint

It is sufficient to allege in the complaint in relation to any party claiming a lien whom it is desired to make a defendant, that such party claims a lien under this article upon the property described; and in case of the intervention of parties, or of the making of new parties, or of the consolidation of actions, so that the issues are in any manner changed or increased, any party to the action shall be allowed to amend his pleadings, or file new pleadings, as the nature of the case may require.

History:

L. 1899: p. 273, § 12. R.S. 08: § 4036. C.L. § 6453. CSA: C. 101, § 26. CRS 53: § 86-3-12. C.R.S. 1963: § 86-3-12.

Case Note:

ANNOTATION

Complaint must contain every fact necessary in the creation of a lien. Arkansas River Land, Reservoir & Canal Co. v. Nelson, 4 Colo. App. 438, 36 P. 307 (1894); Mouat Lumber & Inv. Co. v. Freeman, 7 Colo. App. 152, 42 P. 1040 (1895).

In order to entitle a plaintiff to maintain a suit in the nature of a bill in equity to foreclose a mechanic's lien, he must in his complaint allege everything essential to the existence and establishment of his claim, and by allegations -- both specific and general -- bring himself literally within the terms of this article. Arkansas River, Land, Reservoir & Canal Co. v. Flinn, 3 Colo. App. 381, 33 P. 1006 (1893).

Allegations put in issue must be proved at the trial, whether appearing in the lien statement or not. Mouat Lumber & Inv. Co. v. Freeman, 7 Colo. App. 152, 42 P. 1040 (1895).

In an action to enforce a mechanic's lien against the vendor for labor and materials furnished in making improvements under a contract of sale that required the purchaser to make improvements to a certain value, it was not necessary to allege or prove that the purchaser had not exceeded that amount in making the improvements; if the owner of the property sought to escape liability on the ground that his agent had exceeded the limits of his powers in making the contract for the improvements, it was his duty to aver and prove it. Colo. Iron Works v. Taylor, 12 Colo. App. 451, 55 P. 942 (1899), appeal dismissed, 27 Colo. 310, 61 P. 233 (1900).

Applied in Hall v. Cudahy, 46 Colo. 324, 104 P. 415 (1909); Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912).

§ 38-22-113. Hearing - judgment - summons - defense

(1) The court, whenever the issues in such case are made up, shall advance such cause to the head of the docket for trial and may proceed to hear and determine said liens and claims or may refer the same to a magistrate to ascertain and report upon said liens and claims and the amounts justly due thereon.

(2) Judgments shall be rendered according to the rights of the parties. The various rights of all the lien claimants and other parties to any such action shall be determined and incorporated in one judgment or decree. Each party who establishes his claim under this article shall have judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien has attached to the extent stated in this section.

(3) Proceedings to foreclose and enforce mechanics' liens under this article are actions in rem, and service by publication may be obtained against any defendant therein in a manner as provided by law, and personal judgment against the principal contractor or other person personally liable for the debt for which the lien is claimed shall not be requisite to a decree of foreclosure in favor of a subcontractor or materialman.

(4) In such proceedings, it shall be an affirmative defense that the owner or some person acting on the owner's behalf has paid an amount sufficient to satisfy the contractual and legal obligations of the owner, including the initial purchase price or contract amount plus any additions or change orders, to the principal contractor or any subcontractor for the purpose of payment to the subcontractors or suppliers of laborers or materials or services to the job, when:

(a) The property is an existing single-family dwelling unit;

(b) The property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as his primary residence; or

(c) The property is a single-family, owner-occupied dwelling unit, including a residence constructed and sold for occupancy as a primary residence. This paragraph (c) shall not apply to a developer or builder of multiple residences except for the residence that is occupied as the primary residence of the developer or builder.

History:

L. 1899: p. 273, § 13. R.S. 08: § 4037. C.L. § 6454. CSA: C. 101, § 27. CRS 53: § 86-3-13. C.R.S. 1963: § 86-3-13. L. 87: (4) added, p. 1336, § 2, effective

May 25. L. 91: (1) amended, p. 366, § 42, effective April 9. L. 2000: IP(4) amended, p. 210, § 10, effective August 2.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Foreclosure action addresses equity. An action to foreclose a mechanic's lien is addressed to the equity side of a court. Am. Irrigation Co. v. Fadenrecht, 30 Colo. App. 28, 489 P.2d 1060 (1971).

Right to a materialman's lien is based upon considerations of natural justice, and it is predicated upon the equitable considerations that one who has enhanced the value of property by attaching thereto or having incorporated therein his material shall have a lien therefor. Jackson v. A.B.Z. Lumber Co., 155 Colo. 33, 392 P.2d 288 (1964).

Article contemplates speedy determination of claims, to the end that mechanics' lienors will not have to wait indefinitely for their money, or for experiments in legal procedure. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929); Tiger Placers Co. v. Fisher, 98 Colo. 221 , 54 P.2d 891 (1936).

No prejudice resulted from claimant's failure to serve copy of answer. In a mechanic's lien foreclosure action where a defendant lien claimant failed to serve a copy of its answer and counterclaim on defendant owners, and ample time existed before trial for responsive pleadings thereto, no prejudice to the substantial rights of any litigant to the action, including the right to a speedy disposition of causes of this nature, can occur by permitting service of such answer and counterclaim on the owner defendants. Gould & Preisner, Inc. v. District Court, 149 Colo. 48 4, 369 P.2d 554 (1962).

Applied in Bradbury & Co. v. Butler & Son, 1 Colo. App. 430, 29 P. 463 (1892); Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 P. 187 (1892); Barnes v. Colo. Springs & C.C.D. Ry., 42 Colo. 461 , 94 P. 570 (1908); Pike v. Empfield, 21 Colo. App. 161, 120 P. 1054 (1912).

II. JUDGMENTS.

Personal judgment rendered for amount due. In an action to foreclose a mechanic's lien, a personal judgment may be rendered for the amount due, notwithstanding no right to a lien exists. Cannon v. Williams, 14 Colo. 21, 23 P. 456 (1890); Finch v. Turner, 21 Colo. 287, 40 P. 565 (1895).

Saving clause in decree held valid. Saving clause in a decree providing that certain trust deed holders should not be affected by its terms, is valid. Stark Lumber Co. v. Keystone Inv. Co., 92 Colo. 259, 20 P.2d 306 (1933).

Decree awarding lien fails in part. A decree awarding a lien, in part for things not the subject of a lien, fails only to the extent to which the allowance is improper. Horn v. Clark Hdwe. Co., 54 Colo. 522, 131 P. 405 (1913).

Cross Reference Note:

For service of summons by publication, see C.R.C.P. 4(g) and 4(h).

§ 38-22-114. Disposition of proceeds - execution

(1) The court shall cause said property to be sold in satisfaction of said liens and costs of suit as in case of foreclosure of mortgages; and any party in whose favor a judgment for a lien is rendered, may cause the property to be sold within the time and in the manner provided for sales of real estate on executions issued out of any court of record, and there shall be the same rights of redemption as are provided for in the case of sales of real estate on executions. And if the proceeds of such sale, after the payment of costs, are not sufficient to satisfy the whole amount of such liens included in the decree of sale, then such proceeds shall be apportioned according to the rights of the several parties. In case the proceeds of sale amount to more than the sum of said liens and all costs, then the remainder shall be paid over to the owner of said property; and each party whose claim is not fully satisfied in the manner provided in this section shall have execution for the balance unsatisfied against the party personally liable, as in other cases.

