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Phillips, et al

BY THE LABOR AND
COMMERCE COMMITTEE

1 IN THE HOUSE

2

CS FOR HOUSE BILL NO. 494 (L&C)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to liens for labor or material
7 furnished."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 34.35.062 is repealed and reenacted to read:

10 Sec. 34.35.062. CONSTRUCTION FINANCING. (a) A claimant to whom
11 payment for the labor, material, service, or equipment furnished for a
12 project is past due may give the lender a stop-lending notice. The
13 claimant shall at the same time give a copy of the notice to the owner
14 and to each prime contractor with whom or through whom the claimant or
15 the claimant's debtor has contracted. A stop-lending notice shall

16 (1) instruct the lender to stop disbursing, advancing, or
17 otherwise providing construction financing for the project;

18 (2) be verified by the claimant;

19 (3) state the claimant's name, address, and telephone
20 number;

21 (4) describe the labor, material, service, or equipment
22 furnished by the claimant and state the name of the person to whom
23 furnished;

24 (5) describe the real property improved by the labor,
25 material, service, or equipment and state the name of the person the
26 claimant believes to be the owner of the real property;

27 (6) state the amount due and unpaid to the claimant for the
28 labor, material, service, or equipment.

29 (b) After the lender has received a stop-lending notice and has

1 had a reasonable time to act on it the lender may not disburse a draw
2 until the notice expires or is revoked. A notice expires on the 91st
3 day after it is received by the lender unless the claimant has com-
4 menced an action on the claim that is the subject of the notice before
5 that day and the lender has received written notification of the
6 action. A stop-lending notice may be revoked at any time in writing
7 signed by the claimant. Expiration or revocation of a notice extin-
8 guishes the liability of the lender to the claimant under (c) of this
9 subsection.

10 (c) A lender who provides construction financing for a project
11 after it is the subject of a binding stop-lending notice is liable to
12 the claimant in an amount equal to the lowest of the following
13 amounts:

14 (1) the amount of construction financing provided by the
15 lender after receipt of the claimant's stop-lending notice; if there
16 are two or more binding stop-lending notices when the disbursement
17 occurs, the lender's liability to each claimant is based on the claim-
18 ant's ranking under AS 34.35.112;

19 (2) the amount owed to the claimant for labor, material,
20 service, or equipment furnished for the project by the claimant,
21 including interest, costs, and attorneys fees, as established by a
22 written agreement signed on or after the date of the stop-lending
23 notice by the claimant, the owner and the prime contractor with whom
24 or through whom the claimant or the claimant's debtor has contracted
25 or by a final judgment in an action in which the owner, the claimant
26 and the claimant's debtor are named and, if necessary, served parties;

27 (3) 150 percent of the amount stated as due in the stop-
28 lending notice.

29 (d) Within 10 days after receiving the written agreement or a

1 certified copy of the judgment under (c)(2) of this section estab-
2 lishing the amount owed to a claimant from whom it has a binding
3 stop-lending notice, a lender shall send to the claimant a verified
4 statement showing, by date and amount, all construction financing
5 provided by the lender for the project. Except as provided in (e) of
6 this section, the lender shall include with the statement payment in
7 the amount of the lender's liability to the claimant under (c) of this
8 section.

9 (e) If there are two or more claimants to whom a lender is or
10 may be liable under (c) of this section and the lender is uncertain as
11 to the amount of its liability or possible liability to each, the
12 lender may bring an action to require the claimants to interplead
13 their claims.

14 (f) A lender may not provide a draw to the owner or an agent of
15 the owner until

16 (1) the owner delivers a verified certificate to the lender
17 that states the

18 (A) progress of the project, including the percentage
19 of completion of the project;

20 (B) name, address, and telephone number of each prime
21 contractor who has furnished labor, material, service, or equip-
22 ment for the project;

23 (C) amount owed by the owner to each listed prime
24 contractor;

25 (D) portion of the draw that the owner will pay to
26 each listed prime contractor; and

27 (2) each prime contractor listed in the owner's certificate
28 delivers a verified certificate to the lender that states the

29 (A) amount owed to the prime contractor by the owner

1 for the project;

2 (B) name, address, and telephone number of each person
3 who has furnished labor, material, service, or equipment for the
4 project under a contract with the prime contractor;

5 (C) description of the labor, material, service, or
6 equipment furnished by each listed person;

7 (D) amount owed by the prime contractor to each listed
8 person for the labor, material, service, and equipment;

9 (E) portion of the draw to be paid by the owner to the
10 prime contractor that the prime contractor will pay to each
11 listed person; and

12 (F) name, address, and telephone number of each person
13 who has not entered into a contract with the prime contractor but
14 has furnished labor, material, service, or equipment to or for
15 the benefit of the project through the prime contractor.

