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Protecting Arbitration Rights in Lien Proceedings

THIS ISSUE

How can parties to a construction contract guard against the inadvertent loss of contractual rights to arbitration in lien enforcement proceedings?

BACKGROUND

Typically under California law a party who files an action in Superior Court has not automatically waived his contractual rights to arbitration, so long as he has not gained an unfair advantage over his opponent by filing in court. For example, a plaintiff might gain an advantage by filing an action in superior court and obtaining information that he would not have been able to obtain in arbitration. If he later moved to change the matter to arbitration, the defendant could argue that he waived that right by filing in court first. And some arbitration contracts allow for filing of certain limited actions – for example, where it may be necessary to record a lis pendens – without waiving arbitration rights.

But in actions to enforce mechanics’ liens, the rules are different, and controlled by specific legislation affecting the enforcement of lien rights. (Code of Civil Procedure section 1281.5). In California, a party to a construction agreement may inadvertently waive the contractual right to arbitration merely by filing an action in Superior Court without making the appropriate allegations in the complaint to preserve those arbitration rights.

FACTUAL SCENARIO

A property owner and a general contractor enter into a construction agreement with a comprehensive arbitration provision. During construction, the owner and contractor disagree about whether the owner must pay for work outside the scope of the original contract, performed without a written change order. Negotiations between the owner and contractor fail. The contractor records a

mechanics' lien and, facing a very short statute of limitations to perfect the lien, files a foreclosure action in Superior Court. Has the contractor waived his right to compel arbitration? Can the owner keep the matter in Superior Court? Alternatively, can the owner compel arbitration of the dispute?

CLAIMANT WAIVER OF ARBITRATION

As of January 1, 2004, a mechanic's lien claimant may waive the right to compel arbitration if he does not make the appropriate allegations in his complaint. To protect the right to arbitration in a mechanic's lien foreclosure action, a claimant must allege that the claimant does not intend to waive any right of arbitration and intends to move, within 30 days after serving the complaint, for an order to stay all court proceedings and proceed with arbitration. In the alternative, the claimant may, within 30 days of serving the complaint, file a petition asking the court to stay the action pending arbitration.

The claimant's failure to follow this procedure results in the automatic waiver of the right to compel arbitration in a lien proceeding.

DEFENDANT WAIVER OF ARBITRATION

In the scenario above, the defendant may have a right to compel arbitration, even if the claimant initially waives that right. But if the defendant fails to timely and properly exercise his right to arbitration, that right can be lost. To preserve his arbitration rights, the defendant must file a petition to compel arbitration at or before the time he files an answer to the complaint. If he does not, the defendant waives the right to compel arbitration.

WHY IS THIS IMPORTANT?

Construction contracts often contain arbitration provisions designed to avoid the costs, delays and public forum of litigation in court. Losing the benefit of those provisions can be devastating, forcing the parties into expensive litigation.

Arbitration is not a perfect solution to dispute resolution, but the process is more flexible than an action in court. For example, arbitration offers some advantages over court actions: speed of the action, control of the process, and selection of the arbitrator. And arbitration is usually scheduled to suit the convenience of the parties involved, rather than forced into the time schedule of an overburdened court system. Thus, the parties can select an agreed date on which the action will be completed, design a schedule for discovery that allows for control of the process, and schedule motions with the arbitrator at times that are convenient. This kind of scheduling flexibility is a significant advantage over civil litigation. Also, the contract may provide for hiring an arbitrator with special expertise (such as a contractor instead of a retired judge). It may also limit – or even eliminate entirely – the ability to conduct discovery, which, in the right case, can be a tremendous cost savings for the participants. Finally, arbitration is confidential, allowing the parties to avoid showcasing their disputes in public records.

Thus, the ability to protect the right to arbitration may be enormously important. Knowing and understanding the lien enforcement regulations can help to avoid the inadvertent loss of those rights in construction lien disputes.

NEXT ISSUE

Extinguishing easements by unity of title – a new case on an old subject.

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