(2) In the first instance without a previous sale of said property to which such liens have attached, an execution may issue in behalf of any such lien claimant for the full amount of his claim against the party personally liable, and he may thereafter enforce such lien for any balance of such judgment remaining unsatisfied. A transcript of the docket of said judgment and decree may be filed with the county clerk and recorder of the county where such property is situated or in any other county, and thereupon said judgment and decree shall become a lien upon the real property in such county of each party so personally liable in favor of any such lien claimant holding any such judgment against any such party so personally liable, as in other cases of recording transcripts of judgment.

History:

L. 1899: p. 274, § 14. R.S. 08: § 4038. C.L. § 6455. CSA: C. 101, § 28. CRS 53: § 86-3-14. C.R.S. 1963: § 86-3-14.

Case Note:

ANNOTATION

Assignee of lien claimant has redemption right. Where the proceeds from the sale of land were sufficient to satisfy only a part of a lien claimant's judgment, and thereafter claimant filed with the clerk and recorder a transcript of his judgment, his assignee was a senior lienor and such assignee had the right to redeem. Twogood v. Ocsay, 97 Colo. 300, 49 P.2d 437 (1935).

When allocation of proceeds of foreclosure sale proper. The allocation of the proceeds of a foreclosure sale is proper where the mortgage of the bank provides for the appointment of the receiver and the payment of his costs and expenses lies within the sound discretion of the trial court. Plateau Supply Co. v. Bison Meadows Corp., 31 Colo. App. 205, 500 P.2d 162 (1972).

Applicability of exception to time period under §38-39-102. The "agricultural real estate" exception to the otherwise applicable 75-day period under §38-39-102 applies only to foreclosures under mortgages and deeds of trust and is not applicable to sales upon foreclosure of mechanics' liens or upon sale under execution. Kimtruss Corp. v. Westland Manor Nursing Home N., Inc., 39 Colo. App. 542, 568 P.2d 105 (1977).

How execution sale may be set aside. An execution sale may be set aside either on motion in the court which issued the process or in an independent action in a court possessing equitable jurisdiction. Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

Inadequacy of price alone is not a sufficient ground upon which to set aside a judicial sale. Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

Applied in Bassick Mining Co. v. Schoolfield, 10 Colo. 46, 14 P. 65 (1887); Fitch v. Stallings, 5 Colo. App. 106, 38 P. 393 (1894); Howard v. Fisher, 8 6 Colo. 493 , 283 P. 1042 (1929).

Cross Reference Note:

For foreclosure of mortgages, see §38-36-162 ; for sale of real estate on execution, see §13-56-201 .

§ 38-22-115. Parties to action

Principal contractors and all other persons personally liable for the debt for which the lien is claimed shall be made parties to actions to enforce liens under this article, and service of summons shall be made either personally or by publication in the same manner and with like effect as is provided by law in cases of attachment and other proceedings in rem.

History:

L. 1899: p. 274, § 15. R.S. 08: § 4039. C.L. § 6456. CSA: C. 101, § 29. CRS 53: § 86-3-15. C.R.S. 1963: § 86-3-15.

Case Note:

ANNOTATION

Principal contractor is a necessary and indispensable party to an action for the foreclosure of mechanics' liens. Estey v. Hallack & Howard Lumber Co., 4 Colo. App. 165, 34 P. 1113 (1893); Union Pac. Ry. v. Davidson, 21 Colo. 93, 39 P. 1095 (1895).

When principal contractor deemed unnecessary party. When the contract amount is greater than $500 and the contract is not recorded, the principal contractor is a proper, but not a necessary party, and the action is sufficient without him. Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

Where several original contractors exist, only one necessary as defendant. In an action to foreclose a mechanic's lien for material furnished a subcontractor, where there are several original contractors, it is not necessary to make more than one of them a defendant; but, if the owners of the property wish the other joint contractors to be made defendant the court may, in its discretion, have them brought in, if they are within its jurisdiction. Barnes v. Colo. Springs & C.C.D. Ry., 42 Colo. 461, 94 P. 570 (1908).

Applied in Decker v. Myles, 4 Colo. 558 (1879); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519 , 427 P.2d 861 (1967).

Cross Reference Note:

For service of summons in attachment or other in rem proceedings, see C.R.C.P. 4(e) to 4(g).

§ 38-22-116. Costs

The court shall divide the costs between the parties liable therefor, according to the justice of the case.

History:

L. 1899: p. 275, § 16. R.S. 08: § 4040. C.L. § 6457. CSA: C. 101, § 30. CRS 53: § 86-3-16. C.R.S. 1963: § 86-3-16.

Case Note:

ANNOTATION

Applied in Los Angeles Gold Mine Co. v. Campbell, 13 Colo. App. 1, 56 P. 246 (1899); Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 455, 59 P. 83 (1899); Davidson v. Jennings, 27 Colo. 187, 60 P. 354 (1900); Campbell v. Los Angeles Gold Mine Co., 28 Colo. 256, 64 P. 194 (1901); Perkins v. Boyd, 16 Colo. App. 266, 65 P. 350 (1901); Antlers Park Regent Mining Co. v. Cunningham, 29 Colo. 284, 68 P. 226 (1902); Sickman v. Wollett, 31 Colo. 58, 71 P. 1107 (1903); Nat'l Union Fire Ins. Co. v. Denver Brick & Pipe Co., 162 Colo. 519 , 427 P.2d 861 (1967).

§ 38-22-117. Assignment of lien - failure to support lien

Any party claiming a lien may assign in writing his claim and lien to any other claimant or other person who shall thereupon have all the rights and remedies of the assignor for the purpose of filing and for the enforcement of any such lien by action under this article, and the assignment shall be a sufficient consideration as to all other parties for the purpose of such action. Such assignment may be made before or after the filing of the statement of lien. Any such claimant, whether as assignee or otherwise, may include all the liens he may possess against the same property in any such statement, and when more than one such claim is included in one such statement, one verification thereto shall be sufficient. Any person may file separate statements of two or more claims. If, on the trial of a cause under the provisions of this article, the proceedings will not support a lien, the plaintiff and all lien claimants entitled thereto may proceed to judgment as in an action on contract, and executions may issue as provided in such cases, and said judgment shall have all the rights of a judgment in a personal action.

History:

L. 1899: p. 275, § 17. R.S. 08: § 4041. C.L. § 6458. CSA: C. 101, § 31. CRS 53: § 86-3-17. C.R.S. 1963: § 86-3-17.

Case Note:

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Contracts", see 36 Dicta 19 (1959).