16 (g) The owner and each prime contractor shall use each draw as
17 indicated in the certificates given by them to the lender under (f) of
18 this section. The lender may not be required to verify the informa-
19 tion in a certificate and is not liable for an error in a certificate.

20 (h) An owner or prime contractor who wilfully and intentionally
21 fails to apply construction financing proceeds as indicated by the
22 certificate required under (f) of this section is guilty of a class C
23 felony. If the owner or prime contractor is not a natural person,
24 upon conviction the owner or prime contractor may be fined in an
25 amount not to exceed \$50,000.

26 (i) Within 10 days after being requested, a lender shall provide
27 a person who has given it a notice of right to lien with a copy of

28 (1) each certificate received by the lender under (f) of
29 this section; and

1 (2) a verified certificate stating the amount of construc-
2 tion financing proceeds committed by the lender for the project that
3 have not been disbursed by the lender.

4 (j) The lender may not provide construction financing proceeds
5 for payment of indebtedness of the owner that is not incurred for the
6 project.

7 * Sec. 2. AS 34.35.064(a) is amended to read:

8 (a) Before furnishing labor, material, service, or equipment for
9 a project, a person [AFTER ENTERING INTO A CONTRACT, A CLAIMANT] may
10 give a notice of right to lien to the owner or owner's agent [AND THE
11 LENDER]. If the notice is given in accordance with this section, the
12 owner has the burden of proof to show that the owner did not know of
13 or consent to the furnishing of the labor, material, service, or
14 equipment by the claimant in an action to foreclose the claimant's
15 lien on the property under AS 34.35.050 - 34.35.120. Otherwise the
16 claimant has the burden of proof to show that the owner knew of and
17 consented to the furnishing of the labor, material, service, or equip-
18 ment. The notice of right to lien shall be in writing, state that it
19 is a notice of a right to assert a lien against real property [A
20 BUILDING OR OTHER IMPROVEMENT] for labor, materials, services, or
21 equipment furnished in connection with a project [CONSTRUCTION, ALTER-
22 ATION, OR REPAIR OF THE BUILDING OR OTHER IMPROVEMENT], and contain

23 (1) a legal description sufficient for identification of
24 the real property [UPON WHICH THE BUILDING OR OTHER IMPROVEMENT IS
25 LOCATED];

26 (2) the name of the owner;

27 (3) the name and address of the claimant;

28 (4) the name and address of the person with whom the claim-
29 ant contracted;

1 (5) a general description of the labor, materials, ser-
2 vices, or equipment provided or to be provided;

3 (6) a statement that the claimant may be entitled to record
4 a claim of lien; and

5 (7) the following statement in type no smaller than that
6 used in providing the information required by (1) - (6) of this
7 subsection: WARNING: Unless provision is [HAS BEEN] made for payment
8 of sums due to this claimant, your property described in this notice
9 may be subject to foreclosure regardless of whether [THIS CLAIM, YOU
10 MAY BE LIABLE FOR PAYMENT DIRECTLY TO THIS CLAIMANT, NOTWITHSTANDING
11 THE FACT THAT] payment has been made to a prime contractor or other
12 person for the labor, material, service, or equipment furnished by the
13 claimant [PARTY].

14 * Sec. 3. AS 34.35.067 is amended to read:

15 Sec. 34.35.067. RECORDING NOTICE OF RIGHT TO LIEN. A notice of
16 right to lien may be recorded by a claimant at any time after the
17 claimant enters [ENTERING] into a contract for or first furnishes
18 labor, material, service, or equipment [FURNISHED] in connection with
19 a project [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR
20 OTHER IMPROVEMENT]. The notice shall be recorded in the same manner
21 as specified for the recording of a claim of lien under AS 34.35.070.

22 * Sec. 4. AS 34.35.070(a) is amended to read:

23 (a) A [SUBJECT TO THE PROVISIONS OF AS 34.35.069(a), A] claimant
24 may record a claim of lien after entering into a contract for a proj-
25 ect [THE CONSTRUCTION, ALTERATION, OR REPAIR OF A BUILDING OR IMPROVE-
26 MENT]. A claim of lien may not be recorded later than the time spec-
27 ified under AS 34.35.068.

