

Alerts and Updates

BUILD FOR THE TENANT, BUT LIEN THE LANDLORD'S TITLE? MASSACHUSETTS SUPREME JUDICIAL COURT CLARIFIES THE STANDARD

April 19, 2011

The Massachusetts Supreme Judicial Court (the "SJC") released a decision on April 13, 2011—in *Trace Construction v. Dana Barros Sports Complex*¹—that clarifies a contractor's lien rights against a landlord when the contractor performed work for the tenant. The decision is likely to have significant ramifications for contractors doing tenant work. As in many cases, this one arose when one company folded—the tenant here.

The Dana Barros² Sports Complex LLC signed a lease with Oxford Road Realty Trust for indoor commercial space, to turn the space into a basketball camp facility. Barros advised Oxford that he intended to renovate the premises, and the lease provided that all renovations would become the property of Oxford at the end of the lease period. Barros was required to obtain Oxford's consent for any alteration of the building. Barros signed contracts with Trace Construction ("Trace") and CB Seating. Trace had several subcontractors.

Barros got behind in payments to the contractors; the work stopped; and one year later, he signed a "surrender of possession" document and returned the space to Oxford.

Massachusetts has long recognized the right of a contractor to pursue a lien against a leasehold interest in real estate.³ Contractors working for tenants often seek to cast a broader lien net in the hopes of gaining additional security and leverage. Landlords are typically cautious of liens being placed on the building title when work is being performed for a tenant occupying only a portion of the premises. Against this backdrop, the SJC decision clarifies the circumstances in which a broader lien claim can prevail.

Section 2 of chapter 254 of the Massachusetts General Laws governs lien claims by prime contractors. It states, in part:

A person entering into a written contract with the owner of any interest in real property, or with any person acting for, on behalf of, or with the consent of such owner for [work giving rise to lien rights] shall have a lien upon such real property . . . owned by the party with whom or on behalf of whom the contract was entered into

The SJC allowed the lien claims of the two prime contractors, but dismissed the lien claims of the two subcontractors. The court reasoned as follows:

1. While the lien law requires a "written contract" for a lien claim, it does not require the owner's consent to be in writing. Thus, the lack of any written "consent" by Oxford was not dispositive.
2. The phrase "on behalf of" in the latter part of the sentence in section 2 (see quoted portion above) references the earlier phrase "acting for, on behalf of, or with the consent of." Thus, the contractor could assert a lien on Oxford's property interest when contracting with Barros, if Barros was acting with the consent of Oxford.
3. The key question is whether Oxford "consented" to the work being done under contract with Barros. The court discussed the underlying facts at some length and noted that the lease terms made "such renovation exceedingly likely." Also, Oxford would retain the benefit of any renovation work performed by Barros, and there was testimony that the rent was priced low due to the investment Barros was making in the facility. Thus, the SJC concluded that "the work was performed 'with the consent of' [Oxford] for purposes of G.L. ch. 254, § 2."

However, the outcome was different for the subcontractors. Subcontractor liens are established by section 4 of chapter 254, and subcontractors have lien rights "upon such real property, land, building, structure or improvement owned by the party who entered into the original contract." Since that party was Barros, and not Oxford, the subcontractors had lien rights against only the leasehold interest. Those rights were wiped out by the "surrender" of the premises by Barros, as the lease expired via that act.

This case appears to offer a lesson for owners—whether landlord or tenant—as well as contractors and subcontractors. The scope of lien rights can vary depending on the relevant language in a lease, or the intent of both landlord and tenant at the time the lease is signed. This variation can have a significant, direct effect on prime contractor lien rights. As a result of this decision, landlords may take steps to avoid any action that might be construed as "consent" to tenant fit-out work (which may, of course, be contrary to their interest in assuring that the work is performed consistently with the rest of the premises). Prime contractors may seek assurance from the tenant—or even directly from the landlord, if possible—that the work is being done with the landlord's consent. And subcontractors may quiz the prime contractor regarding the landlord's consent to the work being undertaken, and they may also wish to learn more about the tenant's financial wherewithal.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact [Stan Martin](#), any member of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Trace Construction, Inc. v. Dana Barros Sports Complex, LLC*, 2011 Mass. LEXIS 165 (Mass. Sup. Jud. Ct. Apr. 13, 2011).
2. Dana Barros is a retired National Basketball Association player, whose career included stints with the Seattle SuperSonics, Philadelphia 76ers and Boston Celtics.
3. Mass. Gen. Laws ch. 254, § 25.

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