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FILED  
ENDORSED

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02 DEC -2 PM 4:07  
LEGAL PROCESS #11

8 Attorneys for Defendants and Cross-Complainants  
9 David E. Ernce and Lynn Trinka Ernce



10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SACRAMENTO

2530

12 MJB/BIXBY CONSTRUCTION, INC.,

Case No. 01AS07168

13 Plaintiff,

**NOTICE OF MOTION AND MOTION  
TO EXPUNGE MECHANICS' LIEN**

14 v.

15 DAVID AND LYNN ERNCE,

16 Defendants.

17 DAVID E. ERNCE and LYNN TRINKA  
18 ERNCE,

Date: December 23, 2002  
Time: 9:00 a.m.  
Dept. 54, 800 9th Street  
Sacramento, CA 95816

19 Cross-Complainants,

20 v.

21 MJB/BIXBY CONSTRUCTION, INC., a  
22 corporation and MARK J. BIXBY,  
23 individually and dba BIXBY  
24 CONSTRUCTION,

Complaint Filed: November 26, 2001  
Trial Date: None Set

25 Cross-Defendants.

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28 ///

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1 **TO PLAINTIFF/CROSS-DEFENDANT MJB/BIXBY CONSTRUCTION, INC.,**  
2 **CROSS-DEFENDANT MARK J. BIXBY AND THEIR ATTORNEY OF RECORD:**

3 NOTICE IS HEREBY GIVEN that on December 23, 2002, at 9:00 a.m., or as  
4 soon thereafter as the matter may be heard, in Department 54 of this court, located at 800  
5 Ninth Street, Sacramento, California, defendants/cross-complainants David E. Ernce and  
6 Lynn Trinka Ernce (together, "Ernces") will, and hereby do, move the Court for an order  
7 expunging the \$35,000 mechanics' lien recorded against the Ernces' home, which is the  
8 subject of plaintiff's complaint in this action pursuant to California Civil Code section 3118.

9 This motion is made on the ground that Bixby's lien is fraudulent and is based  
10 on this Notice Of Motion And Motion, the Declaration Of Margaret Carew Toledo and  
11 Declaration Of David E. Ernce and exhibits attached thereto, and the Memorandum Of Points  
12 And Authorities filed herewith, on the records and file herein, and on such oral and  
13 documentary evidence and argument as may be presented at the hearing of the motion.

14 Pursuant to Local Rule 3.04, the court will make a tentative ruling on the  
15 merits of this matter by 2:00 p.m., the court day before the hearing. To receive the tentative

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02 DEC -2 PM 4:08

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SACRAMENTO

13 MJB/BIXBY CONSTRUCTION, INC.,

14 Plaintiff,

15 v.

16 DAVID AND LYNN ERNCE,

17 Defendants.

Case No. 01AS07168

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO EXPUNGE MECHANICS'  
LIEN**

Date: December 23, 2002  
Time: 9:00 a.m.  
Dept: 54  
800 9th Street  
Sacramento, CA 95816

18 DAVID E. ERNCE and LYNN TRINKA  
19 ERNCE,

20 Cross-Complainants,

21 v.

22 MJB/BIXBY CONSTRUCTION, INC.,  
23 a corporation and MARK J. BIXBY,  
24 individually and dba BIXBY  
25 CONSTRUCTION,

26 Cross-Defendants.

Complaint Filed: November 26, 2001  
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I.

INTRODUCTION

Under California Civil Code section 3118, the penalty for filing a fraudulent lien is forfeiture of the lien. Here, the kitchen remodel contract between David and Lynn Ernce (“Ernces”) and MJB/Bixby Construction, Inc., signed by its president, Mark J. Bixby (together, “Bixby”) was for a total contract price of \$17,964. The Ernces paid Bixby \$13,000, but the contract was never fully performed and, to the extent it was performed, Bixby’s workmanship was shoddy and defective. Indeed, the Ernces’ expert anticipates that it will cost the Ernces at least \$11,000 to repair and correct Bixby’s defective workmanship.