28 * Sec. 5. AS 34.35.071(a) is amended to read:

29 (a) The owner of real property that may be subject to a lien

1 under AS 34.35.050 - 34.35.120 may announce the date of completion of
2 the project [A BUILDING OR OTHER IMPROVEMENT ON THE PROPERTY] by

3 (1) recording a notice of completion after completion of
4 the project [CONSTRUCTION, ALTERATION OR REPAIR OF THE BUILDING OR
5 OTHER IMPROVEMENT] in the office of the recorder of the district in
6 which the real property [BUILDING OR OTHER IMPROVEMENT] is situated;
7 and

8 (2) giving notice at least five days before the recording
9 of the notice of completion to all claimants who have given a notice
10 of right to lien or a stop-lending [STOP-PAYMENT] notice to the owner
11 and the lender prior to 10 days before recording a notice of comple-
12 tion; the notice must include a copy of the notice of completion and a
13 statement advising claimants that a notice of completion will be
14 recorded not earlier than five days after the date of the notice.

15 * Sec. 6. AS 34.35 is amended by adding a new section to read:

16 Sec. 34.35.074. CIVIL SUITS. (a) A person injured by a viola-
17 tion of AS 34.35.050 - 34.35.120 may bring a civil action

18 (1) for actual damages that are proximately caused by the
19 violation, and if the person prevails and the defendant's conduct is
20 found to be wilful and intentional, the person shall be awarded three
21 times the amount of actual damages plus costs, including reasonable
22 actual attorney's fees;

23 (2) to enjoin the violation, and if the person prevails,
24 the person shall be awarded costs, including reasonable actual attor-
25 ney's fees.

26 (b) A claimant with a claim of lien recorded under AS 34.35.075
27 who fails to promptly remove the claim from the record upon receiving
28 payment on the claim or discovering that the claim is in error is
29 liable for actual damages caused by the improperly recorded claim plus

1 costs, including reasonable actual attorney's fees.

2 * Sec. 7. AS 34.35.080(a) is amended to read:

3 (a) A lien provided for in AS 34.35.050 - 34.35.120 does not
4 bind real property [A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT] for
5 more than six months after the claim of lien is recorded [FILED],
6 unless an action is commenced in [SUIT IS BROUGHT BEFORE] the proper
7 court to enforce the lien within

8 (1) [WITHIN] that time; [,] or

9 (2) [WITHIN] six months after recording of an extension
10 notice in the same recording office within the original six-month
11 period showing the recording date and the book and page or instrument
12 number of the initial claim of lien, and the balance owing.

13 * Sec. 8. AS 34.35.080 is amended by adding a new subsection to read:

14 (c) A lien extended by commencement of an action in accordance
15 with (a) of this section does not affect an interest of a person in
16 real property acquired after the commencement of the action without
17 knowledge or actual notice of the action if the person acquired the
18 interest in good faith for valuable consideration. For purposes of
19 this subsection, notice of the pendency of the action conforming to
20 requirements under AS 09.45.790 and recorded before the person ac-
21 quires the interest in property constitutes actual notice of the
22 action.

23 * Sec. 9. AS 34.35.112 is amended to read:

24 Sec. 34.35.112. PAYMENT OF CLAIMANT'S LIENS. (a) If more than
25 one lien created under AS 34.35.050 - 34.35.120 is claimed against
26 property, the court in its judgment shall declare the rank of each
27 lien or class of liens in the following order:

28 (1) all persons other than prime contractors or subcontractors
29 with lien rights under AS 34.35.050(1);

1 (2) the trustees of employment benefit trusts for persons
2 described in (1) of this subsection;

3 (3) all materialmen and subcontractors;

4 (4) [SUBCONTRACTORS, INCLUDING] prime contractors other
5 than the general contractor [AND PERSONS DESCRIBED IN AS 34.35.050-
6 (5)];

7 (5) the general contractor.

