

**IN THE CIRCUIT COURT OF WHEREVER COUNTY,  
STATE OF ALABAMA**

<b>PARTY 1,</b>	)	<b>CV-YEAR-CASE NUMBER</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>PARTY 2,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

The Defendant, by and through his attorney of record, **YOUR NAME**, hereby submits to the Court as provided by Rule 56 of the Alabama Rules of Civil Procedure, the following Motion for Partial Summary Judgment, With Supporting Narrative Summary. In support of said motion, Defendant offers the following:

1. The documentary evidence attached hereto, and incorporated by reference;
2. The Affidavit of the Defendant;
3. The Narrative Summary and Memorandum filed and submitted with this Motion.

Wherefore, premises considered, the Defendant requests that this Honorable Court grant his motion for summary judgment against the Plaintiff.

Dated:

\_\_\_\_\_  
YOUR NAME  
Attorney for Defendant

IN THE CIRCUIT COURT OF WHEREVER COUNTY,

STATE OF ALABAMA

PARTY 1, ) CV-YEAR-CASE NUMBER  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PARTY 2, )  
 )  
 Defendant. )

NARRATIVE SUMMARY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

1. Undisputed Facts

On or about June 8, 2006, the Defendant, entered into an agreement with a residential contractor to construct a residential dwelling at SOME PLACE. See affidavit of Defendant.

The Defendant is informed and believes that contractor entered into an agreement sometime after June 8, 2006, with the Plaintiff, a sub-contractor, whereby subcontractor would provide certain materials for the construction of the Defendant’s residential dwelling. See affidavit of Defendant.

On or before **October 31, 2006**, the Plaintiff completed deliveries of the materials, and/or labor performed, as referred to herein-above. See affidavit of Defendant.

On **June 1, 2007**, Plaintiff filed the herein-action against contractor and Defendant, claiming a lien on Defendant’s property as provided for by Section 35-11-210, *et seq.*, of the Code of Alabama (1975). See paragraph four (4) of the Plaintiff Complaint and Amended Complaint, which is part of the Court file.

On **June 28, 2007**, the Plaintiff filed a “Lis Pendens” with the Probate Court of Wherever County, State of Alabama, in an attempt to comply with the requirements of Section 35-11-215 of the Code of Alabama (1975), i.e., the filing of a Notice of Lien. A true and correct copy of said Lis

Pendens is attached hereto, marked as **Exhibit 1**, and incorporated by reference.

## **2. Plaintiff's Claims**

The Plaintiff seeks to enforce the alleged non-payment of materials and labor by virtue of the lien it filed on June 28, 2007, and the herein action it filed on June 1, 2007.

## **3. Defendant Position**

The Defendant seeks partial summary judgment against the Plaintiff to expunge the Lis Pendens filed by Defendant on June 28, 2007, from the Probate Record because Plaintiff, as a sub-contractor failed to comply with the requirements of Section 35-11-221 of the Code of Alabama (1975), to wit: to timely file a Notice of Lien and/or Lis Pendens within four (4) months of the last date materials and/or labor were delivered to the above-referenced real property.

## **4. Standard For Summary Judgment**

Summary Judgment is properly entered by a trial Court and affirmed on appellate review when the pleadings, depositions, answers to interrogatories and admissions on file, together with Affidavits, if any, show that there is no genuine issue as to an material fact and that the moving party is entitled to judgment as a matter of law. Alabama Rule of Civil Procedure 56(c)(3).

Although the party moving for Summary Judgment bears the burden to show that it is entitled to one, once the moving party has made a **prima facie** showing or presented evidence that, if uncontested, would entitle him to judgment as a matter of law, the non-moving party must set forth specific evidence that would present a genuine issue of material fact for consideration by a jury in order to avoid Summary Judgment. Gillion v. Alabama Forestry Association, 597 So. 2d 1315 (Ala. 1992.)

The non-moving party must present **substantial evidence** supporting his or her position to avoid Summary Judgment. **Substantial evidence** is evidence of such weight and quality that a fair minded person in exercise of impartial judgment can reasonably infer the existence of facts sought

to be proven. Lucas v. ALFA Insurance Company, 622 So. 2d 907 (Ala. 1993).

