

Temporary Employment Agency Allowed to Enforce Mechanics Lien¹

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In June of this year [Ed. Note: 2007], The Texas Supreme Court decided that a temporary employment agency which places workers at a construction project under a contract with a subcontractor can enforce a mechanics lien under Chapter 53 of the Texas Property Code. The Court treated the temporary employment agency the same as a supplier of materials, reasoning that just as a supplier “furnishes material” for the project, the temporary employment agency “furnished labor” for the project within the meaning of section 53.021 of the Texas Property Code.

In *Reliance National Indemnity company, L&T, J.V., vs. Advance'd Temporaries, Inc.*, a general contractor agreed with a subcontractor that the subcontractor would frame, drywall, and roof an apartment project. The subcontractor did not have an adequate workforce to properly man the job, and therefore sought additional workers from a temporary labor agency. The agreement between the subcontractor and temporary agency provided that the workers supplied were the employees of the temporary agency and obligated the temporary agency to obtain workers’ compensation and general liability insurance for them. The temporary agency paid the temporary employees directly and also paid their payroll taxes. The subcontractor supervised and controlled the temporary employees while on the job site but the temporary agency agreed to promptly replace any worker upon two hours notice if the temporary worker’s performance was not satisfactory.

The general contractor paid the subcontractor all that was owed under its subcontract, however, the subcontractor did not pay the temporary agency for labor furnished to the subcontractor on the project. The temporary agency filed a mechanics lien asserting right under the Texas Property Code claiming it “furnished labor” to the project. The general contractor contested the validity of the mechanics lien.

The case turned on whether the temporary agency in fact “furnished labor” within the meaning of section 53.021 of the Texas Property Code. The general contractor argued that the temporary agency did not furnish labor as required by the Texas Property Code because the temporary agency did not control or supervise the temporary workers nor was it responsible for the quality of the work performed, and that the temporary workers were the subcontractor’s employees pursuant to the legal tort doctrine of “borrowed-employee”. Pursuant to this doctrine, the general contractor argued that the temporary workers were the employees of the subcontractor, not the employees of the temporary agency, because the subcontractor controlled and supervised them.

The Court rejected the tort test of “control and supervision” under the borrowed-employee doctrine relying instead on a “contractual relationship” test for purposes of determining which party furnished labor. The Court reasoned that the party controlling or supervising the workers and the quality of the work was not as important as who the parties contractually agreed was the employer of the employees. The contract between

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the subcontractor and the temporary agency clearly stated that the temporary workers remained the employees of the temporary agency and that the responsibilities retained by the temporary agency, [i.e. obtaining insurance, submission of employment taxes, paying the temporary workers salaries, determining which employees to provide on a daily basis] was more than a mere administrative function but rather showed that the temporary agency had actual responsibility as the employer, even though the subcontractor controlled and supervised the temporary workers work. The court determined that tort doctrine had no application because the parties responsibilities were spelled out by the contract.

Practice Pointer: Treat temporary agencies providing labor to a subcontractor on the project the same as you would a supplier providing material to a subcontractor on the project.
