

# Mechanic's-Lien Tactic Flops In Unlicensed Contractor Case

By Lawrence R. Jensen

The California courts last month reaffirmed their recent trend of dealing harshly with unlicensed parties attempting to collect on contracts for which a contractor's license is required. Interestingly, the case turned not only on a bad business decision by the plaintiff — a restaurant design firm — in agreeing to provide the disputed services, but also on

the party's legal strategy in asserting a mechanic's lien claim.

The case, *Banis Restaurant Design Inc. v. Serrano*, 2005 DJDAR 14238 (Nov. 18), teaches that unlicensed parties are courting disaster if they provide services for which a contractor's license is required — and they're downright marrying disaster if they resort to the mechanic's lien law in an effort to recover!



The plaintiff-appellant in *Banis* entered into a contract not only to perform \$16,000 worth of design services, but also to procure "equipment, furnishings, material, and related labor ... required to complete the project." The "project" was described as a "work of improvement" on the defendant's property.

While the court's decision on this point is not entirely clear, it appears that non-design charges eventually grew to a sum exceeding \$1.7 million. The plaintiff's first cause of action, for breach of contract, sought to collect \$219,848.12 — the difference between the agreed amount and the amount paid by the defendant. In the second cause of action, incorporating the allegations of the first, the plaintiff also sought to foreclose on a mechanic's lien in the amount of \$216,821.80, which it alleged was the "reasonable value of all labor, materials and services" furnished "to the work of improvement."

The defendant demurred to the plaintiff's complaint, contending that the plaintiff lacked a contractor's license. Business & Professions Code Section 7026 provides that a "contractor" or "builder" is one "who undertakes ... or does ... through others, (to) construct, alter, repair, add to, subtract from, improve ... or demolish any building, or other structure...."

Generally, contractors must be licensed (Business & Professions Code Section 7028). Business & Professions Code Section 7031 provides that unlicensed contractors are barred from bringing suit to collect for their services.

The demurrer was sustained without leave to amend and the appeal followed. On appeal the plaintiff argued that the trial

court abused its discretion in refusing to grant leave to amend, because it could plead that some of the amount sought was not for services for which a contractor's license was required.

The plaintiff based its arguments on two code sections, the first being Business & Profession Code Section 7045, which excludes from the contractor's licensing requirement persons who confine their activities "to the sale or installation of any finished products, materials or articles of merchandise that do not become affixed to the structure ... (or to supplying) finished products, materials, or articles (and who) do not install or contract for the installation of those items."

This section is designed to exclude persons who provide equipment or materials that will not be permanently affixed to the structure. (*Walker v. Thornsberry*, 97 Cal.App.3d 842 (1979); section excluded manufacturer of prefabricated restroom who assembled parts on foundation provided by general contractor, where trier of fact found the structure was not permanently affixed to the property.)

The other code section cited by the plaintiff was Business & Professions Code Section 7052, which excludes from licensure "any person who only furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of the contractor."

This section applies to parties that deliver or provide raw or completed building components for incorporation into the project, but who do not personally install them. (see, e.g., *Steinbrenner v. Waterbury (J.A.) Construction Co.*, 212 Cal.App.2d 661 (1963); fabricator of custom cabinets that delivered them completed to job site for installation by general contractor not required to be licensed.)

The 3rd District Court of Appeal, in affirming, gave short shrift to the plaintiff's arguments, relying primarily on the fact that the plaintiff recorded a mechanic's lien and asserted a cause of action to foreclose on it. As the court pointed out, "[B]y definition, a mechanic's lien involves fixtures. In filing its lien, under penalty of perjury, plaintiff in essence asserted that the materials it provided were fixtures on the property," thereby precluding resort to Business & Professions Code Section 7045.

The plaintiff also could not plausibly amend to show that it merely furnished material or supplies without consuming them in the performance of its work, thereby being entitled to the benefits of Business & Professions Code Section 7052, because there was no principled way to distinguish between the portions of the contract that were illegal and the mere provision of materials and supplies. Once the plaintiff performed something more than incidental construction services, it could no

longer seek the protection of that section. Accordingly, the trial court properly sustained the plaintiff's demurrer.

Moreover, leave to amend was properly denied because plaintiffs cannot avoid "allegations that are fatal to a cause of action ... by simply filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier." Citing *Hendy v. Losse*, 54 Cal. 3rd 723 (1991). That is because the trial court may "read the original defect into the amended complaint, rendering it vulnerable to demurrer again." (Also citing *Hendy*.)

For that reason, the trial court properly concluded that there was no way for the plaintiff to escape the trap it had set for itself; by filing the mechanic's lien claim, attaching a contract showing that it had agreed to provide extensive construction services and alleging that its labor and materials were incorporated into the works of improvement, the plaintiff had intrinsically asserted that it had performed services for which a contractor's license was required.

In reaching its conclusion, the court distinguished *Walker v. Thornsberry*. In the *Walker* case, the manufacturer's representatives had "merely assembled the pieces" of the prefabricated restroom, and bolted it to the foundation provided by the general contractor. This limited work, incidental to delivery of a completed building component, was quite different from work done by the plaintiff — which essentially included providing or procuring design, engineering and architectural services, project supervision and coordination, and provision of virtually all of the building materials and components for the work of improvement.

The *Banis* case represents a cautionary tale for design firms and others involved in the construction process who do not hold contractor's licenses. Unlicensed persons should refrain from doing anything that arguably requires a contractor's license. If parties qualified as design professionals refrain from providing contractor's services, they should assert their lien rights pursuant to Civil Code Sections 3081.1-3081.10 — not pursuant to the mechanic's lien law. If they provide services and materials for which a contractor's license is not required, then absent an express grant of lien rights under the mechanic's lien law (such as the rights afforded to simple materials providers and equipment lessors), they should refrain from asserting any lien rights whatsoever, lest their claim be barred under the holding of *Banis*.

**Lawrence R. Jensen**, a solo practitioner in San Jose, represents owners, contractors and subcontractors in construction disputes.