Construction Lien Waivers: Recent Case Highlights Importance of Clearly Stated Limits

Apr 12 2021

Posted By: Devon R. Baumbach

Practice Area: Construction Law and Litigation

A subcontractor recently learned the hard way that it is not enough to simply write "partial" on the top of a lien waiver in order to limit the waiver to the amount of money received. The subcontractor claimed it was owed more than $200,000 for work performed on a project due to various change orders. The general contractor said it could pay only about $33,000 based on the original contract amount, and asked the subcontractor to sign a lien waiver titled "Waiver of Lien to Date" in exchange for the payment.

According to the subcontractor, the general contractor agreed to require only a partial lien waiver in exchange for the $33,000 payment, so the subcontractor crossed out the words "to Date" in the title of the waiver and replaced them with the word "Partial" before signing. The problem was that the subcontractor did not change any of the language in the body of lien waiver, including language that waived and released "any and all lien or claim" for items "furnished to this date by the undersigned …"

After the subcontractor filed a lien for the rest of money it was owed, the owner successfully argued to the circuit court that the lien was not valid because it had already been waived based on the broad language of the lien waiver. The Wisconsin Court of Appeals recently reached that same conclusion in *Great Lakes Excavating, Inc. v. Dollar Tree Stores, Inc.*, 2019AP2095 (Wis. Ct. App. Mar. 30, 2021).

Lien waivers are governed by a statute, Wis. Stat. § 779.05. Even assuming that the subcontractor and general contractor intended to limit the waiver to only the partial payment received, the Court of Appeals determined that the subcontractor failed to do what was necessary under that statute to actually limit the scope of the written lien waiver. The Court of Appeals pointed out that the plain language of Wis. Stat. §779.05(1) includes the following rules for interpreting lien waivers:

- A lien waiver "shall be deemed to waive all lien rights of the signer . . . except to the extent that the document specifically and expressly limits the waiver to apply to a particular portion of such labor, services, materials, plans or specifications."
- "Any ambiguity in [a lien waiver] shall be construed against the person signing it."

The Court of Appeals concluded that simply changing "to Date" in the title of the document to "Partial" was not enough to specifically and expressly limit the waiver to a particular portion of the work, as required by the statute. Although the lien waiver did include a reference to the $33,000 payment received, that did nothing to limit the waiver because the waiver said the payment was in consideration for waiving and releasing "any and all lien or claim . . . on account of labor, services, material, fixtures, apparatus or machinery furnished to this date by the undersigned …"

The Court of Appeals' decision highlights the importance of making sure you know the rules that apply to lien waivers, including:

- Lien waivers under Wis. Stat. §779.05(1) have to be in writing and signed by the lien claimant in order to be valid.
- As confirmed by the recent Court of Appeals' decision, lien waivers are broadly construed and deemed to waive all lien rights unless expressly and specifically limited, and any ambiguities are construed against the person signing the waiver.
- Although Wis. Stat. §779.05(1) provides that a lien claimant can refuse to sign a lien waiver unless paid in full for all work covered by the waiver, it also provides that a signed lien waiver is valid even if no payment (or less than full payment) is received in exchange for the waiver (the waiver is "valid and binding as a waiver whether or not consideration was paid therefor…").
- A signed lien waiver is valid regardless of whether it was signed before or after the work was performed.
- Even if you signed a lien waiver without full payment, a lien waiver does not waive your rights to payment under your contract.

Before signing a lien waiver, make sure you carefully review it to know what rights you are waiving. If the scope of the waiver is not clear or is broader than you want it to be, make sure you "expressly and specifically" limit the waiver before signing.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.