

CAUSE NO. 2018-42734

ABG General Construction, Plaintiff,	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	OF HARRIS COUNTY, TEXAS
	§	
3S Real Estate Investments, LLC – Series 3 Defendant.	§	269th JUDICIAL DISTRICT

DEFENDANT’S MOTION TO REMOVE LIEN

To the Honorable Judge of this Court:

Pursuant to Section 53.160 of the Texas Property Code, Defendant 3S Real Estate Investments, LLC – Series 3, LLC, (“Defendant”) files this motion for an order removing the lien asserted by Plaintiff, ABG General Construction (“Plaintiff”) and Silvia Victoriano in the above action, and in support respectfully shows the court the following:

1. Defendant entered into a contractual relationship with United Plus Construction (the “Contract”) for residential construction at 2105 Morse Street, Houston, Texas (the “Property”).
2. Following completion of the construction contemplated by the Contract, on or about January 27, 2017 Defendant received a notice of claims and request for information sent by Plaintiff.
3. On or about January 30, 2017, Plaintiff served Defendant with its response to the notice of claims and request for information. *See Exhibit A.*
4. On or about February 13, 2017, Silvia Victoriano filed with the Harris County Clerk, on behalf of Plaintiff, a Materialman’s Lien Affidavit. The recording number is RP-2017-61894. *See Exhibit B.*
5. The Defendant’s legal grounds for objecting to the validity of the lien are as follows: (1) the lien affidavits are facially invalid according to Texas Property Code §53.054; (2) the purported notice of the filed lien affidavit was invalid according to Texas Property Code §53.055; and (3) Defendant is prepared to deposit into the registry of court all funds subject to the notice of a claim to Defendant upon a ruling by this Court. *See Tex. Prop. Code Ann. §53.160(b).*

I. Lien Affidavits are Facially Invalid

6. According to Tex. Prop. Code Ann. §53.160(b)(2), a party may motion the Court to remove a lien if “an affidavit claiming a lien failed to comply with [Texas Property Code] Section 53.054.”

7. Tex. Prop. Code Ann. § 53.054(a) requires that a lien affidavit “must contain substantially:

- (1) a sworn statement of the amount of the claim;
- (2) the name and last known address of the owner or reputed owner;
- (3) a general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;
- (4) the name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;
- (5) the name and last known address of the original contractor;
- (6) a description, legally sufficient for identification, of the property sought to be charged with the lien;
- (7) the claimant's name, mailing address, and, if different, physical address; and
- (8) for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.” (emphasis added)

8. Tex. Prop. Code Ann. § 53.054(a)(2) requires that the affidavits “must contain substantially” the last known address of the owner. As reported by the Office of the Comptroller of Texas, Defendant’s registered address on file with the Secretary of State of Texas is listed as 7800 Dallas Parkway, Suite 360, Plano, Texas 75024 and its mailing address is listed as 1302 Waugh Drive #539, Houston, Texas 77019. *See Exhibit C.* Defendant’s response to Plaintiff’s notice of claim listed Defendant’s mailing address as 1302 Waugh Drive #539, Houston, Texas 77019. *See Exhibit A.* Instead of using either of the publicly available addresses, Plaintiff listed the project address as the owner’s last known address in its lien affidavit. *See Exhibit B.* This failure is sufficient to warrant removal of the lien from the Property.

9. Tex. Prop. Code Ann. § 53.054(a)(1) requires that the affidavits “must contain substantially” a sworn statement of the amount of the claim. The lien affidavit, however, claims an amount in excess of the statutory retainage for the work performed, instead apparently claiming an amount in excess of the amount of the contract, rendering the lien affidavit facially invalid. *See Exhibit B.* This failure is sufficient to warrant removal of the lien from the Property.

II. Purported Notice of the Filed Lien Affidavit was Invalid

10. As stated, supra, Plaintiff's lien affidavit listed an incorrect last known address for Defendant.

11. Moreover, Plaintiff's lien affidavit indicates that its notice of the filed lien affidavit was sent to Defendant at an address that is not an address officially associated with Defendant, other than being the location of the project site. *See Exhibit B.*

12. According to Tex. Prop. Code Ann. §53.160(b)(3), a party may motion the Court to remove a lien if "notice of the filed affidavit was not furnished to the owner or original contractor as required by Section 53.055."

13. Here, Plaintiff alleges that notice of the filed lien was sent, but according to the lien affidavit it was not sent to Defendant's last known business address, as required by Tex. Prop. Code Ann. §53.055. This failure is sufficient to warrant removal of the lien from the Property.

III. In the Alternative, Defendant Requests Lien Removal Pursuant to Tex. Prop. Code Ann. § 53.160(b)(2)

14. Defendant warrants to the Court that Defendant has the necessary funds available to deposit into the registry of court all funds subject to the notice of Plaintiff's affidavits and lien claims.

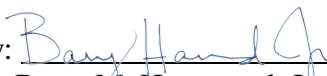
15. According to Tex. Prop. Code Ann. § 53.160(b)(5) the Court may remove the lien if "all funds subject to the notice of a claim to the owner and a notice regarding the retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant."

16. Defendant moves the Court to enter an order removing the lien claimed in Plaintiff's lien affidavits and fixing the amount of the bond required of Plaintiff to stay removal of the lien at the actual amount of the lien claim.

PRAYER FOR RELIEF

Therefore, Defendant respectfully requests that the Court enter an order declaring the Plaintiff's lien to be invalid, void, and unenforceable; fixing the amount of the bond required to stay this order; awarding Defendant reasonable and necessary attorney's fees in bringing this motion (as evidenced by the attached **Exhibit D**); and awarding Defendant any other relief at law or in equity to which defendant is entitled.

Respectfully submitted,

By: 
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**ATTORNEY FOR DEFENDANT 3S
REAL ESTATE INVESTMENTS,
LLC**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon the following as outlined below on this 31st day of August 2018.

Javier Marcos, Jr.
228 Westheimer Road
Houston, Texas 77006
(713) 528-7711 Telephone
(713) 528-7710 Facsimile
Email: jmarcos@marcoslaw.com
Attorney for Plaintiff

Via e-file



Barry M. Hammond, Jr.

VERIFICATION

STATE OF TEXAS §
COUNTY OF HARRIS §

Before me, a notary public, on this day personally appeared **Barry M. Hammond, Jr.**, known to me to be the person whose name is subscribed to the above document and, being by me first duly sworn, declared that the statements contained in the document are true and correct.

Subscribed and sworn to before me on 31st day of August 2018.


Barry M. Hammond, Jr.

STATE OF TEXAS §
COUNTY OF HARRIS §

This instrument was acknowledged before me on the 31st day of August, 2018, by **Barry M. Hamond, Jr.** for the purposes and consideration therein expressed.




Notary Public, State of Texas