8 (b) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of
9 the foreclosure sale of the property are insufficient to pay the lien
10 claims of all persons who have recorded claims [A CLAIM] of lien, the

11 (1) [THE] liens of all individuals with lien rights under
12 AS 34.35.050(1) shall first be paid in full, or pro rata if the pro-
13 ceeds are insufficient to pay them in full;

14 (2) [THE] liens of trustees of employment benefit trusts
15 for persons described in (1) of this subsection shall be paid in full
16 or pro rata if the proceeds are insufficient to pay them in full;

17 (3) [THE] liens of materialmen and subcontractors shall be
18 paid in full or pro rata if the proceeds are insufficient to pay them
19 in full;

20 (4) liens of persons described in AS 34.35.050(5) and [OUT
21 OF THE REMAINDER THE SUBCONTRACTORS, INCLUDING] prime contractors,
22 other than the general contractor, shall be paid in full [,] or pro
23 rata if the remainder is insufficient to pay them in full; and

24 (5) lien of the general contractor [THE BALANCE] shall be
25 paid out of [TO THE GENERAL CONTRACTOR; A GENERAL CONTRACTOR IS ENTI-
26 TLED TO EXECUTION FOR] the balance [DUE AFTER DISTRIBUTION].

27 * Sec. 10. AS 34.35.112 is amended by adding a new subsection to read:

28 (c) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of
29 the foreclosure sale of the property are sufficient to pay the lien

1 claims of all persons who have recorded claims of lien, the balance
2 shall be paid to the person who owned the property before the foreclo-
3 sure sale.

4 * Sec. 11. AS 34.35.114(c) is repealed and reenacted to read:

5 (c) A person who receives a stop-lending notice or notice of
6 right to lien identifying a project for which the person is not the
7 lender shall notify the claimant in writing within 10 days after
8 receipt of the notice that the person is not the lender.

9 * Sec. 12. AS 34.35.114(d) is repealed and reenacted to read:

10 (d) A claimant shall, within 10 days after receipt of a request,
11 provide an owner or lender to whom the claimant has given a stop-lend-
12 ing notice or notice of right to lien a written statement of the
13 amount due to the claimant and unpaid.

14 * Sec. 13. AS 34.35.117(a) is amended to read:

15 (a) Except as provided under (b) of this section, a written
16 waiver of lien or stop-lending [STOP-PAYMENT] notice of rights created
17 under AS 34.35.050 - 34.35.120 signed by a claimant requires no con-
18 sideration and is valid and binding. A waiver permitted under this
19 section may not relate to labor, materials, services, or equipment
20 furnished after the date the waiver is signed by the claimant.

21 * Sec. 14. AS 34.35.120(4) is amended to read:

22 (4) "construction financing" means [THAT PORTION OF] money
23 loaned or other credit extended to an owner secured by an encumbrance
24 on real property to finance a project on that [ORIGINAL CONSTRUCTION
25 OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real prop-
26 erty [, BUT DOES NOT INCLUDE

27 (A) FUNDS TO ACQUIRE REAL PROPERTY;

28 (B) FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUM-
29 BRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE

1 CONSTRUCTION FINANCING;

2 (C) FUNDS TO PAY LOAN, COMMITMENT, TITLE, LEGAL,
3 CLOSING, RECORDING OR APPRAISAL FEES ON THE CONSTRUCTION LOAN];

4 * Sec. 15. AS 34.35.120(9) is amended to read:

5 (9) "give notice" means to mail a notice required under
6 AS 34.35.050 - 34.35.120 by first-class mail and by using a form of
7 mail requiring a signed receipt, or to deliver the notice and obtain a
8 receipt signed by the person to whom it is directed or an agent of
9 that person; a notice is effective when given or delivered to

10 (A) [TO] a lender at the address designated in the
11 encumbrance securing that lender;

12 (B) [TO] an owner at the last known address of the
13 owner;

14 (C) [TO] a prime contractor at the last known address
15 of the prime contractor;

16 (D) [TO] a potential lien claimant at the address
17 specified in a stop-lending [STOP-PAYMENT] notice or notice of
18 right to lien or claim of lien;

19 * Sec. 16. AS 34.35.120(13) is amended to read:

20 (13) "owner" means a person who owns real property or a
21 possessory interest in real property [THE BUILDING OR OTHER IMPROVE-
22 MENT] and who enters into a contract, express or implied, for a proj-
23 ect on that property [THE CONSTRUCTION, ALTERATION OR REPAIR OF A
24 BUILDING OR IMPROVEMENT];

25 * Sec. 17. AS 34.35.120 is amended by adding a new paragraph to read:

26 (17) "project" means construction, alteration, or repair of
27 an improvement on real property or work done to enhance the real
28 property itself.

29 * Sec. 18. AS 34.35.069, 34.35.070(f), 34.35.080(b), 34.35.114(e), and

1 34.35.118 are repealed.