

## ESSAY QUESTION NO. 7

### Answer this question in booklet No. 7

In 2009, Allen purchased an existing home located at 22 Lost Lane, Fairbanks, Alaska 99700, which is situated within the Fairbanks Recording District (the "Property"). Allen financed the Property with Big Bank and executed a promissory note secured by a deed of trust (the "Deed of Trust") which Big Bank properly recorded in the Fairbanks Recording District on January 15, 2009.

In January of 2012, Allen contacted Charlene General Construction, Inc. ("Charlene") to obtain a quote for a potential remodel of the Property's bathroom and foyer. Charlene bid a price of \$5,000 for the bathroom and \$2,000 for the foyer remodel, inclusive of labor and materials. Allen hired Charlene to do the bathroom remodel. Allen borrowed \$5,000 from Local Bank and executed a promissory note in favor of Local Bank secured by a mortgage on the Property (the "Mortgage").

After claiming to have completed the bathroom remodel on February 1, 2012, Charlene sent Allen an invoice for \$5,000. Allen was not satisfied with the quality of Charlene's work and refused to pay.

On February 10, 2012, Charlene hand-delivered to Allen a copy of the following document claiming a lien against the Property, which was signed and notarized by a qualified agent of Charlene:

NOTICE IS GIVEN that as of February 1, 2012, Charlene General Construction of 44 Ruger Road, Holdup, Alaska 99500, provided \$7,000 of labor and materials for a remodel at the request of and benefit for, Allen, of 22 Lost Lane, Fairbanks, Alaska 99700, upon the real property described as Lot 1, Block U, LEAVE ME ALONE SUBDIVISION, according to the official plat thereof filed under Plat No. 12-34, Records of the Fairbanks Recording District, which property is more commonly known as 22 Lost Lane, Fairbanks, Alaska 99700. The date the last labor or materials were furnished was February 1, 2012. The statements contained herein are true and correct to the undersigned's knowledge and the sum claimed is justly due and owed to Charlene General Construction from Allen.

Charlene recorded this claim of lien in the Fairbanks Recording District on February 15, 2012. The following day, on February 16, 2012, Local Bank recorded the Mortgage in the Fairbanks Recording District. Five months later, Allen defaulted on his loans with Big Bank and Local Bank.

1. Discuss whether Charlene's claim of lien is enforceable.
2. For the purpose of this question assume that Charlene's claim of lien is enforceable. Discuss the order of priority of the potential claimants.

**GRADERS' GUIDE**  
**\*\*\* QUESTION NO. 7 \*\*\***  
**REAL PROPERTY**

**1. Discuss whether Charlene's claim of lien is enforceable. (70 total points)**

The enforceability of Charlene's lien depends on whether the claim of lien meets the statutory requirements. Applicants may reach either conclusion as to whether the claim of lien enforceable or not enforceable. However, their conclusion on enforceability should turn upon their analysis and conclusion under subsection C, below. With regard to subsections A, B, and D, the facts support the conclusions set forth in those subsections.

**A. Lien for Labor or Materials Furnished (10 points)**

The work performed by Charlene gives rise to a claim of lien. AS 34.35 et. seq. provides for liens on real property under a variety of circumstances:

AS 34.35.050. Lien for Labor or Materials Furnished.

A person has a lien, only to the extent provided under this chapter, to secure the payment of the contract price if the person

- (1) performs labor upon real property at the request of the owner or the agent of the owner for the construction, alteration, or repair of a building or improvement; . . .
- (3) furnishes materials that are delivered to real property under a contract with the owner or the agent of the owner that are incorporated in the construction, alteration, or repair of a building or improvement; . . . [or]
- (6) is a general contractor.

Here, the facts state that Allen is the owner of existing real property and hired Charlene to perform the bathroom remodel. The facts do not indicate whether Charlene used a subcontractor. Charlene's performance of labor and furnishing of materials for the bathroom remodel is within the scope of AS 34.35.050(1) and (2) as labor performed and material furnished for the alteration of a building and therefore gives rise to a claim of lien. Further, even if Charlene used a subcontractor to perform the work, Charlene may claim a lien under subsection (6) as a general contractor. Therefore, Charlene may claim a lien to the extent the claimed amount is within the scope of AS 34.35.050.

**B. Time Period for Claiming Lien (15 points)**

Charlene's claim of lien must be timely recorded in order to be enforceable. Brooks v. R & M Consultants, Inc., 613 P.2d 268, 269 (Alaska 1980) (holding that a claim of lien for materials or services provided to a

property owner is not effective until properly recorded). Thus, even though the facts state that Charlene hand-delivered a copy of the claim of lien to Allen, the claim of lien must be recorded in order to be enforceable. AS 34.35.068 provides:

AS 34.35.068. Time Periods For Claiming Liens.

- (a) If a notice of completion is not recorded by the owner as provided in AS 34.35.071, a claim of lien shall be recorded not later than 120 days after the claimant
  - (1) completes the construction contract; or
  - (2) ceases to furnish labor, material, services, or equipment for the construction, alteration, or repair of the owner's property.
- (b) If a notice of completion is recorded by the owner as provided in AS 34.35.071,
  - (1) the following shall record a claim of lien or notice of right to lien not later than 15 days after the notice of completion is recorded:
    - • •
- (c) A claim of lien is enforceable only if recorded by a claimant within the time specified in (a) or (b) of this section.

