

MECHANICS' AND MATERIALMEN'S LIENS:
AN OVERVIEW WITH A DISCUSSION
OF SELECTED PROBLEMS

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1. INTRODUCTION

This paper deals with Mechanics' and Materialmen's Liens ("M&M Liens") as they currently exist in State of Oklahoma. This lien is a statutorily created lien which arises when improvements are made to land or oil and gas properties under a contract but the bill for work performed is not paid. The Legislature has authorized the unpaid provider of labor and/or materials to seek recovery of their expected compensation through the creation and foreclosure of a lien upon the lands and oil and gas properties improved by their efforts

When a lien is created by statute and not by voluntary consent of the debtor, the procedures establishing such a lien become especially important because strict adherence to the procedures is usually demanded by the courts

I attempt in this paper in Part 2 to provide an understanding of what liens are in general and then what are the particular procedures relating to M&M Liens. In Part 3 I pose and then answer several questions that arise in trying to implement this procedural scheme. Attached as Exhibits are a sample M&M Lien statement form and copies of the cited statutes.

2. OVERVIEW OF PROCEDURES

In Oklahoma both voluntary liens, such as real estate mortgages, and judicially imposed liens affecting real estate, such as money judgment liens must be filed in the local county clerk's real estate records before they are valid against subsequent bona fide purchasers of an interest in real estate (i.e., purchasers or encumbrancers for value without actual notice of such outstanding interest)

A lien is a charge imposed upon specific property, by which it is made security for the performance of an act. (42 §1)*

A lien is created:

1. By contract of the parties; or,
2. By operation of law. (42 §6)

Other things being equal, different liens upon the same property have priority according to the time of their creation. (42 §15)

A mortgage given for the price of real property, at the time of its conveyance, has priority

*All statutory citations are to the Oklahoma Statutes Annotated through the 1984-85 Pocket Part, unless otherwise noted.

over all other liens created against the purchaser, subject to the operation of the recording laws. (42 §16)

The record of a mortgage duly made, operates as notice to all subsequent purchasers and encumbrancers. (46 §7

The lien of a judgment is regulated by civil procedure. (42 §35)

Judgments of courts of record of this state and of the United States shall be liens on the real estate of the judgment debtor within a county from and after the time a certified copy of such judgment has been filed in the office of the county clerk in that county. No judgment whether rendered by a court of the state or of the United States shall be a lien on the real estate of a judgment debtor in any county until it has been filed in this manner. Execution shall be issued only from the court in which the judgment is rendered. (12 §706)

2.9 However, in Oklahoma the bona fide purchaser or encumbrancer ("BFP") can discover that they acquired their real estate interest subject to an unrecorded lien known as a Mechanics' and Materialmen's Lien ("M&M Lien")

2.10 There is a surface and an oil and gas M&M Lien created by state statute and the procedure for attachment and perfection of this M&M Lien does not follow the usual recording rule of "first in time first in right"

2.11 This M&M Lien attaches to the subject real estate (subject to perfection) as of the date of the furnishing of the first item of material or the date of the performance of the first labor or the first use of the rental equipment on said land (42 §142 - surface lien), and

the date of the furnishing of the first item of material or the date of the performance of the first labor or services. (42 §144 - oil and gas lien)

2.12 The perfection of this M&M Lien consists of filing a verified affidavit (i.e., with a verification and a jurat*) known as a lien statement in the real estate records of the local county clerk, and such perfection can, in the case of a general contractor, take place up to:

"four (4) months after the date upon which material or equipment used upon said land was last furnished or labor last performed under contract" (emphasis added) (42 §142)

*A jurat provides: "Subscribed and sworn to before me this _____ day of _____, 19__."

Such perfection "relates back" to the date attachment. This relation back to the date attachment allows the holder of such an M&M Lien have a priority ahead of other liens which were perfected by filing after the M&M Lien attached before the M&M Lien was perfected.

2.13 The lien statement of an M&M Lien claimant must include the following information

Any person claiming a lien as aforesaid shall file in the office of the county clerk of the county in which the land is situated a statement setting forth (1) the amount claimed and (2) the items thereof as nearly as practicable, (3) the names of the owner, (4) the contractor, (5) the claimant, and (6) a legal description of the property subject to the lien, (7) verified by affidavit. (numbers added) (42 §142)

A sample M&M Lien statement is attached hereto as Exhibit A.