In opposing a Motion For Summary Judgment, a party cannot use conclusory allegations, speculation or subjective beliefs to satisfy the requirement of substantial evidence. Peterman v. Auto Owner's Insurance Company, 623 So. 2d 1059 (Ala. 1993.)

## 5. Applicable Law

### A. **Sub-Contractors Are Entitled To A Mechanics Lien If They Follow The Provisions of Governed By Section 35-11-210 of the Code of Alabama (1975).**

Section 35-11-210 of the Code of Alabama (1975) states in relevant part:

Every mechanic, *person*, . . . who shall do or perform any work, or labor upon, or furnish any material . . .for any building or improvement on land, . . .by virtue of any contract with the . . . contractor, or *subcontractor*, upon complying with the provisions of this division, shall have a lien therefor on such building or improvements and on the land on which the same is situated, . . .” Emphasis added.

### B. **A Sub-Contractor Entitled To A Mechanics Lien Must File A Verified Lien In The Probate Court of The County Where Said Real Property Is Situated.**

Section 35-11-213 of the Code of Alabama (1975) states in relevant part:

*“It shall be the duty of every person entitled to such lien to file in the office of the judge of probate of the county in which the property upon which the lien is sought to be established is situated, a statement in writing, verified by the oath of the person claiming the lien, . . . . Unless such statement is so filed the lien shall be lost..”* Emphasis added.

### C. **If A Sub-Contractor Fails To File A Lien Within Four (4) Months After The Last Item Of Work Or Labor Has Been Performed, Said Lien Is Lost.**

Section 35-11-215 of the Code of Alabama (1975) states in relevant part:

*The lien declared in this division shall be deemed lost unless the statement referred to in section 35-11-213 shall be filed by every original contractor within six months and by every journeyman and day laborer within 30 days, and by every other person entitled to such lien within four months, after the last item of work or labor has been performed or the last item of any material, fixture, engine, boiler or machinery has been furnished for any building or improvement on land or for repairing, altering or beautifying the same under or by virtue of any contract with the owner or proprietor thereof, or his agent, architect, trustee, contractor or subcontractor.”* Emphasis added.

**D. An Action To Enforce A Mechanics Lien Must Be Instituted Within Six (6) Months After The Maturity Of The Entire Indebtedness.**

Section 35-11-221 of the Code of Alabama (1975) states:

*Any action for the enforcement of the lien declared in this division must be commenced within six months after the maturity of the entire indebtedness secured thereby, except as otherwise provided in this division. Emphasis added.*

**6. Legal Argument**

**A. The Plaintiff, As A Sub-Contractor, Was Required To File His Lien Against Defendant's Real Property Within Four (4) Months Of The Last Item Of Work Or Labor.**

As the undisputed facts reveal, contractor had entered into an agreement with Plaintiff for concrete work and water proofing. See **Exhibits 2 and 3**. Defendant had entered into an agreement with Contractor to build his residential dwelling. Plaintiff was therefore a sub-contractor within the meaning of Sections 35-11-210, and 35-11-215 of the Code of Alabama (1975).

Section 35-11-215 of the Code of Alabama (1975) requires that: (1) contractors must file their liens within six (6) months of the last item of work; (2) journeymen with thirty (30) days; **and (3) sub-contractors within four (4) months.**

Defendant avers that Plaintiff was a sub-contractor and was therefore required to file his lien within four (4) months of **October 31, 2006**, which was the last day he had provided work, material, or labor; said expiration date being February 28, 2007.

**B. The Plaintiff, As A Matter of Law, Lost His Right To File A Lien On Defendant's Property Because He Failed To File Said Lien Within Four (4) Months of October 31, 2006.**

As the record reveals, the Defendant did not file his lien, i.e., Lis Pendens, against Defendant's real property until June 28, 2007.

Section 35-11-213 requires that anyone entitled to a lien must file a said lien in the office of the probate judge (within the time prescribed in Section 35-11-215), and if no **“. . .such statement is so filed the lien shall be lost.”**

Given the fact that the Plaintiff did not timely file its lien against the Defendant's real property, the right to said lien is lost, or forfeited, as a matter of law.

