DESIGN PROFESSIONAL LIENS REVISITED: ISSUES RAISED BY *MULTI/TECH*

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A recent case concerns an Oregon construction lien claimed by an engineer. *Multi/Tech Engineering Services, Inc. v. Innovative Design & Construction*, LLC, 274 Or App 389 (Oct. 14, 2015) The case is important because it raises at least two important issues about the potential Oregon lien rights of architects, landscape architects, land surveyors and registered engineers (together referred to in this article as "Design Professionals").

1. Who is an "agent of the owner?" To claim a lien, a Design Professional must provide the services described in ORS 87.010(5) [1] "at the request of the owner *or an agent of the owner.*" "*Agent of the owner*" is not defined in ORS Chapter 87[2] and this author is not aware of any reported case law that construes this statutory phrase.

The facts of *Multi/Tech*, however, provide at least one trial court's view. In *Multi/Tech*, an owner of real property enlisted Innovative Design & Construction, LLC[3] under an oral agreement to perform "all [of] the [initial] ground work" for development of the property, including obtaining design work, City approvals, and project financing. *Multi/Tech*, 274 Or App at 392. Innovative then hired Multi/Tech, a registered engineer, to perform the design services for the development approvals. *Multi/Tech*, 274 Or App at 393. On these facts, the Appeals Court affirmed the trial court's finding that Innovative was the "agent in fact" of the property owner, but only in the context of affirming that the owner was liable to Multi/Tech on a breach of contract claim. *Id.* at 399. Therefore, the Court's acceptance of Innovative as an agent of the owner is dicta insofar as analyzing lien rights.

While *Multi/Tech* did not specifically address the definition of "agent" for purposes of ORS Chapter 87, sources of law from other contexts, however, may provide guidance. For example, in *Vaughn v. First Transit, Inc.*, 346 Or 128 (2009), the Court evaluates the term "agent" used (but not defined) in the Oregon Tort Claims Act ("OTCA")[4] and declares:

> To be an "agent" — using the well-defined legal meaning of that term — two requirements must be met: (1) the individual must be subject to another's control; and (2) the individual must "act on behalf of" the other person. *Vaughn*, 346 Or at 137.

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[1] ORS 87.010(5) provides: "An architect, landscape architect, land surveyor or registered engineer who, at the request of the owner or an agent of the owner, prepares plans, drawings or specifications that are intended for use in or to facilitate the construction of an improvement or who supervises the construction shall have a lien upon the land and structures necessary for the use of the plans, drawings or specifications so provided or supervision performed."

[2] An "agent of the owner" described in ORS 87.010(5) should not be confused with a "construction agent" defined by ORS 87.005(3) who is relevant to most other construction liens by contractors and suppliers under ORS 87.010(1).

[3] Interestingly, Innovative is referred to as an "unlicensed contractor" in the case caption without any discussion in the opinion.

[4] In *Vaughn*, the issue was whether a company that provided airport shuttle bus drivers to the Port of Portland was an "agent" of the Port, such that the shuttle bus company was entitled to protection under the Oregon Tort Claims Act from third party claims. *Vaughn*, 346 Or at 131; ORS 30.265(1) (Agents of a public body who commit torts while acting within the scope of their employment or duties are entitled to indemnification from third party claims.).

Of particular significance, the court assigned importance to the ability of the principal to give "interim" instructions to distinguish "agents" from independent contractors:

> The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 comment f (2006)).

Vaughn, 346 Or at 136.

Courts may also look to other statutes that define or characterize certain persons or entities as having attributes consistent with agency. *See e.g.* ORS 67.090(1) ("Each partner is an agent of the partnership for the purpose of its business"); ORS 63.140(1) (Subject to certain qualifications, "each member is an agent of the limited liability company"); ORS 100.405 ((1)(a) ("An association of unit owners shall * * * serve as a means through which * * * [condominium] unit owners may take action).