Section construed. The only legitimate construction to be given this section is one which will permit the enforcement of the evident legislative intent, which is to enable a plaintiff to recover whenever he is entitled to maintain his action against a defendant, but when there is no privity whatever between a plaintiff and defendant, and no contract established between them, a plaintiff cannot recover. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Applied in Hart, etc., Corp. v. Mullen, 4 Colo. 512 (1878); Small v. Foley, 8 Colo. App. 435, 47 P. 64 (1896); Sprague Inv. Co. v. Mouat Lumber & Inv. Co., 14 Colo. App. 107, 60 P. 179 (1899); Trustees of Carpenters & Millwrights Health Benefit Trust Fund v. Angel-Haus Condominium, Ltd., 36 Colo. App. 133, 535 P.2d 259 (1975); Jordan v. Lone Pines, Ltd., 41 Colo. App. 152, 580 P.2d 1273 (1978).

II. ASSIGNMENT.

Assignment vests enforcement right in assignee. An assignment carries with it the lien and vests in the assignee the right to enforce it. Perkins v. Boyd, 16 Colo. App. 266, 65 P. 350 (1901); Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Contract prohibits assignee's enforcement of claim. Where, on default of the principal contractor, the surety on his bond took assignments of lien claims, it could not enforce such claims against the property, the contract providing that the building should be turned over to the owner free from liens. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Assignee deemed real party in interest. The assignee in an action to foreclose is the real party in interest. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

Burden of pleading and proving valid assignment is upon those who assert it. Howard v. Fisher, 8 6 Colo. 493, 283 P. 1042 (1929).

III. RIGHT TO PERSONAL JUDGMENT.

Intent of article. This article does not purport to create personal liability of a landowner for obligations incurred by a contractor in the performance of his contract, but only authorizes the creation of a lien for improvements upon the land of the owner. Brannan Sand & Gravel Co. v. Santa Fe Land & Imp. Co., 138 Colo. 314, 332 P.2d 892 (1958).

Privity of contract required. In absence of privity of contract, lien claimants may not secure personal judgment against the owners. Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979).

Right to personal judgment for sum due uncontroverted. This section places the right to a personal judgment for the sum due beyond possible controversy, though the lien itself fails. Cannon v. Williams, 14 Colo. 21, 23 P. 456 (1890); Saint Kevin Mining Co. v. Isaacs, 18 Colo. 400, 32 P. 822 (1893).

Even where no lien is allowed, the plaintiff is entitled to personal judgment for the value of materials furnished at request of the defendant. Clark Hdwe. Co. v. Centennial Tunnel Mining Co., 22 Colo. App. 174, 123 P. 322 (1912).

A personal judgment for the amount found to be due may be rendered in an action to foreclose a mechanic's lien, notwithstanding an abandonment of

the claim for a lien. Saint Kevin Mining Co. v. Isaacs, 18 Colo. 400, 32 P. 822 (1893).

§ 38-22-118. Satisfaction of lien - failure to release

The claimant of any such lien, the statement of which has been filed, on the payment of the amount thereof, together with the costs of filing and recording such lien, and the acknowledgment of satisfaction, and accrued costs of suit in case a suit has been brought thereon, at the request of any person interested in the property charged therewith, shall enter or cause to be entered an acknowledgment of satisfaction of the same of record, and if he neglects or refuses to do so within ten days after the written request of any person so interested, he shall forfeit and pay to such person the sum of ten dollars per day for every day of such neglect or refusal, to be recovered in the same manner as other debts. A valid tender of payment, refused by any such claimant, shall be equivalent to a payment for the purpose of this section. Any such statement may be satisfied of record in the same manner as mortgages.

History:

L. 1899: p. 275, § 18. R.S. 08: § 4042. C.L. § 6459. CSA: C. 101, § 32. CRS 53: § 86-3-18. C.R.S. 1963: § 86-3-18.

Case Note:

ANNOTATION

Law reviews. For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954).

§ 38-22-119. Agreement to waive - effect

(1) No agreement to waive, abandon, or refrain from enforcing any lien provided for by this article shall be binding except as between the parties to such contract. The provisions of this article shall receive a liberal construction in all cases.

(2) An agreement to waive lien rights shall contain a statement, by the person waiving lien rights, providing in substance that all debts owed to any third party by the person waiving the lien rights and relating to the goods or services covered by the waiver of lien rights have been paid or will be timely paid.

History:

L. 1899: p. 276, § 19. R.S. 08: § 4043. C.L. § 6460. CSA: C. 101, § 33. CRS 53: § 86-3-19. C.R.S. 1963: § 86-3-19. L. 2009: Entire section amended, (SB 09 - 137), ch. 145, p. 610, §2, effective July 1.

Case Note:

ANNOTATION

Law reviews. For article, "Assemblage, Design and Construction for Real Estate Developments", see 11 Colo. Law. 2297 (1982).

That this article shall be liberally construed means that it is to be construed according to equitable principles. Buerger Inv. Co. v. Salzer Lumber Co., 77 Colo. 401 , 237 P. 162 (1925).

Mechanic's lien may be waived by the express agreement of a party in whose favor it exists. Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958).

A waiver of any lien established pursuant to this article is effective only if the party in whose favor the lien exists expressly agrees to such a waiver. Gen. Growth Dev. v. A & P Steel, Inc., 678 F. Supp. 243 (D. Colo. 1988).

Doubt in language resolved against waiver. Where the terms of a contract, or the evidence offered in support of an alleged waiver of the right to claim a lien are ambiguous, the doubt must be resolved against the waiver. Bishop v. Moore, 137 Colo. 263 , 323 P.2d 897 (1958).

Clauses of contracts, purporting to prohibit the contractor from asserting a statutory right of lien, should be strictly construed; if language used is of

doubtful import, it should be construed in favor of the lien. Aste v. Wilson, 14 Colo. App. 323, 59 P. 846 (1900).

Lien waiver enforceable if consideration or estoppel is shown. The right to a mechanic's lien can be waived in this state; however, if the waiver is to be enforceable, consideration for lien waivers or an estoppel is required. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Consideration sufficient to support waiver. The voluntary agreement of a lender to continue financing a financially troubled joint venture is adequate consideration to support lien waivers executed by a joint venturer who had supplied materials. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

Estoppel sufficient to support waiver. Where a subcontractor advised an owner in writing that he had been paid in full and the owner proceeded to disburse funds to the contractor in reliance upon the representation, the waiver is enforceable without finding specific consideration. Woodcrest Homes, Inc. v. First Nat'l Bank, 11 B.R. 342, aff'd in part and rev'd on other grounds, 15 B.R. 886 (D. Colo. 1981).

When owner unable to assert invalidity of waiver provision. Where there is an entire failure to file with the county recorder such a contract as is provided for in §38-22-101 , the owner is not in a position to assert the invalidity of the waiver provision of this section. Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262 , 275 P. 12 (1929).

Applied in Gutshall v. Kornaley, 38 Colo. 195, 88 P. 158 (1906); Miller v. Davis, 26 Colo. App. 483, 145 P. 714 (1914).

§ 38-22-120. Rules of civil procedure apply

The provisions of the Colorado rules of civil procedure, insofar as the same are applicable and not in conflict with the provisions of this article, shall be observed in proceedings to establish and enforce mechanics' liens.

History:

L. 1899: p. 276, § 20. R.S. 08: § 4044. C.L. § 6461. CSA: C. 101, § 34. CRS 53: § 86-3-20. C.R.S. 1963: § 86-3-20.

Case Note:

ANNOTATION

Applied in Empire Constr. Co. v. Crawford, 57 Colo. 281, 141 P. 474 (1914).