After first recording an improper \$20,000 lien against the Ernces’ home, and although Bixby had performed no additional work after the filing of the \$20,000 lien, Bixby then recorded a fraudulent \$35,000 lien against the Ernces’ home. Because Bixby’s \$35,000 lien is completely false and unsupported, the Ernces respectfully request that this Court expunge the lien pursuant to California Civil Code section 3118.

II.

BACKGROUND

A. The Ernces’ Home And The Contract For The Kitchen Remodel

The Ernces’ home is located at 2811 3rd Avenue, Sacramento, California 95818. Declaration Of David E. Ernce In Support Of Motion To Expunge Mechanics’ Lien (“Ernce Decl.”), ¶ 2.

In March 2001, the Ernces entered into negotiations with Bixby for a kitchen remodel at their home. *Id.*, ¶ 3. On or about March 29, 2001, Bixby’s office manager sent David an e-mail containing Bixby’s preliminary bid and proposed contract for the remodel. The original proposal quoted a price of \$17,364. *Id.* The proposal included as an option that Bixby would provide melamine interiors for the kitchen cabinets at an additional cost of \$600, which would bring the total price to \$17,964. *Id.*

In early April 2001, the Ernces met with Bixby to discuss Bixby’s bid and proposal. After the meeting, the Ernces gave Bixby their requested changes to the contract.

1 Among other things, they requested that the contract expressly provide that: (a) Bixby would  
2 pay all charges incurred by Bixby for labor and materials as they became due, including  
3 payments to subcontractors; (b) Bixby would indemnify and hold the Ernces harmless for any  
4 damage or injury caused by Bixby in the performance of the contract; and (c) Bixby would  
5 provide the Ernces with proof of the workers' compensation and liability policies. *Id.*, ¶ 4.

6 On April 13, 2001, Bixby's office manager sent David an e-mail with a revised  
7 proposal which was dated March 28, 2001 and entitled "Proposal And Contract For Home  
8 Improvements." The revised proposal showed the Ernces' changes to the contract in red ink,  
9 and Bixby's additional changes to the contract in green ink. *Id.*, ¶ 5.

10 On or about April 17, 2001, David went to Bixby's office to finalize and sign  
11 the proposed contract. The contract price was for \$17,964, since the Ernces opted for the  
12 melamine cabinet interiors. At that meeting, Bixby had two original contracts. Bixby gave  
13 one contract to David and asked him to sign it. Bixby signed the remaining contract and then  
14 traded contracts with David so that each of them had a contract signed by the other. David  
15 asked Bixby for a copy of the fully executed contract signed by both of them. Bixby told  
16 David that his copy machine was not working and that he would have his office manager  
17 make a copy of the fully executed contract and send it to the Ernces. *Id.*, ¶ 6. A true and  
18 correct copy of the contract signed by Bixby on April 17, 2001 in David's presence and given  
19 to David by Bixby is attached to the Ernce Decl. as Exhibit A. The finalized contract was  
20 supposed to include and attach the kitchen drawings previously provided to Bixby by the  
21 Ernces.<sup>1</sup> Despite the Ernces' repeated requests, Bixby did not provide them with a complete  
22 and fully executed copy of the contract as promised. *Id.*

23  
24  
25 <sup>1</sup> See Mark J. Bixby's Response To Request For Admissions, Set One and MJB/Bixby  
26 Construction, Inc.'s Response To Request For Admissions, Set One (together, "Bixby  
27 Admissions, Set One"), No. 2 (admitting that the Ernces provided plans, drawings and  
28 specifications which were to be used in performing the kitchen remodel). The Bixby  
Admissions cited herein are attached as exhibits A through D to the accompanying  
Declaration Of Margaret Carew Toledo In Support Of Motion To Expunge Mechanics' Lien  
("Toledo Decl.").