2.14 And the county clerk must process the M&M Lien statement as follows:

Immediately upon the receipt of such statement the county clerk shall enter a record of the same against the tract index and in a book kept for that purpose, to be called the mechanics' lien journal, which shall be ruled off into separate columns, with headings as follows: "When filed", "Name of Owner", "Name of Claimant", "Amount Claimed",

"Legal description of property", and "Remarks", and the clerk shall make the proper entry in each column. (42 §142)

2.15 And:

Within one (1) business day after the date of the filing of the lien statement, provided for in Sections 142 and 143 of Title 42 of the Oklahoma Statutes, a notice of such lien shall be mailed by restricted delivery mail to the owner of the property on which the lien attaches. . . . Provided that, if with due diligence the person against whom the claim is made or the owner of the property cannot be found, the claimant after filing an affidavit setting forth such facts may, within thirty (30) days of the filing of the lien statement, serve a copy of such notice upon the occupant of the property or the occupant of the improvements, as the case may be, in a like manner as is provided for service upon the owner thereof, or, if the same be unoccupied, he may post such copy in a conspicuous place upon the property or any improvements thereon. (42 §143).

2.16 A materialman or subcontractor who provides material, rental equipment or labor to the contractor also has and can assert and enforce an M&M Lien, so long as the appropriate lien statement is filed within ninety (90) days of the last provision of labor or materials. (42 §143)

2.17 Owners of owner occupied dwellings are presumably less likely to be aware of the possibility of M&M Liens attaching to their homes than are owners

of non-residential real estate or oil and gas properties. Therefore, such residential owners must receive advance additional notice (and acknowledge such receipt in writing) of the potential for M&M Liens under the following statutory provisions:

No lien arising under the provisions of Sections 141 through 153 of this title which affects property presently occupied as a dwelling by an owner shall be enforceable unless, prior to the first performance of labor or the first furnishing of materials by the lien claimant, the original contractor, subcontractor, laborer, or materialman shall have provided to one of the owners a written notice which shall include substantially the following language: . . . (42 §142.1; also see 142.2))

2.18 Although there are some differences between the statutory language creating surface and oil and gas M&M Liens, these liens are perfected and enforced in the same manner. (42 §146)

2.19 M&M Liens for labor and materials provided to improve oil and gas lands attach to the:

1. Pipeline,
2. Leasehold,
3. Buildings
4. Appurtenances
5. Proceedings of sale of oil & gas,
6. Materials & supplies so furnished,

7. Articles used on the well,
8. Well itself, and
9. Fixtures and appliances used for operations. (42 §144)

2.20 Third party purchasers of oil and gas which is subject to an M&M Lien must receive actual notice of the M&M Lien before they become accountable to the M&M Lien claimant. The statutes provide:

No lien claimed by virtue of this act, insofar as it may extend to the proceeds from the sale of oil or gas produced from such lease, shall be effective against any purchaser of such oil or gas until a copy of the statement of lien claim required to be filed by the provisions of this chapter has been delivered to such purchaser by registered or certified mail. (42 §144)

2.21 After an M&M Lien is perfected it is sometimes discovered that the lien statement was incorrect or incomplete in some aspect. The statutes provide:

. . . any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed. (42 §172)

This amendment provision has been liberally construed by the courts to allow the correction of substantially every kind of error except "the amount claimed".

However, in the M&M Lien context, none of the courts have ever specifically established any general criteria to define the limits to which "pleadings may be" amended. (Several examples of permitted amendments are mentioned in Part 3 hereof.

2.22 Any M&M Lien can be discharged by depositing cash or a valid corporate surety bond in the amount of 125% of the face amount of the lien claim (as shown on the filed lien statement) with the county clerk for the county where the subject real estate is located
Thereafter:

The cash deposit or bond, as the case may be, shall stand in lieu of the released lien, and the lien claimant must proceed against the substituted security in the same time and manner as is required for foreclosure of a lien claim. (42 §147.1)

2.23 The monies received under a remodeling contract (not an oil and gas related contract): by the contractor or subcontractor, or by a mortgagor from the mortgagee, or by a seller from a buyer, shall be held as trust funds for the payment of lienable claims. 42 §152)

2.24 A suit to foreclose an M&M Lien "shall be brought within one (1) year from the time of the filing of said lien with the county clerk" (42 §172); and

"if no action to foreclose or adjudicate any lien filed under the provisions of this chapter shall be instituted within one (1 year from the filing of said lien, the lien is cancelled by limitation of law." §177).

(However, it should be noted that the state's case law suggests that the filing of a suit in state court within four (4) months of the provision of last labor and materials provides the necessary perfection at least as to the owner and contractor or subcontractor. See paragraph 3.10 hereof.

2.25 State law also provides:

If the proceeds of the [foreclosure] sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each. (42 §178)

3. DISCUSSION OF SELECTED PROBLEMS

Q: Is the M&M Lien statute constitutional in light of what appears to be a statutory taking of property without due process?

