

## Construction Case Notes

### **Materialman's Lien Claim not Rendered Ineffective by Failing to State When Claim Became Due**

*Vulcan Construction Materials, LP v. Franklin Builders Properties, Inc.*, 298 Ga.App. 120, 679 S.E.2d 356 (2009)

The Georgia Court of Appeals reversed the trial court's grant of summary judgment against a materialmen's lien claimant whose lien failed to state the date the materialman's claim became due. Franklin Builders contracted with Buck Paving to perform grading and other services on property owned by Franklin Builders. Buck Paving in turn contracted with Vulcan to provide materials for the Project. Franklin Builders contended that Buck Paving's work was defective and that all materials had to be removed, and refused to pay Buck Paving. Buck Paving in turn never paid Vulcan.

Vulcan timely filed a lien on Franklin Builders' property, and brought suit against Buck Paving for non-payment. Vulcan procured a default judgment against Buck Paving, and filed an action to foreclose its lien on Franklin Builders' property.

While in all other respects Vulcan's lien claim was proper, the lien did not state the date its claim became due. OCGA § 44-14-361.1(a)(2) requires a lien claimant to file a claim of lien within three months after the material is furnished

in the office of the clerk of the superior court of the county where the property is located, *which claim shall be in substance as follows*: "A.B., . . . a materialman . . . claims a lien in the amount of (specify the amount claimed) on the . . . premises or real estate on which it is erected or built . . . *for satisfaction of a claim which became due on (specify the date the claim was due) for . . . furnishing material . . .*"

(Emphasis added.) OCGA § 44-14-361.1(a)(2). (Note: This lien statute was substantially amended in 2008, thus the exact wording of the statute cited above is not applicable for lien actions after March 31, 2009.)

Franklin Builders argued that Vulcan's lien was unenforceable for failing to comply with the strict terms of the lien statute. The trial court agreed, and granted summary judgment to Franklin Builders.

The Court of Appeals acknowledged that Georgia lien law is in strict derogation of the common law, and should be strictly construed, and that failure to comply with the lien statute generally results in invalid and unenforceable liens. The Court of Appeals noted, however, that the wording of OCGA § 44-14-361.1(a)(2), in regard to stating the date the claim was due, only required that the lien claim "shall be in substance as follows."

Citing to an earlier Georgia Supreme Court opinion, the Court of Appeals held that where a lien is timely filed and the lien action is timely filed, the claim of lien is still effective as against the underlying property. *See J.H. Morris Bldg. Supplies v. Brown*, 245 Ga. 178, 264 S.E.2d 9 (1980). Finding that Vulcan's lien did comply in substance with the lien

statute, the Court of Appeals reversed the trial court's grant of summary judgment to Franklin Builders.

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**Contractor's waiver of right to recover from Owner did not invalidate insurance coverage.**

***Holmes v. Clear Channel Outdoor, Inc.*, 679 S.E. 2d 745 (Ga. App. June 2, 2009).**

Holmes, a bill-poster, had a contract with Clear Channel's predecessor to place posters on billboards. In the contract, Holmes waived any rights for recovery against Clear Channel "for any damages incurred by Contractor in providing services hereunder, provided that such waiver of recovery does not invalidate the insurance coverage." Holmes sued for personal injuries after the catwalk on the billboard collapsed. The trial court entered summary judgment in favor of Clear Channel on the basis of the waiver in the contract.

The Georgia Court of Appeals affirmed the summary judgment. Holmes contended that the waiver "invalidated his insurance coverage under the general commercial liability policy" obtained by Holmes. Clear Channel was a named insured on Holmes's GCL policy. Holmes argued that the waiver provision necessarily invalidated coverage under that policy by barring any action by Holmes against Clear Channel. The Court of Appeals disagreed. "Holmes's waiver of his right to recover from Clear Channel simply means that Clear Channel is not legally obligated to pay damages to Holmes for injuries sustained in putting up posters for Clear Channel. Coverage is not invalidated; it simply does not apply."

Holmes also argued that the waiver paragraph was void against public policy, citing O.C.G.A. § 13-8-2(b); however, the Court of Appeals noted that no statute prohibits a billboard owner from contracting with an independent contractor to limit the owner's liability to the contractor. The Court distinguished O.C.G.A. § 13-8-2(b) as existed at the time of the contract as covering only contract provisions purporting "to indemnify or hold harmless the promisee against liability for damages." The waiver did not purport to indemnify Clear Channel from damages incurred by Holmes.

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**Prejudgment Interest on Debts from Construction Contracts.**

***Swainsboro Cabiney Co., Inc. v. Ed Johns Construction Co.*, \_\_ S.E.2d \_\_ (2009 WL 1859020) (Ga. App. June 30, 2009).**

In *Swainsboro Cabinet Co., Inc. v. Ed Johns Constr. Co.*, A09A0447 (June 30, 2009), the Georgia Court of Appeals reversed in part a trial court ruling providing for prejudgment interest in favor of a cabinet company which had not been paid in full for its material and labor.

Swainsboro Cabinet Co., Inc. ("SCSI") filed suit against Ed Johns Construction Co. ("EJCC") for the remaining balance due on its contract for materials and cabinet installation, totaling \$14,646.98. EJCC, in turn, brought a counterclaim against SCSI for faulty workmanship, totaling \$45,065.58. Following a bench trial, the trial court ruled in favor of SCSI on its claim in the amount of \$10,655.13