1 **B. The Ernces' Payments To Bixby**

2 1. **The \$1,000 Deposit Pursuant To The Contract**

3 On April 24, 2001, the Ernces met with Bixby at their home. At that meeting,  
4 or shortly thereafter, Bixby told the Ernces that work would begin on May 2, 2001. During  
5 the April 24, 2001 meeting, the Ernces paid Bixby the \$1,000 deposit that was required by the  
6 written contract. *Id.*, ¶ 7 and Ex. B (copy of \$1,000 check).<sup>2</sup>

7 2. **Bixby's Improper Payment Demand And The \$7,000 Payment Made**  
8 **Under Duress**

9 Although the contract does not provide for progress payments, and although  
10 Bixby told the Ernces that no progress payments would be required, on May 30, 2001,  
11 Bixby's office manager sent David a fax requesting that the Ernces make a progress payment  
12 of \$7,000 and that such amount be paid by June 1, 2001. Ernce Decl., ¶ 8 and Ex. C.<sup>3</sup>

13 On June 4, 2001, Bixby's office manager arrived at the Ernces' home to speak  
14 with an electrician who was then on site. David was home when Bixby's office manager  
15 arrived and Bixby's office manager demanded immediate payment of the \$7,000. *Id.*, ¶ 9.  
16 David asked Bixby's office manager what work the \$7,000 related to. Bixby's office  
17 manager refused to give the Ernces any information regarding what work had been completed  
18 or to confirm whether any part of the \$7,000 would be used to pay labor supplier CLP  
19 Resources (which had filed a preliminary lien notice of \$10,000 against the Ernces' home)  
20 and threatened to pull Bixby's workers from the job unless the Ernces paid the \$7,000  
21 immediately. Although the Ernces did not believe that Bixby had performed \$8,000 worth  
22 of work (the \$7,000 demanded plus the \$1,000 deposit), because of Bixby's threat to  
23 immediately abandon the kitchen remodel, at a time that the Ernces' kitchen was entirely  
24

25 \_\_\_\_\_  
26 <sup>2</sup> See Bixby Admissions, Set One, No. 4 (admitting payment made); see also MJB/Bixby  
27 Construction, Inc.'s Response to Request for Admissions Re: Genuineness of Documents,  
28 Set No. Two and Mark J. Bixby's Response to Request for Admissions Re: Genuineness of  
Documents, Set No. Two (together, "Bixby Admissions, Set Two"), No. 3 (admitting  
genuineness of check).

<sup>3</sup> See Bixby Admissions, Set Two, Nos. 5 and 8 (admitting genuineness of fax and invoice).

1 gutted, Lynn left work and went to Bixby's office at on June 4, 2001 to deliver a \$7,000 check  
2 to Bixby. *Id.* and Ex. D (copy of \$7,000 check).<sup>4</sup>

3 **3. Bixby's Additional Payment Demand And The \$5,000 Payment**

4 On the morning of June 15, 2001, Bixby's office manager arrived at the  
5 Ernces' home and gave Lynn an invoice for an additional draw and "change orders" totaling  
6 approximately \$8,000. *Id.*, ¶ 10 and Ex. E.<sup>5</sup> Bixby's office manager initially refused to leave  
7 without a check. Lynn confirmed that Bixby would be at their home later that day and said  
8 she would discuss it then. At the end of the day on June 15, 2001, the kitchen remodel was  
9 not completed as Bixby previously had promised the Ernces. Among other things, the kitchen  
10 cabinets were incomplete, the cabinets that had been installed were of poor quality and  
11 workmanship and the Ernces' appliances were improperly installed. Nevertheless, Bixby  
12 asked David for payment on the \$8,000 invoice. *Id.* David told Bixby that, among other  
13 things, the Ernces had concerns about the alleged "change orders" on the invoice. Bixby  
14 demanded \$5,000 and agreed that amount would be applied as payment on the contract, not  
15 towards the disputed "change orders." The Ernces paid Bixby \$5,000 because they were  
16 afraid that, if they did not comply with Bixby's demand, Bixby would abandon the job, as  
17 Bixby previously threatened. *Id.* and Ex. F (copy of \$5,000 check).<sup>6</sup> In total, the Ernces have  
18 paid Bixby \$13,000. *Id.*

19 **C. The Ernces Did Not Sign Any Written Change Orders For The Kitchen Remodel.**

20 The kitchen remodel contract between the Ernces and Bixby required any  
21 changes to the contract to be executed only upon a written change order, signed by the Ernces  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>4</sup> See Bixby Admissions, Set One, No. 5 (admitting payment made), Bixby Admissions,  
27 Set Two, No. 6 (admitting genuineness of check).

