

**NO. 2018-42734**

<b>ABG GENERAL CONSTRUCTION</b>	<b>§</b>	<b>IN THE DISTRICT COURT</b>
<b>Plaintiff,</b>	<b>§</b>	
	<b>§</b>	
<b>V.</b>	<b>§</b>	<b>269TH JUDICIAL DISTRICT</b>
	<b>§</b>	
<b>3S REAL ESTATE INVESTMENTS,</b>	<b>§</b>	
<b>LLC- SERIES 3</b>	<b>§</b>	
<b>Defendant.</b>	<b>§</b>	<b>OF HARRIS COUNTY, TEXAS</b>

**PLAINTIFF'S RESPONSE TO  
DEFENDANT'S SUMMARY MOTION TO REMOVE LIEN**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**NOW COMES** Plaintiff, as Non-Movant herein, and requests this Honorable Court to DENY Defendant's Summary Motion to Remove Lien.

**I. Background**

A. The claimant is not required to file a response Movant's motion. Tex Prop. Code Section 53.160.

B. Movant is trying to trick the Court and make non-Movant unnecessarily work up the file. Non-Movants complied with the statute and sent the proper notices. See:

- Exhibit A Request Information to Property Owner
- Exhibit B Request Information to Contractor
- Exhibit C Notice of Claim to Owner, Contractor, and Property
- Exhibit D Letter sending copy of Lien to Owner, Contractor, and Property
- Exhibit E Lien Affidavit

Section 53 as enumerated in Movant's motion is complied with.

C. Non-Movants even request information to both contractor and property owner to determine if any information was lacking or incorrect per Texas Property Code sections 53.106, 53.107, and 53.159. It is undisputed that the notices were received. See movants Exhibit A. Movant failed to retain in their entirety and therefore are personally responsible for the entire

claim. According to Movant they “remitted full payment for invoice on January 9, 2017” after “receiving an invoice on December 29, 2016”. See Movants Exhibit A. Movant is supposed to retain for a full 30 days after receipt of an all bills paid affidavit, of which, Movant did not. See Movant’s Exhibit A. Movant did not even attain an all bills paid affidavit, they simply paid an invoice. If Movant would have waited the statutory period, then the full amount would have been retained.

D. “The claimant is not required to file a response”. Texas Property Code Sec. 53.160 (c).

## **II. Response**

A. Non-Movants complied with the statute and sent the proper notices. See Exhibit A - E.

Non-Movants have substantially complied as required:

a. The Texas Supreme Court has recognized that “substantial compliance” with the statutes “is sufficient to perfect a lien....” First Nat’l Bank in Graham v. Sledge, 653 S.W.2d 283, 285 (Tex 1983). The “liberal construction” of the materialman’s lien excuse failure to comply with the statutory required language. Wesco Distrib., Inc. v. Westport Grp., Inc., 150 S.W.3d 553, 558 (Tex 2004).

B. Non-Movants even request information to determine both property owner and contractor to see if any information was lacking or incorrect per Texas Property Code sections 53.106, 53.107, and 53.159. See Exhibit A and B. There was not a response.

C. Movants are attempting to confuse the Court to invalidate any liens. There is a clear fact dispute as to agreed price for services, the quality of work, and/or if work was performed or not. All prerequisites of Texas Property Code Section 53 have been met.

D. It is undisputed that the notices were received. See movants Exhibit A. Movant failed to

retain in their entirety and therefore are personally responsible for the entire claim. According to Movant they “remitted full payment for invoice on January 9, 2017” after “receiving an invoice on December 29, 2016”. See Movants Exhibit A. Movant is supposed to retain for a full 30 days after receipt of an all bills paid affidavit, of which, Movant did not. See Movant’s Exhibit A. Movant did not even attain an all bills paid affidavit, they simply paid an invoice. If Movant would have waited the statutory period, then the full amount would have been retained.

E. “The claimant is not required to file a response”. Texas Property Code Sec. 53.160 (c)

### **III. Oral Hearing AND Continuance Requested**

Movant’s motion is premature and has not allowed for the discovery period to complete. Non-Movant respectfully requests oral hearing and a continuance if the Honorable Judge of this Court does not deny Movant’s motion.

### **IV. Event not successful request bond**

A. Sec. 53.161. BOND REQUIREMENTS AFTER ORDER TO REMOVE. (a) In the order removing a lien, the court shall set the amount of security that the claimant may provide in order to stay the removal of the claim or lien. The sum must be an amount that the court determines is a reasonable estimate of the costs and attorney's fees the movant is likely to incur in the proceeding to determine the validity or enforceability of the lien. The sum may not exceed the amount of the lien claim.

### **V. Support outside Statute**

A. Though substantial compliance with these lien affidavit requirements is required, the requirements should be liberally construed for the purposes of protecting laborers and materialmen. Gill Sav. Ass’n v. International Supply, 759 S.W.2d 697, 700 (Tex. App.—Dallas 1988, den.). Prospective holders of mechanic’s liens are not required to search property records

to determine actual ownership at any time. Instead, the contractor (or subcontractor) is entitled to rely on representations of ownership made by the parties with whom the contractor deals. Valdez v. Diamond Shamrock Refining, 842 S.W.2d 273, 276 (Tex. 1992), Prop. C. § 53.054.

B. A statutory lien may be based on the promise implied by law to pay for beneficial services rendered and knowingly accepted. A recovery in quantum meruit may support a lien. Sixty-Seven Prop. V. Cutsinger Elec. Contr., 536 S.W.2d 268, 271 (Civ.App.—Corpus Christi 1976, no writ. The lien is perfected when a lien affidavit is properly filed and served; if the claim is unpaid, the original contractor may expect the lien to attach to the property. Contractor denied statutory lien when there was no showing that contract was substantially performed and removed was based on quantum meruit. Davidson v. Clearman, 391 SW2nd 48, 50-52 (Tex. 1965), Taylor v. Rigby, 574 S.W.2d 833, 837-839 (civ. App.—Tyler 1978, nre).

C. The owner has a direct relationship with an original contractor. The nature of the improvement and the contract price are part of the bargain of the parties, and the owner must plan to meet the obligations imposed by the agreement. If the owner fails to meet those obligations, it is appropriate for the owner to subject himself to damages and subject his property to a lien. Movant in this suit is clearly the original contractor per his testimony, thus directly liable and is not afforded the protections of Property code Section 53.001.

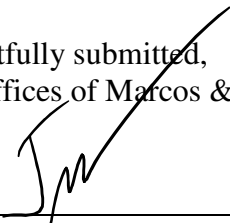
D. Funds must be retained for 30 days after last date of actual work. An owner who prematurely pays funds to an original contractor before that should be done, and is then personally liable to derivative claimant. Prop. C. § 53.084, TDIndustries v. NCNB Texas Nat. Bank, 837 S.W.2d 270, 272 (Tex.App—Eastland 1992, no writ).

### **PRAYER**

**WHEREFORE, PREMISES CONSIDERED**, Non-Movant prays that this Court will

deny Defendant's Summary Motion to Remove Lien, and for such other and further relief that may be awarded at law or in equity.

Respectfully submitted,  
Law Offices of Marcos & Associates, P.C.

By:   
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**CERTIFICATE OF SERVICE**

I certify that on September 18, 2018 a true and correct copy of Plaintiff's Response to Defendant's Summary Motion to Remove Lien was served on all counsel of record in accordance with Rule 21a of the Texas Rules of Civil Procedure.

  
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Javier Marcos, Jr.