§ 38-22-121. Liens of surveyors and engineers

The provisions of this article shall apply to surveyors, civil and mining engineers doing any work of surveying or plotting of any mines, mining claims, lodes, or mineral deposits, and they shall have like lien and claim as other persons under the provisions of this article.

History:

L. 1883: p. 227, § 8. G.S. § 2138. R.S. 08: § 4045. C.L. § 6462. CSA: C. 101, § 35. CRS 53: § 86-3-21. C.R.S. 1963: § 86-3-21.

Case Note:

ANNOTATION

Law reviews. For article, "Mechanics' Liens Relative to Oil and Gas Operations -- Part II", see 34 Dicta 373 (1957).

§ 38-22-122. Lien under two contracts - effect

In case the act of doing such work or of furnishing such laborers or materials is continuous, said lien shall attach as in other cases, even though such work is done or laborers or materials have been furnished under two or more contracts between the same parties.

History:

L. 1883: p. 230, § 17. G.S. § 2147. R.S. 08: § 4046. C.L. § 6463. CSA: C. 101, § 36. CRS 53: § 86-3-22. C.R.S. 1963: § 86-3-22. L. 2000: Entire section amended, p. 210, § 11, effective August 2.

Case Note:

ANNOTATION

Attachment of lien based upon several contracts. Where the work done and material furnished, for which a mechanics' lien is claimed, tended to the accomplishment of one purpose, as the construction of a smelting plant, and was practically continuous, the lien will attach from the commencement of the work even though the work was done and material furnished under two or more contracts between the same parties, and it is necessary for the lien claimant to take steps for asserting his lien at the completion of each contract. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Continuity of work not destroyed by short interruptions. Where there was no abandonment of the intention to prosecute the work, the fact that there were interruptions of short periods of time in the construction of a building does not destroy the continuity of the work and prevent the attaching of the lien from the commencement of the building. Cary Hdwe. Co. v. McCarty, 10 Colo. App. 200, 50 P. 744 (1897).

Applied in Smith v. Stroehle Mach. & Supply Co., 109 Colo. 460 , 126 P.2d 341 (1942).

§ 38-22-123. Payment to avoid invalid

No payment made by any owner to any contractor for the purpose of avoiding any anticipated lien of any subcontractor shall be valid; and if any person files either of said statements for a lien for a larger sum than is due or to become due, in fact, or in probability, as the case may be, with intent to cheat or defraud any other person, and that fact appears in any proceeding under this article, such person shall forfeit all rights to such lien under this article.

History:

L. 1883: p. 235, § 29. G.S. § 2159. R.S. 08: § 4047. C.L. § 6464. CSA: C. 101, § 37. CRS 53: § 86-3-23. C.R.S. 1963: § 86-3-23.

Case Note:

ANNOTATION

Trial court should invoke forfeiture on its own initiative when the facts warrant its application whether or not it has been affirmatively pleaded. Pope Heating & Air Conditioning Co. v. Garrett-Bromfield Mtg. Co., 29 Colo. App. 169, 480 P.2d 602 (1971).

"Cheat or defraud" standard encompasses "knowledge". The "cheat or defraud" standard as to the lien claimant's state of mind in this section encompasses the "knowledge" standard in §38-22-128 . If a person intends to cheat or defraud someone regarding the amount of a mechanic's lien, he would necessarily have to have had knowledge that the amount was in error. Concrete Contractors v. E.B. Roberts Constr. Co., 664 P.2d 722 (Colo. App. 1982), aff'd, 704 P.2d 859 (Colo. 1985).

This section is facially irreconcilable with §38-22-128, but since §38-22-128 was enacted later, it controls. Wigham Excavating v. Colo. Fed. S & L, 796 P.2d 23 (Colo. App. 1990).

Applied in Armour & Co. v. McPhee & McGinnity Co., 87 Colo. 97, 285 P. 942 (1930).

§ 38-22-124. Other remedies not barred

No remedy given in this article shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise provided in this article. In case of two or more owners, contractors, or subcontractors interested in the same contract, the rule of procedure shall be the same as in the case of one such.

History:

L. 1883: p. 236, § 31. G.S. § 2161. R.S. 08: § 4048. C.L. § 6465. CSA: C. 101, § 38. CRS 53: § 86-3-24. C.R.S. 1963: § 86-3-24.

Case Note:

ANNOTATION

The remedy provided by article is cumulative, as the remedy thus afforded does not prevent any person from enforcing any other remedy which he otherwise would have had, except as otherwise herein provided. Hayutin v. Gibbons, 139 Colo. 262 , 338 P.2d 1032 (1959).

Claimant may pursue his remedy for a money judgment, notwithstanding he has a right to a lien. Hayutin v. Gibbons, 139 Colo. 262 , 338 P.2d 1032 (1959); Tighe v. Kenyon, 681 P.2d 547 (Colo. App. 1984).

Recovery of judgment for debt no bar to foreclosure action. The recovery of judgment for a debt due for labor and materials furnished by a contractor does not bar an action by the creditor to foreclose a mechanic's lien to secure the payment of the same indebtedness. Marean v. Stanley, 5 Colo. App. 335, 38 P. 395 (1894).

Failure to investigate information sources deprives guarantors of remedy. Where guarantors have the same sources of information available to them as mortgagor, failure to investigate deprives them of any remedy misrepresentations might have afforded them. Plateau Supply Co. v. Bison Meadows Corp., 31 Colo. App. 205, 500 P.2d 162 (1972).

Unenforceability of mechanics' lien does not preclude assertion of claim premised on unjust enrichment. F.M. Hall & Co. v. Sw. Props., 747 P.2d 688 (Colo. App. 1987); Redd Iron v. Int'l Sales & Serv., 200 P.3d 1133 (Colo. App. 2008).

This section is the rare exception to the doctrine of claim preclusion and permits a subsequent action based upon the same

claim for relief involving the same parties. Dave Peterson Elec., Inc. v. Beach Mtn. Builders, Inc. 167 P.3d 175 (Colo. App. 2007).

In enacting this section, the general assembly intended to abrogate the doctrine of claim preclusion by permitting a mechanic's lien claim subsequent and in addition to a claim to foreclose a judgment lien. Dave Peterson Elec., Inc. v. Beach Mtn. Builders, Inc., 167 P.3d 175 (Colo. App. 2007).

Applied in Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 P. 912 (1897); Jordan v. Lone Pines, Ltd., 41 Colo. App. 152, 580 P.2d 1273 (1978).

§ 38-22-125. Bona fide purchaser

No lien, excepting those claimed by laborers or mechanics as defined in section 38-22-108(1)(a), filed for record more than two months after completion of the building, improvement, or structure shall encumber the interest of any bona fide purchaser for value of real property, the principal improvement upon which is a single- or double-family dwelling, unless said purchaser at the time of conveyance has actual knowledge that the amounts due and secured by such lien have not been paid, or unless such lien statement has been recorded prior to conveyance, or unless a notice as provided in section 38-22-109(10) has been filed within one month subsequent to completion or prior to conveyance, whichever is later; except that nothing in this section shall extend the time for recording lien statements as provided in section 38-22-109(4), (5), and (10). For the purposes of this section, the dwelling shall be deemed complete upon conveyance and occupancy if not completed before. The lien for items of labor, work, or material which shall thereafter be furnished shall be effective and may be claimed within the time thereafter as provided in section 38-22-109(4), (5), and (10), and their priority shall not be affected by this section.