**B. The Plaintiff Cannot, As A Matter Of Law, Enforce His Lien Against The Real Property Of The Defendant Because It Is Impossible To Commence An Action Within Six Months Of The Filing Of Its Mechanics Lien.**

Oddly, the Plaintiff filed a lawsuit against the real property of Defendant *before* he filed his notice of lien and/or lis pendens; although the Plaintiff alleges in its complaint said action was brought to enforce and/or claim a lien on said real property.

Section 35-11-221 of the Code of Alabama (1975) *specifically* required the Plaintiff to enforce any lien by instituting an action within four (4) months of the maturity of the entire indebtedness. The Plaintiff failed to timely file a lien as prescribed by law and is therefore time barred by 35-11-221, to enforce the lien he did file.

The Court of Civil Appeals, in determining the application of Section 35-11-221 stated in Southtrust Bank of Dothan, N.A. v. Hornsby, 555 So.2d 1107 (1989) the following:

““We readily agree with the principle of law stated in Grimsley v. First Ave. Coal & Lmbr. Co., [217 Ala. 159, 115 So. 90 (1928) ], that a materialman's lien attaches and is created at the time the work on the building or improvement commences, and it is not defeated by a subsequent sale or conveyance of the property, *provided the lienor perfects his lien in accordance with the requirements of law*, and it is immaterial that the conveyance was executed before suit is brought to enforce the lien. *But under our statute the lien can be lost by failure to pursue it by timely filing of suit for its enforcement.* In Sorsby [v. Woodlawn Lumber Co., 202 Ala. 566, 81 So. 68 (1919)] and in Home Federal Savings & Loan Assn. v. Williams, 276 Ala. 37, 158 So.2d 678 (1963), we said: '*The lien the materialman or mechanic acquires is by virtue of the statutes only, and the requirements of the statutes as to acquiring and enforcing it must be pursued, else it is lost* or does not exist. \* \* \*' (Emphasis [added in Lily Flagg ])" 85 Ala. at 407, 232 So.2d at 648. *We find in the instant case that the lien was lost when Hornsby failed to timely file the suit to perfect his lien.*” Emphasis added.

See also, Government Street Lumber Company v. Baldwin County Savings & Loan Association, 532 So.2d 645 (Ala.Civ.App., 1988), wherein the Court of Civil Appeals affirmed a trial court decision that ruled a lumber company lost its lien by failing to comply with Section 35-11-215, i.e., file a suit to enforce said lien within six (6) months after the last item of work or labor had

been performed or the last item had been furnished. After reviewing the trial court record, the *Government, supra.*, court stated, the following:

“There was clearly evidence to support the trial courts judgment. We find, therefore, that the lumber company’s *failure to comply with the technical requirements set for in Section 35-11-215 resulted in an ineffective and unenforceable lien* [Citations omitted].” Emphasis added.

The *Government, supra.*, decision added:

“We point out that to create an enforceable lien in the case at bar, the lumber company not only had to file its lien within six months of the last delivery date, *but it also had to commence suit within six months after the maturity of the indebtedness.*” Emphasis added.

The Plaintiff not only neglected to file a statutory lien timely, it filed a lawsuit before it filed the lien. In addition, the complaint filed by the Plaintiff complaint was itself more than four (4) months after the last work, labor or material provided. The statutory and case law governing these liens require strict compliance with Section 35-11-221; and the failure of a party to comply with this section results in the lien being unenforceable as a matter of law.

### **Conclusion**

Based upon the forgoing, it is respectfully requested that this Honorable Court enter an Order granting the Defendant’s motion for partial summary judgment that: (1) Expunges the June 28, 2007, lien filed by the Plaintiff against the real property of Defendant; and (2) grant such other and further relief as the Court deems just and proper.

Dated:

\_\_\_\_\_  
YOUR NAME

### **CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Motion For Partial Summary Judgment on OTHER ATTORNEY via E-File this day of \_\_\_\_\_.

\_\_\_\_\_  
YOUR NAME