

GRADER'S GUIDE

*** QUESTION NO. 1 ***

SUBJECT: REAL PROPERTY

1. What steps must Builder take to assert a mechanic's lien under Alaska law? **[20 points]**

AS 34.35.050(1) provides that a person who “performs labor upon real property at the request of the owner . . . for the construction, alteration, or repair of a building or improvement,” has a lien “to secure the payment of the contract price” for the work. (Emphasis added). Similarly, a person has a lien if that person “furnishes materials that are delivered to real property under a contract with the owner . . . that are incorporated in the construction, alteration, or repair of a building or improvement.” AS 34.35.050(3) (emphasis added).

In order to properly assert a mechanic's lien, Builder must record a claim of lien “not later than 90 days after the claimant (1) completes the construction contract; or (2) ceases to furnish labor, materials, services, or equipment for the construction, alteration, or repair of the owner's property.” AS 34.35.068.

Additionally, Builder must satisfy the requirements of AS 34.35.070(c), which provide:

- (c) The lien shall be verified by the oath of the claimant or another person having knowledge of the facts and state
 - (1) the real property subject to the lien, with a legal description sufficient for identification;
 - (2) the name of the owner;
 - (3) the name and address of the claimant;
 - (4) the name and address of the person with whom the claimant contracted;
 - (5) a general description of the labor, materials, services, or equipment furnished for the construction, alteration, or repair, and the contract price of the labor, materials, services, or equipment;
 - (6) the amount due to the claimant for the labor, materials, services, or equipment; and

- (7) the date the last labor, materials, services, or equipment were furnished.

Finally, Builder's mechanic's lien must be recorded in the recording district in which Ray's house is located. See AS 40.17.020.

2. What remedies does First Bank have against the property and Ray personally under Alaska law due to Ray's default on the First Note and the First Deed of Trust? Discuss each remedy and the advantages and disadvantages of each remedy. **[40 points]**

First Bank has two remedies available to it with respect to the property. First Bank may seek to foreclose on the property either non-judicially or judicially. See AS 34.20.070. In a non-judicial foreclosure, the Trustee for the Deed of Trust records a notice of default and provides notice by mail or in person to those persons or entities entitled to notice by statute. See AS 34.20.070. Then, the Trustee may sell the property at public auction. See AS 34.20.080. If First Bank chooses to pursue non-judicial foreclosure it cannot then seek a deficiency judgment against Ray. See *Smith v. Shortall*, 732 P.2d 548, 549 (Alaska 1987). However, Ray may not redeem the property after a foreclosure sale if First Bank chooses non-judicial foreclosure. See *Moening v. Alaska Mutual Bank*, 751 P.2d 5, 8 (Alaska 1988).

First Bank may also initiate a judicial foreclosure in which First Bank would file suit to have the court foreclose on the property and force a sale. AS 09.45.170 provides:

A person having a lien upon real property, other than that of a judgment, whether created by mortgage or otherwise, to secure a debt or other obligation may bring an action to foreclose the lien. In the action, the court may direct the sale of the encumbered property or a portion of it and the application of the proceeds of the sale to the payment of costs, expenses of sale, and the amount due the plaintiff. The judgment shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and be entered accordingly.

First Bank would retain the right to pursue a deficiency judgment against Ray personally if the amount of the judicial foreclosure sale did not satisfy the outstanding secured debt. See *Moening*, 751 P.2d at 7; AS 34.20.160. However, Ray would retain a statutory right of redemption for twelve months following the judicial sale of the property. See *id.* ("The debtor has a statutory right of redemption for twelve months after the sale is confirmed."); AS 09.45.190, 09.35.250.

First Bank may also choose to first sue Ray on the outstanding debt due under the First Note. It may then choose to pursue judicial foreclosure of the property to satisfy any outstanding judgment on the First Note. See *Moening*, 751 P.2d at 8 (“[T]he creditor may sue directly on the note without first foreclosing the property. Moreover, if the creditor prevails in the legal action and cannot satisfy the judgment against the debtor's personal property, it may then maintain an action for judicial foreclosure of the security.”).

3. If Builder properly records a mechanic's lien and either First Bank or Second Bank forecloses on their respective deeds of trust, what is the priority of the three liens? Discuss. **[30 points]**

The First Bank's First Deed of Trust has first priority, Builder's mechanic's lien has second priority, and Second Bank's Second Deed of Trust has third priority.

Alaska is a race notice state. See AS 40.17.480(b). First Bank's First Deed of Trust has priority because it was recorded first.

Second Bank's Deed of trust normally would have second priority because it was created second in time. However, Second Bank did not properly record the Second Deed of Trust. The facts indicate that Builder also did not have knowledge of the Second Deed of Trust. Therefore, Builder's properly recorded mechanic's lien will have second priority.

Further, AS 34.35.060 provides that a prior recorded encumbrance, like the First Deed of Trust, is preferred to a mechanic's lien, except when the mechanic's lien is asserted for labor or materials provided in the original construction of a building:

(a) Except as provided in (c) of this section, an encumbrance which is properly recorded shall be preferred to a lien created under AS 34.35.060-34.35.120 unless the claim of lien under AS 34.35.070 or notice of right to lien under AS 34.35.064 has been recorded before the encumbrance. The preference granted for a prior mortgage or deed of trust under this section applies without regard to when the sums are disbursed or whether the disbursements are required under the terms of a loan agreement.

...

(c) A lien created by As 34.35.050 – 34.35. 120 in favor of an individual actually performing labor upon a building or other improvement in its original construction . . . is preferred

to a prior encumbrance upon the land on which the building or other improvement is constructed.

The Alaska Supreme Court in *Lynch v. McCann*, 478 P.2d 835, 838 (Alaska 1970), held that a “new addition to the . . . building was not original construction within the intendment of AS 34.35.060(c).” Remodeling, similarly, would not be considered “original construction” under AS 34.35.060. Therefore, the prior-recorded First Deed of Trust will have priority over Builder’s mechanic’s lien. *See id.* at 839.

4. Would your answer to No. 3 change, if Builder’s labor and materials had been provided in the original construction of Ray’s house? Explain. **[10 points]**

Yes, as noted in the Answer to No. 3, AS 34.35.060(c) provides that a mechanic’s lien for labor and materials provided in “original construction” is preferred to prior encumbrances:

- (c) A lien created by AS 34.35.050 – 34.35. 120 in favor of an individual actually performing labor upon a building or other improvement in its original construction . . . is preferred to a prior encumbrance upon the land on which the building or other improvement is constructed.

Builder’s properly asserted and recorded mechanic’s lien would therefore have priority over the two Deeds of Trust if Builder had provided his labor and materials in original construction.