History:

L. 65: p. 854, § 5. C.R.S. 1963: § 86-3-25. L. 75: Entire section amended, p. 1424, § 4, effective October 1.

Case Note:

ANNOTATION

All bona fide purchasers possess, prior to closing, an equitable interest in the property purchased which may be subject to a mechanics' lien. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. App. 1986).

Perfection of lien against bona fide purchaser. In "deemed completed" situations such as that at issue here, a claimant may perfect a lien as against the interest of a bona fide purchaser only: (1) If a lien statement is filed either before or within two months after the date of conveyance and occupancy; (2) if a §38-22-109(10) notice is filed within one month after that time; or (3) if it can be shown that the bona fide purchaser had, at the time of conveyance, actual knowledge of nonpayment. Richter Plumbing & Heating v. Rademacher, 729 P.2d 1009 (Colo. App. 1986).

§ 38-22-126. Disburser - notice - duty of owner and disburser

(1) For the purposes of this section, the word "disburser" means any lender who has agreed to make any loan to the owner or contractor, the proceeds of which are to be disbursed from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed; or, any person who receives funds from any lender, contractor, or owner to be disbursed from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed; or, any owner who has agreed to pay any sum to any contractor from time to time as work upon a structure or other improvement progresses, or any part of which is to be withheld until all or any part of such work is completed.

(2) It is the duty of the disburser, prior to the first disbursement, to see that there has been recorded in the office of the county clerk and recorder of the county where the land to be improved is situated, a notice stating the name and address of the owner, the names, addresses, and telephone numbers of the principal contractor, if any, and the disburser, and the legal description of the land and its address, if any. One notice may include as many parcels as desired, providing that all the information is stated as to each parcel. Such notice shall be indexed by the county clerk and recorder under the name of the owner and each principal contractor as grantors and according to address.

(3) It is the duty of any person upon ordering or contracting for any labor, services, machinery, tools, equipment, laborers, or materials to be used as provided in section 38-22-101, upon demand of the person from whom he or she is so ordering or with whom he or she is so contracting, to furnish to such person a statement of the names, addresses, and telephone numbers of the owner or reputed owner of the land to be improved, the principal contractor, if any, and the disburser, if any, as defined in subsection (1) of this section, together with a legal description or the address, if any, of the land to be improved.

(4) Any lien claimant who is entitled to a lien under this article may give notice to the disburser stating the property by address or legal description, or by such other description as will identify the real property; the claimant's name, address, and telephone number; the person with whom he has contracted; and a general statement of his contract.

(5) Such notice shall be in writing and shall be served upon the disburser by certified mail or by delivering the same personally to such disburser, or by leaving a copy at his residence or at his place of business with some person in charge.

(6) Upon such notice being received by the disburser, it is the duty of the disburser, before disbursing any funds to the person designated in said notice with whom said claimant has contracted, to ascertain the amount due to the claimant on any disbursement date, and to pay such amount directly to the claimant out of any undisbursed funds available for and due to said person designated in said notice on such date; except that any amounts actually paid by the disburser to others for labor, services, machinery, tools, equipment, and laborers or materials performed, supplied, or furnished for such structure or improvement that are chargeable to said person designated in said notice shall not be deemed available for said person designated in said notice; and further except that if the amount claimed by said claimant is disputed by said person designated in said notice, the disburser may impound such amount until the amount due is settled by agreement or final judicial determination.

(7) If the disburser fails to comply with subsection (6) of this section and the said claimant suffers loss by reason of said failure the disburser shall be liable to said claimant for the amount which the disburser should have paid claimant to the extent of claimant's loss.

History:

L. 65: p. 854, § 5. C.R.S. 1963: § 86-3-26. L. 2000: (3) and (6) amended, p. 210, § 12, effective August 2.

Case Note:

ANNOTATION

Law reviews. For article, "Mechanic's Liens -- The 'Intent' Provisions Explored", see 11 Colo. Law. 1492 (1982).

Definition of "disburser" in this section was not intended by the legislature to apply to §38-22-127 . Flooring Design Assocs. v. Novick, 923 P.2d 216 (Colo. App. 1995).

Presumption of receipt. Return receipt for certified mail raises presumption of receipt by addressee. Johnson-Voiland-Archuleta, Inc. v. Roark & Assocs., 43 Colo. App. 370, 608 P.2d 818 (1979).

Subsection (6) requires a disburser, upon appropriate notice, to pay the subcontractor directly rather than pay the contractor in order to ensure that the subcontractor receives payment for labor and materials. Flooring Design Assocs. Inc. v. Novick, 923 P.2d 216 (Colo. App. 1995); Crissey Fowler Lumber v. FCIB, 8 P.3d 531 (Colo. App. 2000).

Under the rules of statutory construction, the phrase in subsection (6) "available for and due to" refers to the construction loan proceeds in full, and not merely to those funds paid to the general contractor upon completion of a project. Subsection (6) plainly states that the disburser should pay the claimed amount directly to the claimant out of any undisbursed funds available for and due to the general contractor. Crissey Fowler Lumber v. FCIB, 8 P.3d 531 (Colo. App. 2000).

§ 38-22-127. Moneys for lien claims made trust funds - disbursements - penalty

(1) All funds disbursed to any contractor or subcontractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services, or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made.

(2) This section shall not be construed so as to require any such contractor or subcontractor to hold in trust any funds which have been disbursed to him or her for any subcontractor, laborer or material supplier, or laborer who claims a lien against the property or claims against a principal and surety who has furnished a bond under the provisions of this article if such contractor or subcontractor has a good faith belief that such lien or claim is not valid or if such contractor or subcontractor, in good faith, claims a setoff, to the extent of such setoff.

(3) If the contractor or subcontractor has furnished a performance or payment bond or if the owner of the property has executed a written release to the contractor or subcontractor, he need not furnish any such bond or hold such payments or disbursements as trust funds, and the provisions of this section shall not apply.

(4) Every contractor or subcontractor shall maintain separate records of account for each project or contract, but nothing contained in this section shall be construed as requiring a contractor or subcontractor to deposit trust funds from a single project in a separate bank account solely for that project so long as trust funds are not expended in a manner prohibited by this section.

(5) Any person who violates the provisions of subsections (1) and (2) of this section commits theft, as defined in section 18-4-401, C.R.S.

History:

L. 75: Entire section added, p. 1420, § 2, effective October 1. L. 2000: (1) and (2) amended, p. 211, § 13, effective August 2.

Case Note:

ANNOTATION

Law reviews. For article, "The Mechanics' Lien Trust Fund Statute -- Theft or Not Theft", see 16 Colo. Law. 1968 (1987). For article, "The Mechanic's Lien Trust Fund Statute: An Underused Tool in Civil Litigation and Bankruptcy Cases", see 31 Colo. Law. 55 (Aug. 2002). For article, "Juggling Hammers: Bankruptcy Issues and the Mechanic's Lien Trust Fund Statute", see 39 Colo. Law. 21 (Dec. 2010).