A: Yes; "the filing of the lien statement is a de minimis taking to which due process protection does not attach"
Mobile Components, Inc. v. Layon, Ok., 623 P.2d 591 at 595 (1980)

Q: Can oil and gas leasehold co-tenants have an M&M Lien on the other's interest?

A: No; the M&M Lien statute was not intended to apply between co-tenants.
Uncle Sam Oil Co. v. Richards, Ok., 158 P.1187 (1916)

Q: Where the contractor failed to complete its contract (through no fault of the owners) can the subcontractor have an M&M Lien?

A: No; since the contractor could not assert an M&M Lien neither could the sub-contractor.

Josey Oil Co. v. Ledden, Ok., 20 P.2d
(1933); Conservation Oil Co. v.
Grapher, Ok., 46 P.2d 441 (1935); and
Murray Tool & Supply Co. v. Bridgeport
Machine Co., Ok., 23 P.2d 165 (1933)

3.4 Q: Does a subcontractor have an M&M Lien if the owner paid the contractor in full?

A: Maybe; the Oklahoma Supreme Court has
"We feel owner meets its obligation when it pays to contractor sufficient money to meet the total contracted price of the project." (However, this opinion has apparently been withdrawn for other reasons, and the court fails to discuss in this opinion the statutory language relating to surface M&M Liens which provides "The risk of all payments made to the original contractor shall be upon such owner until the expiration of the ninety (90) days herein specified.

" 42 §143)

Anchor Concrete Co. v. Victor Savings & Loan Assn., et al, 53 OBJ 870 at 872 (1982); also see Consolidated Cut Stone Co. v. Seidenbach, Ok., 75 P.2d 442 at 448 (1937).

3.5 Q: Does surveying work constitute labor or services giving rise to an M&M Lien?

A: Yes. Midland Mortgage Company v. Sanders England Investments et al, Div No. 2, 55 OBJ 654 (1984)

3.6 Q: Can a contractor tack together work under separate contracts, even if on one leasehold, on a single lien statement and thereby preserve a lien for labor or materials last provided more than 4-months before?

A: No; and if the amount of the lien attributable to the "extinguished" part of the lien is not discernible from the contents of the lien statement, the entire lien may be void.

Exchange Nat'l Bank of Tulsa v. Okega
Oil & Gas Co., Ok., 229 P.765 (1924),
Continental Supply Co. v. George H.
Greenan Co., Ok., 282 P.598 1928)

3.7 Q: Do M&M Lien statements need to be
acknowledged prior to recording to
be valid?

A: No; an acknowledgment is not necessary
A lien statement must be verified but
legislature never intended for a
lien statement to comply with this
aspect of the recording statutes.

Davidson v. Pioneer Oil & Scott
Petroleum, 55 OBJ 1984 (1984); also see
16 §96 and 42 §154 (1984 Supplement)

3.8 Q: Can an M&M Lien be perfected against a
debtor/owner after the debtor has
declared bankruptcy?

A: Yes. 11 U.S.C. §362(a) & (b)(3),
11 §546(b), and 11 §547(e)(2)

3.9 Q: Is a contractor's debt to subcontractors (related to a surface Lien) dischargeable in bankruptcy when the debt is attributable to intentional failure to pay?

A: No; it is a breach of a fiduciary duty by the contractor and is not dischargeable

In re Edmond, Neely v. Edmond, W.D. Ok.,
5 B.R. 172 (1980)

3.10 Q: Does filing an M&M Lien foreclosure suit within the statutory 4-month lien statement filing period (or 90-days, as appropriate), have the same effect as filing a lien statement within the 4-month period?

A: Yes; as to the owners joined in the suit. However, M&M Lien claimants which have properly perfected their liens by filing a lien statement with the appropriate county clerk have a higher priority lien. (While the court is silent on the priority of other properly perfected third party owners or

encumbrancers, it is likely that such BFP's take free of such unfiled M&M Lien claims.)

Tulsa Excavation, Inc. v. Gary Pinalto et al, Div. No. 4, 55 OBJ 1303 (1984)

3.11 Q: Which has the higher priority: an M&M Lien arising from a contract with a purchaser of the real property who was not in possession and not in title, or a purchase money mortgage lien?

A: Purchase money mortgage lien.

Sisemore v. Voelkle, Ok., 312 P.2d 922 (1957)

3.12 Q: Should the court permit an M&M Lien statement to be amended to add the names of omitted owners after the passage of the 4-month filing period?