2. Notice of Right to a Lien. A second significant issue in *Multi/Tech* is that the Court of Appeals held the construction lien was invalid because the trial court record did not establish whether the lien claimant either provided a Notice of Right to a Lien ("Notice") (as required by ORS 87.021(1)) or avoided the requirement to provide a Notice under the "commercial improvement" exception in ORS 87.021(3).

In order to perfect a valid lien, ORS 87.021(1) requires a Design Professional to provide a Notice (in substantially the form required by ORS 87.023) to the owner of the site if "material, equipment, services or labor" is provided at the request of someone other than the owner.[5] A Notice is not required, however, if the lien claimant "performs labor upon a commercial improvement or provides labor and material for a commercial improvement." See ORS 87.021(3).

The lien claimant Multi/Tech argued that the trial court record shows the lien claimant provided a Notice to Innovative as an attachment to its agreement for services, and therefore, Multi/Tech served the notice upon the owner. *Multi/Tech*, 274 Or App at 397 n.5. Implicitly, the lien claimant apparently argued that notice provided to Innovative as an agent of the owner discharged the obligation to provide Notice to the owner (i.e. that notice to agent constitutes notice imputed to the principal). Of course, such an argument contradicts the plain language of the statute – that if a Design Professional does not contract with the owner, a Notice must be given to the owner of the site under ORS 87.021(1). The Court side-stepped the lien claimant's argument simply by focusing on the fact the Notice of Right to a Lien form attached to the lien claimant's contract had not been filled out with the information required by ORS 87.023, so the notice failed to substantially comply with ORS 87.023 as required by ORS 87.021(1). *Multi/Tech*, 274 Or App at 398 n.6. Had the lien claimant properly filled out the Notice, however, the Court would have had to confront a more interesting issue: Can notice given to the agent be imputed to the owner under common law agency principles or does ORS 87.021(1) trump agency principles by explicitly requiring a lien claimant give notice to the owner, not the agent?

As noted above, the Court also disallowed the lien because Multi/Tech did not provide labor on a "commercial improvement" as required to avoid the Notice requirement under ORS 87.021(3). The Court held that the onsite activities of Multi/Tech were too incidental to qualify Multi/Tech as a person who "performs labor upon" or "provides labor and materials" to a "commercial improvement" as is necessary to avoid the Notice of Right to a Lien requirement under the ORS 87.021(3) exception. *Id.* at 395-396 (citing *Teeny v. Haertl Constructors, Inc.*, 314 Or 688, 597-599 (1992)). Multi/Tech's onsite activities consisted of digging some test holes,

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[5] ORS 87.021(1) also contains a prohibition against a Design Professional claiming a lien under ORS 87.010(5) or (6) if services are provided for an owner-occupied residence at the request of an agent of the owner.

taking measurements, conducting "field exploration work" and taking a soil sample. *Id.* at 398.

The court failed to note, however, that the term "services" – explicitly mentioned in the rule requiring the Notice in ORS 87.021(1) – is not mentioned anywhere in the "commercial improvement" exception to providing Notice in ORS 87.021(3). Had the "labor" performed onsite by Multi/Tech been more than incidental, ORS 87.021(3) still does not provide an exception to the requirement that a lien for "services" provide a Notice of Right to a Lien. The seemingly best result Multi/Tech could have obtained is a lien for the onsite "labor" – the test holes, measurements and field exploration under ORS 87.010(1).[6]

3. Conclusion. The *Multi/Tech* case raises some interesting questions that Design Professional lien claimants face, but ultimately falls short of providing clear guidance to interpretation of the statutes associated with Design Professional liens.

[6] Note that "labor" and "services" is not defined in ORS Chapter 87, however, labor is clearly described in reference to ORS 87.010(1) and (2) liens, so by elimination, "services" must refer to those liens claimed under ORS 87.010(5) by Design Professionals. See 87.021 (1) ("Except when material, equipment, *services* or labor described in ORS 87.010 (1) to (3), *(5) and (6)* is furnished at the request of the owner, a person furnishing any materials, equipment, *services* or labor described in ORS 87.010 (1) to (3), *(5) and (6)* for which a lien may be perfected under ORS 87.035 shall give a notice of right to a lien to the owner of the site. * * *").