Prosecution not imprisonment for civil debt. Because the intent to defraud, necessary to §18-4-401 , must be proven in order to convict an accused, a prosecution for violation of this section does not conflict with the constitutional prohibition of imprisonment for civil debt in § 12 of art. II, Colo. Const. People v. Piskula, 197 Colo. 148, 595 P.2d 219 (1979).

General assembly intended to protect subcontractors, laborers, material suppliers, and homeowners from unscrupulous contractors. In re Regan, 151 P.3d 1281 (Colo. 2007); Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

The purpose of this section is to protect homeowners, laborers, and material suppliers from dishonest or profligate contractors by requiring contractors to hold in trust their customers' advanced payments if independent laborers or material suppliers are necessary to complete a particular job. People v. Collie, 682 P.2d 1208 (Colo. App. 1983); In re Regan, 151 P.3d 1281 (Colo. 2007); Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

Trade vendors are permitted to waive rights enacted for their benefit and protection. A construction subcontract agreement that unambiguously waived all rights of trade vendors to make claims under this section is not void as against public policy nor is the waiver an unenforceable exculpatory clause. In re Vill. Homes of Colo., Inc., 405 B.R. 479 (Bankr. D. Colo. 2009).

Subsection (1) imposes a statutory trust on all funds disbursed to a contractor or subcontractor for the benefit of laborers and suppliers who have furnished services or supplies on a particular construction project, satisfying the technical trust element of a fiduciary relationship necessary to establish a claim under 11 U.S.C. §523(a)(4). In re Cupit, 514 B.R. 42 (Bankr. D. Colo. 2014).

Subsection (1) does not require a contractor to hold funds for each of its construction projects in individual trust accounts. Hottinger Excavating & Ready Mix, LLC v. R.E. Crawford Constr., LLC, 175 F. Supp. 3d 1269 (D. Colo. 2016).

Subsection (2) does not require a contractor to hold funds in trust for a subcontractor if the contractor has a good faith belief that the subcontractor's lien or claim is not valid. Hottinger Excavating & Ready Mix, LLC v. R.E. Crawford Constr., LLC, 175 F. Supp. 3d 1269 (D. Colo. 2016).

There is no express statutory prohibition of a waiver of this section. The fact that §38-22-119 refers to lien waivers, and limits the effect of such waivers to the parties to the agreement, neither authorizes nor prohibits waivers of mechanics' liens. In fact, it recognizes their validity as between the contracting parties. Section 38-22-119 does not give rise to an implication that statutory authorization is required in order to waive rights under this section. In re Vill. Homes of Colo., Inc., 405 B.R. 479 (Bankr. D. Colo. 2009).

Section is not in itself criminal statute; it merely defines conduct that will be considered theft under §18-4-401 . Any violation of this section must be charged and prosecuted as a violation of the theft statute. People v. Brand, 43 Colo. App. 347, 608 P.2d 817 (1979); People v. Collie, 682 P.2d 1208 (Colo. App. 1983).

Each of the essential elements of theft as set forth in §18-4-401 must be proven beyond a reasonable doubt to support a conviction even where theft is sought to be proven by showing a violation of this section. People v. Erickson, 695 P.2d 804 (Colo. App. 1984); In re Gamboa, 400 B.R. 784 (Bankr. D. Colo. 2008).

In the context of theft of construction project trust funds, the "knowingly using" element of mental culpability in §18-4-401(1)(b) does not require a conscious objective to deprive another person of the use or benefit of the construction trust funds, but instead requires the offender to be aware that his manner of using the trust funds is practically certain to result in depriving another person of the use or benefit of the funds. People v. Anderson, 773 P.2d 542 (Colo. 1989); In re Helmke, 398 B.R. 38 (Bankr. D. Colo. 2008); In re Gamboa, 400 B.R. 784 (Bankr. D. Colo. 2008); In re Cupit, 514 B.R. 42 (Bankr. D. Colo. 2014).

Owner/officer personally liable for breach of statute. Alexander Co. v. Packard, 754 P.2d 780 (Colo. App. 1988); Flooring Design Assocs. v. Novick, 923 P.2d 216 (Colo. App. 1995); In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

An individual in complete control of the finances and financial decisions of an entity that violates the statute is personally liable for such violation. Alexander Co. v. Packard, 754 P.2d 780 (Colo. App. 1988); Flooring Design

Assocs. v. Novick, 923 P.2d at 216 (Colo. App. 1995); In re Walker, 325 B.R. 598 (Bankr. D. Colo. 2005); In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

A part owner and vice-president of contractor was personally liable for damages and costs incurred by owner of property in defending materialmen liens on project where vice-president breached the statutory trust relationship by diverting trust funds received from the owner of the property intended for payment to materialmen to pay other obligations of the contractor. Alexander Co. v. Packard, 754 P.2d 780 (Colo. App. 1988).

Once trust funds are identified as having been disbursed to a contractor or subcontractor on a particular project, the burden to account for proper disposition of the funds under subsection (1) rests squarely on the contractor or subcontractor. The inability to meet that burden constitutes a breach of fiduciary duty. Stetson Ridge Assocs., Ltd. v. Tri-C Constr., 315 B.R. 595 (Bankr. D. Colo. 2004), aff'd in part and rev'd in part on other grounds, 325 B.R. 598 (D. Colo. 2005); In re Gamboa, 400 B.R. 784 (Bankr. D. Colo. 2008).

Trust fund claims are limited by the applicable statute of limitations, just as lien claims are limited by §§38-22-109 and 38-22-110 . In re Regan, 151 P.3d 1281 (Colo. 2007).

Where contractor obtained a surety bond and is later paid by the owner, the contractor receives those payments free of the express trust otherwise imposed by this section. In re Western Urethanes, Inc., 61 Bankr. 245 (Bankr. D. Colo. 1986).

Priority of interests under this section. An unsecured supplier claiming an interest under this section, which imposes a trust fund for materialmen and laborers, takes priority over a prior perfected security interest in all present and future accounts receivable and proceeds of accounts. First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

Contractor who received advances from clients but failed to retain them for payment of subcontractors and materialman could be convicted of theft, as set forth in §18-4-401 , though contractor was allegedly ignorant of this section's requirement that such funds be held in trust. However, the prosecution must prove all elements of §18-4-401 to obtain conviction. People v. Mendro, 731 P.2d 704 (Colo. 1987).

Definition of "disburser" in §38-22-126 was not intended by the legislature to apply to this section. Flooring Design Assocs. v. Novick, 923 P.2d 216 (Colo. App. 1995).

Merchant homebuilders are "contractors" under this section. Flooring Design Assocs. v. Novick, 923 P.2d 216 (Colo. App. 1995).

All funds disbursed to merchant homebuilder from a construction loan and all funds received by merchant homebuilder from the sale of the property constituted "funds disbursed to a contractor" and are subject to the statute. In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

Funds made available to the developer of a construction project, including an owner's voluntary loans or capital contributions, are not trust funds under subsection (1). Owner's voluntary injection of his own money as a survival loan did not constitute "funds disbursed to any contractor . . . on [a] construction project". Yale v. AC Excavating, Inc., 2 013 CO 10, 295 P.3d 470 .

