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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

RE: CONSTRUCTION LIEN ENFORCEMENT

DATE: May 4, 2004

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The moral of this confused tale of woe is that when drafting or negotiating a construction contract for improvements to property, it is extremely important that one follows, meets and exceeds the requirements of the Michigan Construction Lien Act. This case involves issues concerning the validity, priority and extinguishment of property interests and liens and interpretation of portions of the Construction Lien Act.

In 1997 the Defendant C & C Construction had an oral contract with a previous owner of the property named Barrow to perform certain construction and make other improvements to the property. The agreement was later reduced to writing. The contract was for a total of \$350,000, of which Defendant only received \$50,000. Barrow lost the property to the foreclosing mortgagee named Shaw. Shaw became title holder in April, 1998. Defendant recorded a Claim of Lien and Claim of Interest on October 22, 1998. Two weeks later the property was conveyed to Defendant C & C through judicial foreclosure proceedings. Michelle Degregorio ("Degregorio") obtained the title to the property pursuant to a Warranty Deed from the previous owner. On October 21, 1999, Defendant C & C filed a complaint in the Circuit Court to foreclose its construction lien. The Notice of Lis Pendens was not recorded until January 19, 2000, well after the property was conveyed to Degregorio. Neither the Shaws nor the Degregorios were named in the lawsuit. The Defendant subsequently purchased the property at the

judicial sale on the construction lien foreclosure on May 16, 2000. The redemption period for that judicial sale was to expire on August 9, 2000 and before that date Degregorio filed her complaint to quiet title on August 3, 2000. The trial court entered a preliminary injunction preventing the conveyance of the property and extending the redemption period that was about to expire. Degregorio also asserted that the Claim of Lien was invalid because the defendant was not a licensed builder and the contract was not in writing sufficient to satisfy the statute.

The appellate court ruled that the written contract between Barrow and the Defendant C & C did not contain required language regarding licensure and did not mention licenses or liens. Therefore, according to the appellate court, "no valid lien attached under the factual circumstances of this case."

The appellate court also ruled against the Defendant C & C because (i) the foreclosure action was not brought within the statutory one year period, (ii) the owners of record with respect to the property were never named in the suit, as required by law, and (iii) Degregorio did not have record notice that a foreclosure action had commenced when the property was acquired because the Lis Pendens was not recorded in a timely manner. Note in particular that the Lis Pendens was filed three (3) months after the Complaint was filed).

The appellate court noted that while the result might appear unfair and inequitable to the Defendant, the party doing the work at the property, the Construction Lien Act contains language that is clear and unambiguous and that the court must assume that the Legislature intended its plain meaning and that the statute is to be enforced as written. Therefore, the fact that the written contract did not comply with the Construction Lien Act, when combined with the Defendant's failure to name Shaw in the lien foreclosure action, required C & C's construction lien to be voided. Foreclosing lien claimants must observe the letter and spirit of the Construction Lien Act.

While the Construction Lien Act does not provide a particular remedy where a necessary party is not joined, it is clear that the failure to name all required parties resulted in a judgment that could not affect or divest Degregorio of title to the property. Because later enforcement of the lien by C & C would require refileing the foreclosure action that would be beyond the one year limitation period under the Construction Lien Act, the court's ruling effectively discharged and rendered ineffective the claim of lien.

Our firm has considerable experience with construction contracts, both residential and commercial. We also regularly provide advice and counsel to builders and contractors regarding lien rights. If you need further information about the Construction Lien Act or the holding in this case, please contact me at (248) 359-6326 or at edw@maddinhauser.com.