

**CAUSE NO. 2018-42734**

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

**DEFENDANT’S SUR-REPLY IN SUPPORT OF  
DEFENDANT’S SUMMARY MOTION TO REMOVE LIEN**

Defendant, 3S Real Estate Investments, LLC – Series 3, files this Sur-Reply in Support of Defendant’s Summary Motion to Remove Lien and asks the Court to issue an order removing the lien asserted by Plaintiff in the above action, and in support respectfully shows the Court the following:

**INTRODUCTION**

1. On August 31, 2018, Defendant filed its Summary Motion to Remove Lien with the Court, because the lien affidavit supporting the lien asserted by Plaintiff was facially invalid and that proper notice of its filing was not provided to Defendant.
2. On September 18, 2018, Plaintiff filed its Plaintiff’s Response to Defendant’s Summary Motion to Remove Lien. Plaintiff fails to prove that it meets the burden of “substantial compliance” with the statutes.
3. As Plaintiff has not proven that the lien affidavit and notice to owner of filing of the same were done in substantial compliance with the applicable statutes, the Court should issue an order removing the lien asserted by Plaintiff without requiring a deposit into the registry of the Court by Defendant.

**REPLY**

*Lien Amount*

4. Tex. Prop. Code Ann. § 53.105 establishes that the maximum amount a subcontractor may claim a lien for is capped by the amount of the retainage.<sup>1</sup> Defendant presented this issue in paragraph 9 of its Summary Motion to Remove Lien.

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<sup>1</sup> Sec. 53.105. OWNER'S LIABILITY FOR FAILURE TO RETAIN. (a) If the owner fails or refuses to comply with this subchapter, the claimants complying with Subchapter C or this subchapter have a lien, at least to the extent of the amount that should have been retained from the original contract under which they are claiming, against the

5. In its response, Plaintiff fails to provide a citation to statute or caselaw that contradicts this principle, merely making the statement “Movant failed to retain in their [sic] entirety and therefore are personally responsible for the entire claim”. *See* Plaintiff’s Response to Defendant’s Summary Motion to Remove Lien. This unsubstantiated legal conclusion contradicts the clear language and intent of the statute.

6. Plaintiff continues to defend its client’s filing of a lien affidavit that claims a lien 10 times larger than allowable under statute. This should not be considered substantial compliance with the statute, and therefore the lien should be declared invalid and ordered removed.

*Improper Last Known Address*

7. Tex. Prop. Code Ann. § 53.054(a)(2) requires that the lien affidavit contain the last known address of the owner, Tex. Prop. Code Ann. § 53.055 requires that notice of the filed lien be sent to the last known address of the owner, and Tex. Prop. Code Ann. §53.160(b)(3) allows the Court to issue an order removing a lien if a claimant failed to substantially comply with either of the preceding statutes.

8. Through no fault of Defendant, Plaintiff listed the worksite address as the last known address of the owner and sent its notices to the same. Defendant responded to Plaintiff’s notice of claim and in its response provided the proper mailing address. *See* Exhibit A to Defendant’s Summary Motion to Remove Lien. Further, Defendant’s mailing and registered addresses were current with the Secretary of State at the time the notices were sent. *See* Exhibit C to Defendant’s Summary Motion to Remove Lien.

9. Plaintiff provides no justification for sending the notices to the wrong address, and sending the notices to the wrong address is incurable error. The Texas Supreme Court has held that a plaintiff’s knowing use of an outdated or improper address in its certificate of last known address for foreclosure notices is not substantially compliant with the Texas Property Code. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160 (Tex.2015); *see also Onwuteaka v. Cohen*, 846 S.W.2s 889 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1993) (citing *Krueger v. Swann*, 604 S.W.2d 454, 457 (Tex.Civ.App.—Tyler 1980, writ ref’d n.r.e.) (*interpreting* Tex.Rev.Civ.Stat. Ann. art. 3810, the predecessor statute)).

**CONCLUSION**

10. Plaintiff filed a facially invalid lien, provided improper service, and fails in its response to the Summary Motion to Remove Lien to establish its right to a lien on Defendant’s property, and by virtue of the foregoing Defendant requests that this Court grant its Summary Motion to Remove Lien.


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house, building, structure, fixture, or improvement and all of its properties and against the lot or lots of land necessarily connected.

**PRAYER**

11. 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 Exhibit D to Defendant's Summary Motion to Remove Lien); 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 CONFERENCE**

On September 16-17, 2018, counsel for both Plaintiff and Defendant corresponded by email regarding Defendant's contention that the lien was filed for the incorrect amount. Plaintiff disagreed and filed its response to the Summary Motion to Remove Lien. Defendant files this Sur-Reply having attempted to comply with TEX. R. CIV. P. 191.2 and Rule 3.3.6 of the LOCAL RULES OF THE CIVIL TRIAL DIVISION OF THE HARRIS COUNTY DISTRICT COURTS.

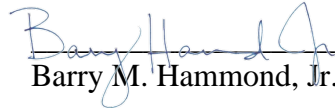
  
Barry M. Hammond, Jr.

**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 19th day of September 2018.

**Javier Marcos, Jr.**  
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*Via e-file*

  
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Barry M. Hammond, Jr.