Because personal funds owner made available were not trust funds, owner as a member and manager of the limited liability company cannot be held civilly liable for theft under subsection (5) for using those funds to pay company obligations instead of paying in full the amounts owed to a subcontractor. Yale v. AC Excavating, Inc., 2013 CO 10, 295 P.3d 470 .

The failure to fully account for all disbursements from the construction loan and the use of proceeds from the sale of the property in a manner inconsistent with the statute constitute violations of the statute. In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

Merchant homebuilder committed a defalcation pursuant to 11 U.S.C. §523(a)(4) by failing to ensure that all such disbursements were held in trust for the unpaid suppliers of material and labor. In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

An individual in complete control of the finances and financial decisions of an entity that violates the statute is personally liable for such violation. In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

The debts owed by debtor merchant homebuilder to suppliers of material and labor that result from this defalcation are non-dischargeable under 11 U.S.C. §523(a)(4). In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007).

A trust fund claimant is not required to have a properly perfected lien or still be able to perfect a lien to seek access to money held in trust under this section. By its plain language, this section allows subcontractors, laborers, and material suppliers to assert claims directly against contractors if they have a lien or may have a lien, which means they have added value to a property or may have added value to a property. In re Regan, 151 P.3d 1281 (Colo. 2007); In re Regan, 477 F.3d 1209 (10th Cir. 2007); In re Barnes, 377 B.R. 289 (Bankr. D. Colo. 2007); Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

The section protects subcontractors, laborers, and material suppliers who add value to property but are unable to recover money owed to them through the lien claim process. In re Regan, 151 P.3d 1281 (Colo. 2007).

The procedural requirements for perfecting a lien contained in §§38-22-109 and 38-22-110 do not apply to claims against money held in trust under this section. In re Regan, 151 P.3d 1281 (Colo. 2007); In re Regan, 477 F.3d 1209 (10th Cir. 2007).

General contractor does not have standing under subsection (1) to pursue claims against subcontractors. AMEC Earth & Envtl. v. SolSource Energy Solutions, 854 F. Supp. 2d 1014 (D. Colo. 2012) (distinguishing bankruptcy cases).

An owner of a project or a general contractor has standing to sue under subsection (1) to contest the dischargeability of a subcontractor-debtor under 11 U.S.C. §523(a)(4). Stetson Ridge Assocs., Ltd. v. Tri-C Constr., 325 B.R. 598 (D. Colo. 2005).

General contractor that paid subcontractor to release its lien on property had standing to sue contractor for contractor's failure to pay subcontractor and to establish that debt was not dischargeable pursuant to 11 U.S.C. §523(a)(4). Allowing general contractor recourse under this section merely subrogates it to the rights of the subcontractor whom it paid when the contractor failed to do so. Subcontractor is among the identified class for whom funds shall be held in trust under subsection (1)(a). In re Brennan, 449 B.R. 114 (Bankr. D. Colo. 2011).

Property owner had standing to sue contractor for contractor's failure to make payments to subcontractors, laborers, and material suppliers. Material supplier's lien on property owner's house amounted to an injury in fact, and the property owner of a construction project, as well as the subcontractors, material suppliers, and laborers, has a legally protected interest to enforce the trust created under subsection (1). Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

As beneficiaries, property owners are able to enforce this section against a contractor separate from the lien claim laws. In re Regan, 151 P.3d 1281 (Colo. 2007); Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

Property owner does not have the right to retain damages awarded against contractor. Instead, property owner is entitled to a judgment imposing a constructive trust on the funds that should have been paid to subcontractors, material suppliers, and laborers. Syfrett v. Pullen, 209 P.3d 1167 (Colo. App. 2008).

Claims under this section are not assignable on a contingency fee basis for collection purposes. In re Thomas, 387 B.R. 808 (D. Colo. 2008).

Although a claim for breach of trust under this section is assignable, even on a contingency payment basis, the right to the penalty of treble damages and the incorporated civil theft remedies under §§18-4-401 and 18-4-405 are not assignable. People v. Adams, 243 P.3d 256 (Colo. 2010) (disagreeing with In re Thomas cited above).

A lien release bond is not equivalent to payment or performance bonds. Because only payment or performance bonds are included in subsection (3), it must be presumed that the legislature intended to exclude lien release bonds from the exemption. Accordingly, defendant's lien release bonds did not support an exemption from the trust fund statute. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

Applied in Climax Molybdenum Co. v. Specialized Installers, Inc., 12 B.R. 546 (D. Colo. 1981).

§ 38-22-128. Excessive amounts claimed

Any person who files a lien under this article for an amount greater than is due without a reasonable possibility that said amount claimed is due and with the knowledge that said amount claimed is greater than that amount then due, and that fact is shown in any proceeding under this article, shall forfeit all rights to such lien plus such person shall be liable to the person against whom the lien was filed in an amount equal to the costs and all attorney's fees.

History:

L. 75: Entire section added, p. 1421, § 3, effective October 1.

Case Note:

ANNOTATION

Law reviews. For article, "Substantial Completion as it Relates to the Colorado Mechanic's Lien Act", see 26 Colo. Law. 45 (Feb. 1997).

"Knowledge" standard encompassed within "cheat or defraud". The "cheat or defraud" standard as to the lien claimant's state of mind in §38-22-123 encompasses the "knowledge" standard in this section. If a person intends to cheat or defraud someone regarding the amount of a mechanic's lien, he would necessarily have to have had knowledge that the amount was in error. Concrete Contractors v. E.B. Roberts Constr. Co., 664 P.2d 722 (Colo. App. 1982), aff'd, 704 P.2d 859 (Colo. 1985).

Reasonableness of award of attorney fees. Where lawsuits were directly attributable to the contractor's giving notice or filing a lien statement claim for an excessive amount, the trial court did not err in awarding all of the attorney fees incurred incident to the excessive claim. Heating & Plumbing Engineers v. H.J. Wilson, 698 P.2d 1364 (Colo. App. 1984).

Where nonlienable items can be separated from the lienable items at trial and no showing or allegations were made stating that the lien was knowingly and intentionally excessive, the lien will remain valid as to the lienable items. Manguso v. Am. Sav. & Loan Ass'n, 782 P.2d 866 (Colo. App. 1989).

Inclusion of accrued interest in lien statement does not render the lien void as excessive. Because lien claimants are entitled to receive interest under §38-22-101(5) , accrued interest can be an "amount due"

under this section. Honnen Equip. Co. v. Never Summer Backhoe Serv., Inc., 261 P.3d 507 (Colo. App. 2011).

Section 38-22-123 is facially irreconcilable with this section, but because this section was enacted later, it controls. Wigham Excavating v. Colo. Fed. S & L, 796 P.2d 23 (Colo. App. 1990).

Where fraudulently inflated construction charges were included in lien statement, forfeiture of lien rights was required as a matter of law. Wigham Excavating v. Colo. Fed. S & L, 796 P.2d 23 (Colo. App. 1990).

An officer of a corporation who has signed a lien in an official capacity is not personally liable for costs and attorney fees. The corporation has an independent legal identity and is considered to be the "person who files a lien". JW Constr. Co. v. Elliott, 253 P.3d 1265 (Colo. App. 2011).

