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CONSTRUCTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law. Please contact us for more information or e-mail us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

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At Gardner, Willis, Sweat & Handelman, we offer a wide range of services including Banking; Bankruptcy; Business Law; Construction Law; Employment Law; Estate and Tax Planning; General Litigation and Appeals; Governmental Law; Real Estate; Trucking Litigation, Social Security Disability and Workers' Compensation.

Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in these and other areas. Please call Sherman at 229-883-2441 for a consultation with him, or send an e-mail to him at sherman.willis@gwsh-law.com

All inquiries are confidential.

Review the following statute and if you are a contractor, ensure that you are providing the required notice.

Official Code of Georgia § 8-2-41

Notice to consumer prior to beginning initial construction work

- (a) Upon entering into a contract for sale, construction, or improvement of a dwelling, the contractor shall provide notice to the owner of the dwelling of the contractor's right to resolve alleged construction defects before a claimant may commence litigation against the contractor. Such notice shall be conspicuous and may be included as part of the contract.
- (b) The notice required by subsection (a) of this Code section shall be in substantially the following form:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED, OR REPAIRED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

Archer Western Contractors, Ltd. v. Estate of Mack Pitts 292 Ga. 219 (2012)

The Supreme Court of Georgia decided this case on November 27, 2012. One of the issues presented to the Court was whether the City of Atlanta (hereinafter "City") breached its contract with the general contractor by failing to ensure that sub-contractors carried sufficient automobile liability insurance up to \$10 million. Holding that the Court of Appeals erred in its determination of this issue, our state's highest court held that it is necessary for courts to consider the separate contractual obligations of each contracting party in order to determine exactly what that party obligated itself to do. After reviewing the various agreements, the Court could not find a promise by the City to ensure that sub-contractors carried adequate insurance. Although the City offered an insurance program for which the City was responsible and was to bear expense, **procuring and maintaining automobile liability insurance was the responsibility of the general contractor and sub-contractors.**

Robertson, et al. v. Ridge Environmental, LLC
January 18, 2013 - Court of Appeals of Georgia - Materialman's Liens

In 2005, Ridge Environmental was hired by B. Kay Builders, the contractor, to clear land for Robertson, Robertson Jr., and C & H Properties, the three property owners and Petitioners in this case. Ridge filed seven claims of lien against the three Petitioners' properties on December 21, 2005. The liens stated the amount claimed, described the property at issue, and stated they were related to a claim that was due and payable on November 11, 2005 for materials furnished at the request of the individual property owners. B. Kay Builders filed suit against Ridge in 2006 and Ridge counter-claimed for the amount of Ridge's liens. The property owners tried to have Ridge's liens declared invalid, claiming that Ridge did not file suit to recover its liens within 365 days as required under O.C.G.A. §44-14-361.1(a)(3), and because the liens did not state the materials were delivered to the contractor, B. Kay Builders.

Materialman's liens in Georgia are highly controlled by statute and precise filing and timing are crucial to ensure a valid lien. **Georgia statute O.C.G.A. §44-14-361.1 does not require that the contractor be named in a claim of lien but does require that a party file suit to recover the lien within 365 days of filing the lien.** Each lien filed by Ridge properly listed the property description where the materials were delivered and used, the amount claimed, the date it became due, and the property owner's name. The Court of Appeals found that Ridge's liens were valid, as the contractor's name was not required. Furthermore, the Court of Appeals found that Ridge's counterclaim against the general contractor in 2006 satisfied the statutory requirement to file suit within 365 days of the date of filing the liens.

Pinnacle Properties V, LLC v. Mainline Supply of Atlanta, LLC
November 30, 2012 - Court of Appeals of Georgia - Materialman's Liens

Mainline Supply of Atlanta supplied materials for a commercial project being constructed by Pinnacle on land owned by Kennesaw Development Authority (KDA). Pinnacle originally owned the land for the project, but deeded it to KDA, who then leased the property back to Pinnacle. The general contractor on the project failed to pay Mainline for the materials it supplied to the project forcing Mainline to file a materialman's lien against Pinnacle and KDA. Mainline subsequently sought to foreclose its lien.

KDA was ultimately dismissed from the lawsuit by the lower court because the agreements between KDA and Pinnacle severed the ownership of the land from the ownership of the building so that KDA retained no ownership interest in the building. Pinnacle objected to the foreclosure and argued that its interest in the property was only usufruct, or license to use, which conveys no property interest. Mainline argued that Pinnacle held a fee-simple interest in the improvements to the property. The Georgia Court of Appeals rejected the arguments made by Pinnacle and Mainline and determined that Pinnacle held an estate for years, which is subject to a materialman's lien, holding that "[e]very legal interest in real and personal property can be seized and sold." Accordingly, Mainline could pursue liens against the property owner and the contractor, as long as the contractor has a legal interest in the property.

This newsletter was prepared by our associates, including Kimberly Guthrie. Kimberly earned her Juris Doctorate from the University of Mississippi School of Law in 2005. She is a member of the Georgia, Mississippi, and Alabama State Bars. Kimberly's practice includes representation of financial institutions, formation of new businesses, workers' compensation litigation defense, labor and employment litigation, commercial transactions, and general business litigation. Contact Kimberly at 229-883-2441 or e-mail her at kimberly.guthrie@gwsh-law.com.

Mark Pickett represents clients in the construction and trucking industries. He embraces a hands-on approach that includes offering immediate, on site investigation of catastrophic accidents. Mark has a thorough understanding of trucking and construction trade practices, which has contributed to his success in jury trials. Mark serves on the Board of Directors for the Boys and Girls Club of Albany and is the Chairman of the Board of Directors for the Chehaw Park Authority. Contact Mark at 229-883-2441 or e-mail him at mark.pickett@gwsh-law.com.



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