A: Maybe; a recent Bankruptcy Court case and several fairly recent Oklahoma Court of Appeals cases say "no", but a 1930 Oklahoma Supreme Court case says "yes".
Mahan & Rowsey, Inc., W.D. Ok., Bkrtcy., 27 B.R. 883 (1983); Joe Brown Company,

Inc. v. Best, Div. No. 1, Okl. App., 601 P.2d 755 (1978); Gaddis-Walker Electric Company, Inc. v. Phillips Petroleum Company, Div. No. 2, Okl. App., 526 P.2d 964 (1974); and Whitfield et al v. Frensley Bros. Lumber Co., Ok., 283 P.985 (1930)

3.13 Q: Is this defect in the filed lien statement usually allowed to be corrected by the courts: incorrect statement of the date of the first or last item of labor or material?

A: Yes, so long as no one has been misled to their detriment.

Price et al v. Preston, Ok., 229 P.473 (1924)

3.14 Q: Is this defect in the filed lien statement usually allowed to be corrected by the courts: platted legal description with the wrong addition or block number?

A: Yes

El Reno Electric Light & Telephone Co.

v. Jennison, Ok., 50 P.144, (1897); King v. Long - Bell Lumber Co., Ok., 105 P.2d 1060 (1940)

3.15 Q: Is this defect in the filed lien statement usually allowed to be corrected by the courts: omission of itemized list of labor or materials?

A: Yes.

Key v. Hill, Ok., 219 P.308 (1923); Spurrier Lumber Co. v. Montgomery, Ok., 24 P.2d 1005 (1933)

3.16 Q: Is this defect in the filed lien statement usually allowed to be corrected by the courts: incomplete listing of items in the verification?

A: Yes; and even the omission of the verification is correctable

El Reno Electric Light & Telephone Co. v. Jennison, Ok., 50 P.144, (1897); Key et al v. Hill, Ok., 219 P. 308 (1923)

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Abstract

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EXHIBIT A

Sample Mechanics' And Materialmen's
Lien Statement

4960 11910

10487

OIL AND GAS LIEN STATEMENT

STATE OF OKLAHOMA)

SS.

COUNTY OF STEPHENS)

83-1759

KNOW ALL MEN BY THESE PRESENTS:

That _____ Company, a corporation, of Duncan, Stephens County, State of Oklahoma, the claimant herein has a claim against _____ Drilling, P.O. Box Woodward, Oklahoma 73801 for the sum of \$99,320.13, plus interest and attorney fees as allowed by law, due it for and on account of services performed in the drilling of a well for oil and gas upon the lands and premises hereinafter described, and that such labor was performed by it on July 2, 1982, through September 27, 1982, according to an itemized statement attached hereto, marked Exhibit "A" and made a part hereof; that such labor was performed in pursuance of a contract with the said _____ Drilling, and the ~~other working~~ interest owners named on Exhibit "B" attached hereto, in the drilling of an oil and gas well under interests in oil and gas leases owned by _____ Drilling covering the Orr well, situated on the following described lands:

Section Thirty-two (32), Township Eleven (11) North, Range Four (4) West, Oklahoma County, Oklahoma.

That the sum hereby claimed is just, due and unpaid, and _____ Company has and claims a lien upon the whole of the oil and gas leases which cover the well, which leases include the oil and gas leases set forth on Exhibit "C" attached hereto, which are owned by parties named on Exhibit "B" hereto, the proceeds from the sale of oil or gas produced therefrom and inuring to the working interest, exempting, however, any valid, bona fide reservations of oil or gas payments or overriding royalty interests executed in good faith and payable out of such working interest, and upon the well, equipment, pipelines, and buildings upon said premises, and all tools and supplies located thereon or used in connection therewith in the amount of \$99,320.13 as set forth above, plus interest and attorney fees as set forth above, according to the laws of the State of Oklahoma.

Dated this 26th day of January, 1983.

COMPANY

By: _____

STATE OF OKLAHOMA
JAN 27 4 24 PM '83
RECORDED ON FILE

83-1759 01-27-83

VERIFICATION

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

sworn, upon oath says: _____, of lawful age, being first duly

That he is the _____ Division Credit Manager for _____ Company, the claimant mentioned in the foregoing Oil and Gas Lien Statement; that he has read said statement and knows the contents thereof; and that the name of the owner, the name of the claimant, the description of the property upon which the lien is claimed, and the items of account as set forth therein, and according to Exhibit "A" attached hereto, are just, true, correct and owing.

Subscribed and sworn to before me this 31 day of _____ January _____, 1983.

Lewis M. Williams
Notary Public

My commission expires:

October 6, 1985
(SEAL)

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

This instrument was acknowledged before me this 31 day of _____ January _____, 1983, by _____, _____ Division Credit Manager of _____ Company a Delaware corporation, on behalf of said corporation.

Lewis M. Williams
Notary Public

My commission expires:

October 6, 1985
(SEAL)