Even though the intent of this section is to punish and deter those who would abuse the lien statute, section's intent is not to be unjust. Party entitled to attorney fees under this section is entitled only to those fees expended in bringing or defending an excessive lien claim, not the fees expended in bringing or defending against other claims unrelated to the lien claim in a multiple-claim suit. Moreover, although this section mandates an award of all attorney fees for successfully defending against an excessive lien, the amount awarded must be reasonable. LSV, Inc. v. Pinnacle Creek, LLC, 996 P.2d 188 (Colo. App. 1999).

A bankruptcy trustee, as a successor to a debtor's interest in real property, may not invalidate a mechanics lien and recover legal fees and costs under this section. In re Old Town N., LLC, 519 B.R. 307 (Bankr. D. Colo. 2014).

Applied in Byerly v. Bank of Colo., 2013 COA 35, 411 P.3d 732 .

§ 38-22-129. Principal contractor may provide bond prior to commencement of work

(1) Except as provided in subsection (4) of this section, the provisions of section 38-22-101(1) shall not apply if, at the commencement of any work upon any construction project for the improvement of real property as described in section 38-22-101(1), a performance bond and a labor and materials payment bond, each in an amount equal to one hundred fifty percent of the contract price, are executed by the principal contractor and one or more corporate sureties authorized and qualified to do business in this state, for the protection of all contractors, subcontractors, materialmen, and laborers supplying labor, laborers, or material in the prosecution of the work on such construction project for the use of each contractor, subcontractor, materialman, or laborer.

(2) All subcontractors, materialmen, mechanics, and others who would otherwise be entitled to a lien under the provisions of section 38-22-101(1) shall have a right of action directly against the principal contractor and his surety for the full amount due. Such action shall be brought within six months after completion of the last work on such project.

(3) In order to be effective, a notice of such bond shall be filed with the county clerk and recorder of the county wherein such project is situate prior to the commencement of any work on the project and shall be indexed according to both the street address and the legal description of the property to be improved. The principal contractor shall post a notice on the property that notice of such bond has been filed with the county clerk and recorder and shall make available copies of the bond to every contractor, subcontractor, materialman, mechanic, or laborer upon request.

(4) If any claimant files for record a lien statement or other notice, pursuant to section 38-22-109, such lien shall be deemed released upon the filing for record of a notice executed by both the principal and all sureties acknowledging the existence of the bond furnished for such project and that said lien claimant is entitled to claim the benefits of said bond. Such acknowledgment shall be executed by the principal and sureties upon demand of the owners or any person filing a lien statement. Said notice may be delivered personally to the surety or its agent and the principal or his agent or may be mailed by certified or registered mail. If the principal and all sureties on any such bonds fail or refuse to execute and record such acknowledgment within thirty days after written demand is made upon them, all lien claimants shall be entitled to enforce their lien claims in the same manner as if no bond had been filed as provided in subsection (1) of this section.

(5) In the event that any corporate surety on any bond filed pursuant to the provisions of subsection (1) of this section becomes subject to an order for relief under the federal bankruptcy code of 1978, title 11 of the United States Code, is the subject of any state or federal corporate reorganization proceedings, makes any assignment for the benefit of creditors, or otherwise is unable to meet its financial obligations as they become due, the provisions of this section shall not apply, and any lien claimant shall be entitled to enforce such lien claim in the same manner as if no bond had been filed as provided in subsection (1) of this section.

History:

L. 75: Entire section added, p. 1424, § 5, effective October 1. L. 80: (5) amended, p. 786, § 14, effective June 5. L. 2000: (1) amended, p. 211, § 14, effective August 2.

Case Note:

ANNOTATION

Notice recorded pursuant to this section does not satisfy the notice requirement of §38-35-110. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

§ 38-22-130. Payment of claims by surety

(1) Subcontractors, materialmen, mechanics, and others who have claims aggregating two thousand dollars or less each on construction projects for the improvement of real property as described in section 38-22-101(1) for which a bond was executed pursuant to section 38-22-129 shall serve upon the principal contractor and his surety an affidavit, supported by all reasonably available documentary evidence, that a claimant has furnished labor or materials used or performed in the prosecution of the work on such project, that he has been unpaid therefor, and the amount of such claim. If after forty-five days such affidavit remains uncontroverted, such surety shall pay to such claimant forthwith the full value of his claim.

(2) Service of such affidavit may be accomplished by certified or registered mail, by personal delivery to such person, or by leaving a copy at his residence or at his place of business with some person in charge.

History:

L. 75: Entire section added, p. 1425, § 5, effective October 1.

§ 38-22-131. Substitution of bond allowed

(1) Whenever a mechanic's lien has been filed in accordance with this article, the owner, whether legal or beneficial, of any interest in the property subject to the lien may, at any time, file with the clerk of the district court of the county wherein the property is situated a corporate surety bond or any other undertaking which has been approved by a judge of said district court.

(2) Such bond or undertaking plus costs allowed to date shall be in an amount equal to one and one-half times the amount of the lien plus costs allowed to date and shall be approved by a judge of the district court with which such bond or undertaking is filed.

(3) The bond or undertaking shall be conditioned that, if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, the principal or his sureties shall pay to such claimant the amount of his judgment, together with any interest, costs, and other sums which such claimant would be entitled to recover upon the foreclosure of the lien.

History:

L. 75: Entire section added, p. 1425, § 5, effective October 1.

Case Note:

ANNOTATION

Bonding pursuant to this section does not excuse failure to record a notice of lis pendens pursuant to §38-22-110 . Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

§ 38-22-132. Lien to be discharged

Notwithstanding any other provision of this article or section 38-35-110, upon court approval of a bond or undertaking as provided in section 38-22-131, and upon the issuance and recording of a certificate of release as specified in this section, the lien against the property, and any notice of lis pendens or notice of the commencement of any action relating to such lien, shall be immediately discharged and released in full; the real property described in such bond or undertaking shall be forever released from the lien, from any notice of lis pendens or notice of the commencement of any action relating to such lien, and from any action brought to foreclose such lien; the bond or undertaking shall be substituted; and no notice of lis pendens or notice of the commencement of any action relating to such lien or any action for the enforcement or foreclosure thereof shall thereafter be recorded against the property. The clerk of the district court with which such bond or undertaking has been filed shall issue a certificate of release which shall be recorded in the office of the clerk and recorder of the county wherein the original mechanic's lien was filed, and the certificate of release shall show that the property has been forever released from the lien, from any notice of lis pendens or notice of the commencement of any action relating to such lien, and from any action brought to foreclose such lien.

History:

L. 75: Entire section added, p. 1426, § 5, effective October 1. L. 2011: Entire section amended, (SB 11 -264), ch. 279, p. 1250, §2, effective July 1.

Cross Reference Note:

For the legislative declaration in the 2011 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2011.

§ 38-22-133. Action to be brought on bond or undertaking

When a bond or undertaking is filed as provided in section 38-22-131, the person filing the original mechanic's lien may bring an action upon the said bond or undertaking. Such action shall be commenced within the time allowed for the commencement of an action upon foreclosure of the lien, and the statute of limitations applicable to a lien foreclosure shall apply to the action upon the bond or undertaking as it would had no bond or undertaking been filed.

History:

L. 75: Entire section added, p. 1426, § 5, effective October 1.