Here, there are no facts to suggest that Allen recorded a notice of completion. Had Allen done so, Charlene would have had to record the claim of lien not later than 15 days after the notice of completion was recorded. Because no notice of completion was recorded, Charlene was required to record the lien no later than 120 days after the completion of the construction contract or 120 days after the last date upon which Charlene furnished labor or materials. The facts state that Allen objects to the quality of Charlene's work and thus Charlene's completion of the construction contract is in doubt. The document recorded by Charlene, however, states February 1, 2012 as the last date that Charlene furnished labor or materials to Allen. Charlene recorded the claim of lien on February 15, 2012 – well within the 120 days required by AS 34.35.068(a)(2). Therefore, Charlene's claim of lien is timely.

### **C. Content of Claim of Lien (35 points)**

Charlene's recorded claim of lien must be sufficient to give notice of the claim. AS 34.35.070(c) prescribes the content of the claim of lien:

AS 34.35.070. Claim of lien.

- (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.

The elements of the claim of lien must be verified under oath per AS 34.35.070(c). Here the final sentence of the document contains verification language: “[t]he statements contained herein are true and correct to the undersigned’s knowledge and the sum claimed is justly due and owed to Charlene General Construction from Allen.” Further, the facts state that the document was notarized thus satisfying the oath requirement. See Anchorage Sand & Gravel Co. V. Wooldridge, 619 P.2d 1014, 1016 (Alaska 1980) (holding that “when a lien claimant, in the presence of a notary, affixes his signature to a written statement incorporating the necessary elements of a claim of lien, and the notary certifies this act, claimant has substantially complied with the requirement of an ‘oath.’”)

In H.A.M.S. Co. v. Electrical Contractors of Alaska, the Alaska Supreme Court held that the lien “statute is strictly construed as to the persons entitled to its benefits and as to the procedures necessary to perfect the lien . . . .” 563 P.2d 258, 263 (Alaska 1977). Here, it appears Charlene’s document on its face meets the technical requirements of AS 34.35.070(c)(1)-(4) and (7). The claim of lien names Charlene as the claimant and Allen as the owner with whom Charlene contracted and the date the last labor/materials were furnished. Further the claim describes the real property both by legal description and common address. See Sullen & Hoss, Inc. v. Farvour, 117 F. Supp 535, 537 (D. Alaska 1954) (holding that a description of real property subject to a claim of lien is sufficient if a “person familiar with the locality [is able] to identify the premises as the only property corresponding with such description” or if “it will enable one familiar with the locality to identify with reasonable certainty the property on which the lien is intended to be claimed”).

There is a question, however, regarding whether the claim meets the requirements of AS 34.35.070(c)(5) and (6). AS 34.35.070(c)(5) requires a general description of the labor and materials provided and the contract price. The document describes the labor and materials as being for a remodel – which may be sufficient. On the other hand, the document makes no mention of the contract price. Moreover, AS 34.35.070(c)(6) requires that the claim of lien state the amount due to the claimant for the labor, materials, services, or equipment. Charlene’s claim of lien, however, states that the amount due is \$7,000 and not the \$5,000 actually invoiced by Charlene. The inclusion of the additional \$2,000 of potentially nonlienable items in an unsegregated lien claim notice has the potential to void the entire lien if made in bad faith or if

substantial rights of the owner were affected by the error. See Moores v. Alaska Metal Buildings, Inc., 448 P.2d 581, 586 (Alaska 1968). Here the claim of lien does not segregate the claimed amount by task, labor, or materials. Thus, the \$2,000 nonlienable amount may void the entire claim of lien if made in bad faith or if it affected the substantial rights of Allen. Facts in support of bad faith by Charlene include the facial discrepancy between the invoiced amount and the claimed amount. Further, the reason for Allen's refusal of payment is his issue with the quality of work, which occurred after Charlene presented the \$5,000 invoice. This suggests that Charlene's \$7,000 claim may be retaliation in bad faith. On the other hand, the claim of \$7,000 equals the total amount for the work Allen originally discussed with Charlene (when the \$5,000 bid price for the bathroom remodel is added to the \$2,000 for the foyer remodel) and it may simply be a clerical error. An applicant may reach either conclusion with regard to bad faith. There are no facts to suggest that the error caused injury to any of Allen's substantial rights.

#### **D. Claim of Lien Must be Recorded (10 points)**

AS 34.35.075 requires that a claim of lien shall be recorded and indexed in the same manner as a conveyance. AS 40.17.020 requires that a conveyance be recorded in the recording district in which the real property is located. Here, the facts state that the Property is located within the Fairbanks Recording District. Because Charlene recorded its claim of lien in the Fairbanks Recording District, the recording complies with AS 40.17.020.

Finally, Charlene must attempt to enforce the claim of lien by filing an action in Superior Court within six months from the date of recording or within six months of recording an extension notice. AS 34.35.080 and AS 34.35.110.

#### **2. For the purpose of this question assume Charlene's lien is enforceable. Discuss the order of priority of the potential claimants. (30 points)**

Alaska is a race-notice jurisdiction. AS 40.17.080(b). For the purpose of recording, deeds of trust are treated as mortgages. AS 34.20.110. Big Bank's Deed of Trust has first priority because it was recorded first. Further, AS 34.35.060 provides that a prior recorded encumbrance, such as Big Bank's Deed of Trust, is preferred to a claim of lien except when the lien is asserted for labor or materials provided for original construction of the subject building. AS 34.35.060(a) and (c). The facts state that Allen purchased an existing home and Charlene's performed remodeling work, not the original construction of the home. See Lynch v. McCann, 478 P.2d 835, 838 (Alaska 1970) (finding that an addition to an existing building was not original construction within the meaning of the statute). Therefore, Big Bank has priority over Charlene. Assuming Charlene's claim of lien is enforceable, it has second priority because it was recorded second. Local Bank recorded the Mortgage after Charlene's recording and thus has third priority.