28 <sup>5</sup> See Bixby Admissions, Set Two, No. 8 (admitting genuineness of invoice).

<sup>6</sup> See Bixby Admissions, Set One, No. 6 (admitting payment made), Bixby Admissions,  
Set Two, No. 7 (admitting genuineness of check).

1 and Bixby. *Id.*, ¶ 11 and Ex. A, ¶ 26.<sup>7</sup> Although the Ernces and Bixby discussed certain  
2 additional work to be performed in connection with the kitchen remodel, the Ernces did not  
3 agree on specific details or the price for such additional work. Bixby did not present to the  
4 Ernces, and the Ernces did not sign, any written change orders. *Id.*

5 **D. Bixby's Abandonment Of The Kitchen Remodel**

6 On June 19, 2001, Bixby abandoned the Ernces' kitchen remodel and then  
7 became verbally abusive and threatening and refused to leave the Ernces' home when  
8 requested by Lynn Ernce. *Id.*, ¶ 12. She was forced to call the police to have Mark Bixby  
9 removed from their home. Bixby did not perform any work at the Ernces' home after June  
10 19, 2001. *Id.*

11 **E. Bixby's Threats To The Ernces**

12 On June 20, 2001, Bixby sent a threatening letter to the Ernces in which Bixby  
13 demanded to return to the Ernces' home to complete the kitchen remodel. *Id.*, ¶ 13 and Ex.  
14 No. G.<sup>8</sup> The Ernces received the letter on June 25, 2001. *Id.* In the letter, Bixby gave the  
15 Ernces 48 hours within which to respond and threatened, among other things, to record liens  
16 against their home and to sue them. *Id.*, Ex. G at 1. In the June 20 letter, Bixby stated, "Let  
17 me make this perfectly clear, I will spare no money, time, energy or effort to prove we at,  
18 MJB Bixby Construction Inc., believe we are one hundred percent correct in this matter." *Id.*  
19 Bixby admitted in the letter that Bixby had "suggested to any and all unpaid sub-contractors  
20 to immediately pre-lien and lien your house . . ." *Id.* Bixby further threatened to interfere  
21 with the Ernces' credit and stated that Bixby would "pull a credit report on [the Ernces]  
22 immediately" and "contact all credit agencies and services to make them aware of [the  
23 Ernces' alleged] non-payment." *Id.* at 3. Bixby also made disparaging remarks and insults  
24 about the Ernces' appearance, financial status and motivations, among other things. *Id.*

25 <sup>7</sup> See Bixby Admissions, Set One, No. 7 (admitting change orders must be written and  
26 signed); see also Mark J. Bixby's Response To Request For Admissions, Set No. One, No. 8  
27 (admitting that the Ernces did not sign any written change orders); but see MJB/Bixby  
28 Construction, Inc.'s Response To Request For Admissions, Set No. One, No. 8 (denying  
same).

<sup>8</sup> See Bixby Admissions, Set Two, No. 9 (admitting genuineness of letter).

