

## **New California Case Law: Mechanics Liens *Von Becelaere Ventures, LLC v. Zenovic***

In recent years, the law has taken an increasingly active role in bisecting cases, separating the issue of collecting money through the lawsuit, which includes the perfecting of a mechanics lien, from all other issues, which are usually construction defect claims. The law's new approach towards litigation forces the contractor to make an almost irreversible decision to determine the fate of a case. When filing the mechanics lien, the contractor must choose whether to pursue the issue through arbitration or wager everything through civil court system. A contractor's failure to heed advice and make an informed decision was immortalized in the recent appellate case of *Von Becelaere Ventures, LLC v. Zenovic*.

Before diving into a thorough analysis of *Von Becelaere*, it is essential to realize the importance of these "split cases". As mentioned earlier, one half of the "split case" primarily concerns itself with the collections of monies owed through both the recording and the filing of a complaint to foreclose on a mechanics lien.

The time allowed to record and file a mechanics lien is very short. California law requires the mechanics lien to be recorded within 90 days of a contractor completing work. After the lien is recorded, the law allows only 90<sup>1</sup> more days, from the date of recording, to file a lawsuit, which perfects the recorded mechanics lien. In addition, the lawsuit may only be brought in a California State Court. Most importantly, a contractor **cannot** bring an action to perfect a mechanics lien in arbitration.

However, many construction contracts require that any disputes between the owner and the contractor, especially construction defect lawsuits, go through arbitration<sup>2</sup> rather than through civil litigation. For a multitude of reasons, including greater efficiency, more experienced trier of fact, etc., the arbitration clause has become a staple in construction contracts throughout California.

Because of this arbitration clause, contractors are compelled to make an almost irreversible choice when filing the lawsuit to enforce the mechanics lien to either:

- (1) stay the civil litigation process as to foreclosing on the mechanics lien while the remainder of the case goes through arbitration; or
- (2) circumvent arbitration and have all claims, including the owner's claims (most likely construction defect claims), decided in civil litigation.

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<sup>1</sup> The date from which the 90 day time limit starts will vary. This is the most conservative time period. Please consult with your attorney for more details.

<sup>2</sup> Arbitration is an alternative means of settling a dispute by a neutral third person without the need to proceed formally in court. In some circumstances, arbitration may lead to a speedy resolution of a contractor/subcontractor's claims. In other circumstances, it may be too expensive or may limit a contractor/subcontractor's ability to present evidence show that the contractor or subcontractor is entitled to money. In many cases, a contractor/subcontractor's ability to effectively present a claim may depend on whether the matter is heard in arbitration or in court.

Though discussed in more detail below, the *Von Becelaere* is a powerful warning to all contractors that a failure to make an affirmative statement for arbitration in the complaint will forever bar the contractor from arbitrating the other issues at a later date.

The *Von Becelaere* case involved a variety of issues between an Owner and Contractor over work that was performed on a property in Laguna Beach, Orange County. The Contractor and the Owner signed a contract for the construction of a single family residence. The contract, however, also included an arbitration clause, declaring that any disputes arising out of the construction project was to be resolved through binding arbitration.<sup>3</sup>

The Contractor completed work on the property, but as expected, there were several disputes between the Owner and Contractor, including a dispute over monies owed to the subcontractor. On March 20, 2017, the Contractor recorded a mechanics lien on the property. Two weeks later, the Owner filed a lawsuit against the contractor in San Diego. In the complaint, the Owner alleged, among other things, that the Contractor had breached the contract, acted negligently, and committed fraud.

The Contractor responded by filing an equally superfluous lawsuit in Orange County. This lawsuit contained several allegations, including a cause of action as to the mechanics lien. As a result, the Owner and Contractor then agreed to consolidate both lawsuits in San Diego.

Shortly thereafter, the Contractor filed a motion to compel arbitration pursuant to the terms of the contract. The Contractor's motion was denied at both the trial court and appellate court level.

The *Von Becelaere* Court held that the Contractor could not compel arbitration for **any** of its claims because the Contractor **waived all rights** to arbitration by **NOT** declaring that the Contractor was seeking arbitration and requesting that the court stay the Contractor's cause of action to foreclose on the mechanics lien pending the outcome of arbitration in the Contractor's complaint.<sup>4</sup>

So what does the *Von Becelaere Ventures, LLC v. Zenovic* decision mean for contractors and subcontractors?

Contractors must decide prior to filing their foreclosure complaint whether or not they want a majority of the issues to be heard in arbitration. Contractors will have to make this decision without knowing what issues, which may include construction defect claims, fraud, etc., the owner will want to litigate.

The caveat (there is always one) is that the owner could file a motion to compel arbitration for **all matters**, except for the contractor's mechanics lien foreclosure cause of action. However, this will be a difficult and time-consuming task for the owner make this motion.

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<sup>3</sup> Again, a lawsuit to foreclose a mechanics lien cannot be brought in arbitration.

<sup>4</sup> Civil Code §1281.5 states that if a contractor files an action in civil court, it waives its right to arbitrate any issues related to the mechanics lien unless 1) the contractor notifies the court that the contractor intends to stay the civil action until the issue has been arbitrated and 2) actually takes steps to stay the action.

In short, there are advantages and disadvantages when deciding whether or not to arbitrate some of the issues. Contractors are advised to speak with their counsel to determine their best options for their current situation.