

LANDLORDS, PROTECT YOUR PROPERTY!

By Michael R. Kiesling, Esq.; August 15, 2016

Let's say you're a landlord. Your tenant's contractor builds improvements. The contractor is not paid, and records a mechanics lien. Does the lien impact your fee interest in the property?

It can.

In California, a mechanics lien may attach to a fee interest even where the landlord does not contract for the improvements. (Civil Code § 8442.) This presents risk where a tenant wants to build. However, there are ways for a landlord to proactively manage this risk. Some practical suggestions follow.

1. **Strategically Negotiate the Lease.** Protective lease provisions are the landlord's first line of defense. The landlord should seek provisions requiring that:

- The tenant provide written notice 10 days before start of construction.
- The tenant's construction contract require the contractor to (i) secure payment and performance bonds, and (ii) provide conditional and unconditional lien waivers and releases. The former insulate against risk of nonpayment, insolvency, and project noncompletion; the latter, against mechanics liens.
- The tenant immediately discharge mechanics liens that are recorded. This affords the landlord a contractual basis to demand the tenant pay or otherwise secure release of the lien, such as through the purchase of a mechanics lien release bond (which, as the name suggests, releases the property from the lien).
- The tenant defend and indemnify the landlord in relation to mechanics liens and contractor claims. This is important in the event the landlord is named in a lawsuit.

2. **Give a Notice of Nonresponsibility.** In California, where a nonparticipating landlord records and posts what is known as a "notice of nonresponsibility," a mechanics lien *generally* will not attach to the fee interest. (Civil Code §§ 8442, 8444.) To be effective, the notice must contain the information required by statute, be signed and verified by the landlord, and be recorded and posted conspicuously at the construction site within 10 days after the landlord has knowledge of the start of construction. (Civil Code §§ 8114, 8444.)

The landlord may not give a notice of nonresponsibility until work has actually commenced. Also, the landlord needs to take care not to "participate" in the construction (e.g., by directing work). Participation renders the notice ineffective.

Takeaways: Where you are negotiating a new lease, consider including the provisions above. If a tenant under an existing lease provides notice it wants to build, review the lease. If the lease does not contain the above provisions, consider requesting an amendment to include them. Finally, consult an attorney about giving a notice of nonresponsibility at the start of construction.

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