

Two Missouri Appellate Courts Rule on Whether
Contractors Provided Proper Mechanic's Lien Notices

by

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Two different Missouri appellate courts ruled in May on whether contractors were original contractors under Missouri's mechanic's lien act. The decisions—favoring contractors in one case but not in the other—highlight the difficulty contractors often face when dealing with developers in knowing if they are proceeding as a general contractor or as a subcontractor.

The difference is critical to the type of notice the contractor must provide to preserve its mechanic's lien claim under Missouri law. The cases are *Winters Excavating, Inc. v. Wildwood Development, LLC*, 2011 WL 2002280 (Mo. App. S.D.) (decided May 24 against the contractor) and *River City Drywall, Inc. v. Raleigh Properties, Inc.*, 2011 WL 1855227 (Mo. App. E.D.) (decided May 17 in favor of the contractor).

Winters Excavating filed a lawsuit against Wildwood Development to enforce a mechanic's lien over property in Camden County for excavation that Winters had provided. Wildwood acquired the property at the Lake of the Ozarks to develop a project known as Diamond Pointe.

Winters initially subcontracted with Constructive Engineering Design, Inc. (CED), as the general contractor to provide excavation work on a time-and-materials basis. Winters started work and then entered into three separate subcontracts with CED.

One was a fixed sum for road and storm drainage expansion; one a maximum price for sanitary sewer service on a per-unit and rock-removal basis; and one a maximum price for potable water service on a per-unit and rock-removal basis. The contracts designated CED as the general contractor, Winters as the subcontractor and Diamond Pointe Development as the owner.

Wildwood terminated CED as the general contractor. CED terminated the three subcontracts with Winters. Winters was paid in full for its work up to that point.

Wildwood through its agent Leland Nollau had Winters continue and complete the work under its prior three subcontracts. Winters knew that Nollau, Tracy While and Jerry Buck were the owners and that Winters became an original contractor to them for the remaining work it did.

After CED's termination, Nollau directed Winter's work and supervised by being on the jobsite almost every day. Winters was to be compensated on a time-and-materials basis with no written contract.

At Nollau's direction, Winters invoiced Diamond Development, LLC but received payments from Wildwood. Starting on August 25, 2006, the invoices contained the proper notice required under Sec. 429.012 as an original contractor.

The bank foreclosed on Wildwood, leaving Winters with a mechanic's lien claim for \$268,381 due from Wildwood. Winters listed itself as the original contractor and Wildwood as the property owner with the work being authorized by Nollau as Wildwood's designated agent.

The appellate court agreed with the trial court's conclusion that before the original contractor notice started appearing on the 2006 invoices, Winters, as the original contractor, had not provided the requisite notice and could not maintain its lien.

Mechanic's liens continue to confound many, including even judges. The Eastern District in River City Drywall reversed a trial court's decision that found two companies to be subcontractors rather than original contractors.

The contractors were Ambassador Floor Company and River City Drywall, Inc. Each one sought mechanic's liens against property in the residential subdivision known as Hillington Estates. Ambassador's lien was for flooring and carpet it installed. River City's lien was for drywall it installed.

At the time of the work in 2007, Raleigh Development, LLC was the property owner of record. Prior to then, there had been owner changes involving Raleigh Properties, Inc. and Raleigh Development, LLC, both owned and controlled by Richard Raleigh. Owner changes between companies owned by one person are not uncommon in real estate development but they easily can complicate a contractor's life when it comes time to file a lien.

Mr. Raleigh was the sole employee, owner and decision-maker of both companies. In other words, as the Eastern District described him: he was a "one-man show."

The initial problem for the contractors was that the trial court found both companies to be subcontractors to Raleigh Properties and that Raleigh Development was the owner. Because the contractors did not provide the requisite ten-day subcontractor notice of their liens (Sec. 429.100 R.S.Mo.), they had defective liens and could not proceed.

There was no dispute that the contractors' contracts were with Raleigh Properties. They argued that Raleigh Properties was an agent of Raleigh Development, given the interrelation between the two companies and the complete control that Richard Raleigh exerted over both.

Section 429.010.1 R.S.Mo. affords the right to a mechanic's lien to anyone who contracts with the owner or the owner's agent. Courts have broadly interpreted the meaning of agent. The Eastern District ruled that an agent does not need to have the same level of authority as would be required to bind the owner personally for payment.

While Raleigh Development was the technical owner of record, the court concluded that "Raleigh Properties acted as and was treated as the owner of the lots with respect to the contractor activities it performed." Thus, the contractors had valid liens as original contractors.

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