

## **Mechanic's Liens Priority vs. Bank Financing**

**By Michael A. Hodgins, Esq. | November 16, 2010**

The Maine Supreme Judicial Court issued a decision on November 9, 2010 in the matter *F.R. Carroll, Inc. v. TD Bank, N.A.* This case follows in a line of decisions dealing with the priority of a contractor's mechanic's lien in relation to prior recorded bank mortgages. Because the decision turned on the specific facts of this case, it did not create any new law. However, this case is an important reinforcement of steps that may be necessary to optimize the ability to get paid for work on a project, or to protect a lender's interest in a mortgaged property.

The Maine Mechanic's Lien statute, 10 M.R.S. § 3251 provides that one who "performs labor or furnishes labor or materials . . . by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands . . . to secure payment thereof. . . ." A bank with a mortgage is considered an "owner" under the statute.

If a bank "consents," then the mechanic's lien has priority over the mortgage. In earlier cases the Court has interpreted "consent" to require: (1) knowledge by the bank of the nature and extent of the work being performed; and (2) conduct on the part of the bank that justifies a belief by the contractor that the bank has consented. If both these criteria are satisfied, the mechanic's lien has priority over the bank's mortgage even though the mortgage was recorded first.

In *F.R. Carroll, Inc.* the critical facts the Court considered are as follows:

- The bank loaned money to finance construction of a commercial building.
- The bank was provided with a total cost estimate, including "site work" and "site improvement." There was no line item for paving.
- The plans for the project, reviewed by the bank, depicted a paved parking lot, and the bank received a status memo with a final completion date "including final paving and signage."
- The bank disbursed the final loan proceeds in September 2006, after receiving photographs showing an unpaved parking lot.
- The following month the owner contracted with the paving contractor to pave the parking lot. The bank was not made aware that the owner was incurring additional paving expenses.
- The work was completed by the end of October 2006. The contractor was not paid, recorded a mechanic's lien, and suit followed.

The District Court ruled in favor of the contractor on a motion for summary judgment. That is, based upon a paper record, the Court determined that the paving contractor was entitled to priority because the bank had consented to its work. The Law Court reversed the decision and sent the matter back to the District Court, not because the bank was entitled to judgment, but because reasonable factual inferences could be drawn in favor of either party, so a trial was necessary to resolve this matter.

The facts seemed to lead to the conclusion that the bank knew about and consented to work up to the point of the final payment disbursement. Had the paving contract not come after disbursement of the funding limits, or had the bank been made aware of the paving contract, it is possible the Court would have upheld the decision in favor of the paving subcontractor. Instead, the parties will need to go to trial to get the final decision.

For contractors and subcontractors, this case reinforces the need to make sure they know who is paying the bills, and the need to ensure that lenders have notice of the scope of their

work and the status of contract payments. For lenders this case reinforces the need to define “consent” to the work in loan documents, and the importance of knowing the status of all work and downstream payments before making the final loan disbursements.

At best the parties are facing a costly and uncertain trial to determine the order of their interests. At worst, one side faces the prospect of not being paid at all, and the other may hold a mortgage that has been trumped by work that happened after all loan proceeds were disbursed.

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