



Mechanic's lien update: What is waived and what can you recover?

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In *Thompson Thrift Construction v. Lynn*, 2017-Ohio-1530 (April 21, 2017), the 5th District held that change orders and retainage were not covered by lien waivers signed by a subcontractor when the subcontractor's claims for the same had not accrued at the time of the lien waiver's execution. The court further held that the subcontractor was not limited by the amount listed on the lien itself, but could recover a larger amount provided that the evidence presented supported such larger amounts.

In *Thompson Thrift*, a subcontractor was terminated from a project after slightly more than one-half the project had been completed. At the time the subcontractor executed his last partial lien waiver, and, shortly before being ordered off of the project, the subcontractor was owed \$77,310 in retainage and \$80,514.11 in change orders. Per the contract documents, the retainage was not payable at the time the partial lien waivers were signed. The parties had also previously agreed that all change orders would be calculated at the end of the project. Therefore, neither retainage nor change order payments were owed to the subcontractor at the time the partial lien waivers had been executed.

The prime contractor argued that the subcontractor's claims for retainage and change orders were waived by virtue of the partial lien waivers. The trial court disagreed, holding that those sums were not due at the time the waivers were executed and thus were not waived. On appeal, the 5th District affirmed the trial court's order and held that the subcontractor was owed the retainage and change order amounts. In so holding, the court held that sums not due at the time of the waiver's signature cannot be excluded by virtue of the agreement between the parties and the waiver's language when the waiver only provides that the subcontractor is waiving claims for the sums having come due on or before the date the waiver is signed.

The court also held that the subcontractor could recover the amounts for the retainage and the change orders despite the fact that the subcontractor failed to include said amounts in the lien itself. In so holding, the court found that Ohio "Courts have held that a lien is not invalidated if the state amount is incorrect when the lienholder testifies to the amount of the lien. *In re Quaistan Corp.*, 303 B.R. 149 (Bankr. S.D. Ohio 2003); *Thomas v. Huesman*, 10 Ohio St. 152 (1859); *Tucker Construction, Inc. v. Kitchen*, 9th Dist. Summit No. 16636, 1995 WL 89431 (March 1, 1995)."

KEY TAKEAWAYS

- Amounts earned but not yet payable and not specifically waived in a lien waiver are not waived by a contractor.
- Lienholders are not limited by the amount listed on their mechanic's lien so long as they provide evidence as to the additional sums owed and can prove they are entitled to recovery.



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