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STATE OF KANSAS

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January 29, 1975

Opinion No. 75- 29

Mr. Ellsworth E. Crowley
Executive Secretary
State Board of Engineering Examiners
12th Floor - 535 Kansas Avenue
Topeka, Kansas 66603

Dear Mr. Crowley:

We have your letter requesting our opinion concerning the interpretation of K.S.A. 58-201 (Supp. 1973) and K.S.A. 60-1101 (Supp. 1973). Specifically you inquire as to whether these statutes encompass design services performed by an engineer, and whether an engineer's design services may be interpreted as being "used or consumed" in the improvement of real property.

K.S.A. Supp. 58-201 provides in pertinent part:

> "Whenever any person at, or with the owner's request or consent shall perform work, make repairs or improvements on any goods, personal property, chattels, horses, mules, wagons, buggies, automobiles, trucks, trailers, locomotives, railroad rolling stock, barges, aircraft, equipment of all kinds, including but not limited to construction equipment, vehicles of all kinds, and farm implements of whatsoever kind, a first and prior lien on said personal property is hereby created in favor of such person performing such work or making such repairs or improvements and said lien shall amount to the full amount and reasonable value of the services performed, and shall include the reasonable value of all material used in the performance of such services . . ."

K.S.A. Supp. 60-1101 provides:

> "Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, under a contract with the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment, material or supplies furnished, and for the cost of transporting the same, and the lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, material or supplies at the site of the property subject to the lien. When two or more such contracts are entered into applicable to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest lien of any of them."

Our research fails to disclose any Kansas decisions which are directly in point, but there are several decisions which are analogous to the submitted questions. In Amazon Irrigating Co. v. Briesen, 1 Kan. Ct. App. 758, 41 P. 1116 (1895), plaintiff entered into employment with the defendant corporation to perform engineering and surveying work. Defendant furnished plaintiff with blank books, papers, maps, charts and profiles to make plots and field maps. Plaintiff refused to turn the completed items over to defendant until he was paid for his services. The court held plaintiff was entitled to a lien on the materials furnished by defendant. The applicable statute (Gen. Stat of 1889, Ch. 58 § 1) provided:

> "Whenever any person shall entrust to any mechanic, artison or tradesman materials to construct, alter or repair any article of value or any article of value to be altered or repaired such mechanic, artison or tradesman shall have a lien on such article."

Syllabus 4 of the opinion states:

> "A civil engineer who makes field-notes, maps, charts and drawings while employed by a corporation in and about the construction of an irrigating canal, on books and papers furnished by the corporation, is entitled to a lien on such field-notes, maps, charts and drawings, and has a right to retain possession of the same until he shall be paid for making the same."

In Lumber Co. v. Douglas, 89 Kan. 308, 131 P. 563 (1913) the Court stated:

> "The mechanic's lien, although unknown to the common law, is not to be given a narrow and strict construction. It is intended as enlargement of the rights of those who furnish labor and material and who cannot conveniently protect themselves in any other way."

The Court concluded:

> ". . . such statutes are to be liberally construed with a view of advancing the beneficent purposes which the legislature was seeking to accomplish by the enactment."

A close analogy to an engineer's design services is the work performed by an architect. Generally, when an architect has prepared the plans and specifications for the improvement of real property and has then supervised the construction done or repairs made, a majority of courts allow the lien. Statutes employing general langugage such as "any person" will more likely be construed to include an architect's services than statutes containing a specific description of persons entitled to a mechanic's lien. Where an architect merely draws the plans and specifications

and does not perform supervisory work at the construction site, the courts are divided as to lien entitlement. [28 A.L.R. 3d 1014 (1969)]

Kansas appears to recognize the rule that an architect may be entitled to a lien for services rendered by an architect, although the question has not been expressly decided. In General Air Conditioning Corp. v. Stuewe, 156 Kan. 182, 131 P. 2d 638 (1942), the court cited 60 A.L.R. 1257 (1929):

> ". . . it appears that the rule obtains in a majority of jurisdictions that an architect who furnishes plans for and supervises the erection of a building is entitled to a lien; that a number of courts have held to the contrary; the two states have allowed a lien for supervision during the course of construction; and that the decisions are in conflict whether an architect is entitled to a lien for only drawing plans."

In Goodyear Tire & Rubber Co. V. Jones, 433 F. 2d 629 (10th Cir. 1970) Judge Hill stated in his dissenting opinion; construing Kansas law:

> "Although there is a lack of complete harmony among the jurisdictions, the weight of authority allows the enforcement of a lien claim for supervising the construction of a building or improvements. Numerous decisions now recognize that 'labor' would indicate, and is broad enough to include mental or physical toil, bodily or intellectual exertion. Had an architect been engaged to render his services in the construction of the project, he would from all appearances, be entitled to a lien, even though such services are not manual labor [citing General Air Conditioning Corp. v. Stuewe, supra]."

It is by no means clear that engineers' design services are lienable under K.S.A. 60-1101. In cases involving liens for architects' services, some courts hold that a lien may be had therefor only when the architect himself also supervises the construction or repair. When the architect does supervise such work, there arises a further division among the decisions, whether the lien is for the value of the labor performed in such supervision, or whether the architect is then entitled to a lien for both plans and supervision. See, e.g., 28 A.L.R.3d at 1021.

The present decisions of the Kansas Supreme Court have not touched closely upon these precise distinctions, and accordingly, do not provide an adequate basis upon which to predicate a firm and closely supported anticipation of its ruling upon the lienability of engineers' design services. Given the complete lack of harmony among decisions from other jurisdictions, and the lack of clearly pertinent definitive authority in our own, we can only suggest that the question is yet to be determined in this state. Engineers' design services seem reasonably analogous to architects' services in drawing plans and specifications, and there is some basis upon which to predict that the Kansas Supreme Court might uphold such a lien. However, the prerequisites necessary to support a lien for labor involved in architects services are not clearly defined by the Court, and accordingly, there is lacking a firm basis for analogy to engineers' services.

Yours very truly,

Curt Schneider

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