

ACT 113

H.B. NO. 2682-74

A Bill for an Act Relating to Mechanic's and Materialman's Lien.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this bill is to limit the lien right of a materialman for the furnishing of materials for an improvement. These cases generally involve claims between two innocent persons (owners vs suppliers) because of their dealings with a third person (contractor) who acted fraudulently or became insolvent. Under the existing system the law protects the supplier and penalizes the owner. The law, instead, should protect the owner as it does a bona fide purchaser or a holder in due course in sales and security cases. Generally speaking, the supplier should seek his remedy from the wrongdoer. The supplier is better able to fend for himself. With the expertise available to a supplier, he can better ascertain the character, ability and credit of the contractor.

SECTION 2. Chapter 507, Hawaii Revised Statutes, is amended by adding a new section thereto as follows:

“Section 507-49† Exceptions. (a) Anything contained in this part to the contrary notwithstanding, in connection with any repairs or improvements made or performed on property which before the repairs or improvements was used primarily for dwelling purposes, no lien shall exist either for the furnishing of materials to a general contractor as defined in this chapter or his subcontractor either of whom was not licensed pursuant to chapter 444 or if unreasonable advancement of credit was given by the furnisher of materials to the general contractor or subcontractor whether such person is licensed, unlicensed or exempted under chapter 444.

The issue of reasonable advancement of credit shall be decided by the circuit judge at the return day hearing provided for in Section 507-43(c); pro-

†Enacted as §507-48; renumbered by revisor as §507-49, former number currently in use.

vided, however, that if a party affected by the lien does not appear at said return day hearing, he may raise the issue of unreasonable advancement of credit at any time prior to the entry of a final or interlocutory decree of foreclosure in the proceeding brought to enforce the lien under Section 507-47. For the purposes of this section, if the furnisher of materials has secured a credit application form from the general contractor or the subcontractor to whom the materials were furnished or has reasonably inquired into the credit status of said general contractor or subcontractor, the advancement of credit by the furnisher of materials shall be prima facie reasonable.

The credit application referred to herein shall be current and updated every three months and shall include at least the following information:

- A. For all persons:
 - 1. Name
 - 2. Address
 - 3. Type of business (Example—plumbing subcontractor)
 - 4. Date business started
 - 5. Contractor's License Number
 - 6. Bonding companies generally used
 - 7. Banks used
 - 8. List of current creditors
 - 9. Balance sheet
 - 10. Total of all outstanding construction contracts \$ _____
 - 11. Incompleted portion of all contracts \$ _____
- B. In addition, for corporate accounts:
 - 1. Names of officers
 - 2. Authorized capital
 - 3. Paid in capital
- C. In addition, for noncorporate accounts:
 - 1. Names of partners, co-venturers, etc.

(b) Anything contained in this chapter to the contrary notwithstanding, no general contractor as defined in this chapter or his subcontractor or the subcontractor's subcontractor shall have lien rights unless such contractor was licensed pursuant to chapter 444 when the improvements to the real property were made or performed, and no subcontractor or sub-subcontractor so licensed shall have lien rights if his work was subcontracted to him by a general contractor as defined in this chapter or his subcontractor who was not licensed pursuant to chapter 444."

SECTION 3. Section 507-43, Hawaii Revised Statutes, is amended to read:

"507-43 Filing notice, contents. (a) Requirements. Any person claiming a lien shall apply therefor in a special proceeding to the circuit court of the circuit where the property is situated. Such application for a lien shall be by a written notice of lien setting forth the alleged facts by virtue of which the person claims a lien. A copy of the notice shall be served in the manner prescribed by law for service of summons upon the owner of the property and any person with an interest therein and upon the party or parties who contracted for the improvements if other than the owner of the property or any person with an

interest therein. If any person entitled to notice cannot be served as herein provided, notice may be given the person by posting the same on the improvement. The notice shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the claim. If the claim has been assigned, the name of the assignor shall be stated. The notice shall specify the names of the parties who contracted for the improvement, the name of the general contractor and the names of the owners of the property and any person with an interest therein. The notice may (but need not) specify the names of the mortgagees or other encumbrancers of the property, if any, and the name of the surety of the general contractor, if any.

The notice shall be returnable not less than three nor more than ten days after service. On the return day, a hearing shall be held by the court to determine whether probable cause exists to permit the lien to attach to the property. The lien shall not attach to the property until the court finds probable cause exists and so orders. No such order shall be entered before notice has been served on the party contracting for the improvement, the general contractor and the owner of the property, and they were given an opportunity to appear at the hearing.

(b) Time for filing; action to vacate. The notice shall be filed not later than forty-five days after the date of completion of the improvement against which it is filed. Where title to the property involved, or any portion thereof, is registered in the land court it shall be incumbent upon the lienor prior to the lapse of the forty-five days to file a certified copy of the notice in the office of the assistant registrar of the land court in order to preserve his rights against subsequent encumbrancers and purchasers of the property. Any person affected by a notice of lien deemed by him to be improper may, prior to the cancellation thereof or the filing of proceedings to enforce the same, file a suit to vacate the notice, and in any such suit the court may award an attorney's fees to the prevailing party.

(c) Joint owner. If the fee title to the land involved is held in joint or common ownership or as an estate by the entirety, service upon one of the owners of a notice of lien in accordance with this section shall be deemed service upon all of the owners. Likewise, if the parties who contracted for the improvement, if other than the owner of fee title to the property involved, hold their interest in the premises in joint or common ownership, or as an estate by the entirety, service upon one of the parties of a notice of lien in accordance with this section shall be deemed service upon all of the parties.

(d) Owner acting through attorney-in-fact. In cases where materials have been furnished or labor was performed at the request, or upon the order, of a person acting under a duly executed and acknowledged power of attorney from the owner and (1) the power of attorney has not been revoked, or (2) the power of attorney has been revoked subsequent to the furnishing of materials and labor upon request or order and the owner cannot be found within the State, service of a notice of lien upon the person acting under the power of attorney shall be deemed service of the notice upon the owner.

(e) Duration of lien. The lien shall expire three months after the date of

completion of the improvement unless proceedings are commenced within that time to collect the amount due thereon by enforcing the same.

(f) Date of completion, notice of. The term "date of completion" as used in this section means the time when the owner or the general contractor for the improvement completes the publication of a notice that the improvement has been completed or has been abandoned and an affidavit of the publication, together with a copy of the notice has been filed in the office of the clerk of the circuit court where the property involved is situated; provided, that notice of completion shall not be effective for any purpose unless prior to the notice there has been substantial completion of the improvement or the improvement has been actually abandoned; and provided further, that the notice shall not be published by the contractor until after the contractor has first made written demand upon the owner to publish the notice and the owner has failed to publish the notice within five days from the date of the demand. The publication of the notice by the contractor or the owner shall not be construed as an admission by either that the improvement has been satisfactorily completed. The notice required herein shall be published twice, seven days apart, in a newspaper of general circulation, printed and published in the county in which the property involved is situated, and the publishing newspaper shall promptly file the affidavit of publication above mentioned in the office of the clerk.

(g) Failure to file or publish notice. If a valid notice of completion is not published and filed within one year after the actual completion or abandonment of the improvement the "date of completion" shall be deemed to be one year after actual completion or abandonment."

SECTION 4. Material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 5. This Act shall take effect upon its approval.

(Approved May 31, 1974.)

*Edited accordingly.