1 **F. The Ernces File A Complaint With The Contractors State License Board**

2 On June 21, 2001, the Ernces filed a complaint against Bixby with the  
3 Contractors State License Board. *Id.*, ¶ 14. In addition to the Ernces' complaint, several  
4 other complaints have been or currently are under investigation by the Board. *Id.* The  
5 Board's investigation of the Ernces' complaint has been concluded and, in August 2002, the  
6 Ernces' complaint was referred to the Office of the Attorney General for the prosecution of an  
7 accusation against Bixby. *Id.* The Ernces are informed and believe that the Board's expert  
8 has concluded that Bixby committed multiple violations of the state contractors license laws,  
9 that the kitchen remodel was not performed according to accepted trade standards or in a good  
10 and workmanlike manner and that it will cost the Ernces over \$10,000 to repair and correct  
11 the poor workmanship performed by Bixby.<sup>9</sup> *Id.*

12 **G. Bixby Records Its First Lien Against The Ernces' Home**

13 On June 22, 2001, three days after Bixby abandoned the Ernces' kitchen  
14 remodel, Bixby recorded an improper mechanics' lien against their home ("First Lien") in the  
15 amount of \$20,000 plus interest at 7% per annum from June 1, 2001. *Id.*, Ex. H.<sup>10</sup>

16 **H. The Ernces Obtain A Judgment Releasing Their Home From The First Lien.**

17 On September 21, 2001, because Bixby failed to file an action to foreclose on  
18 the First Lien within the 90-day limitations period set forth in Civil Code section 3144, the  
19 Ernces filed a verified Petition To Release Property From Mechanic's Lien pursuant to Civil  
20 Code section 3154 ("Petition"). *Id.*, ¶ 16. The Petition was scheduled to be heard in  
21 Department 54 on October 9, 2001. On September 26, 2001, Bixby filed with this Court a  
22 letter stating, among other things, that "Bixby will not be opposing the petition to withdraw  
23 the Mechanics Lien, signed by Douglas Tillotson, dated June 22, 2001 in the amount of  
24 \$20,000 on property 2811 Third Avenue Sacramento, Ca 95818." *Id.*, Ex. I.<sup>11</sup> On October 8,

25 <sup>9</sup> The Board's expert has prepared a report of his findings regarding the defects in the Ernces'  
26 kitchen remodel. At this time, the Board will not publicly release its investigative report.  
27 Toledo Decl., ¶ 9. However, if the Board's expert report becomes publicly available prior to  
28 the hearing on this Motion, the Ernces intend to submit it to the Court. *Id.*

<sup>10</sup> See Bixby Admissions, Set Two, No. 10 (admitting genuineness of First Lien).

<sup>11</sup> See Bixby Admissions, Set Two, No. 13 (admitting genuineness of letter).

1 2001, the Court issued its tentative ruling granting the Petition. The Court entered its  
2 judgment releasing the property from the First Lien on November 6, 2001. *Id.*, Ex. J.

3 **I. Bixby Records Its Second Lien For Almost Double The Amount Of The First**  
4 **Lien Although It Did Not Perform Any Additional Work At The Ernnces' Home.**

5 On September 27, 2001, the same day that Bixby filed its letter of  
6 non-opposition to the release of the First Lien, Bixby recorded a second improper mechanics'  
7 lien against the Ernnces' home ("Second Lien"). *Id.*, Ex. K.<sup>12</sup> The Second Lien was verified  
8 by Mark Bixby. *Id.* Although Bixby did not perform any work at the Ernnces' home after  
9 June 19, 2001 (*Id.*, ¶ 12)<sup>13</sup> the Second Lien is in the amount of \$35,000 – almost double the  
10 amount of the First Lien and almost double the contract price. *Id.* The Second Lien also  
11 claims 9% interest per annum from June 1, 2001 – an increase of 2% from the interest rate  
12 sought in the First Lien. *Compare id.*, Exs. J and K.

13 **J. Other Liens Recorded Against The Ernnces' Home At Bixby's Urging**

14 Also on September 27, 2001, Inline Plumbing, a subcontractor Bixby hired to  
15 perform work on the kitchen remodel, recorded a \$5,000 mechanic's lien against the Ernnces'  
16 home. *Id.*, Ex. L.<sup>14</sup> Previously, on July 24, 2001, CLP Resources recorded a \$3,158.13 lien.  
17 *Id.*, Ex. M. Bixby refused to pay either CLP Resources or Inline Plumbing and urged both  
18 companies to record liens against the Ernnces' home. *See* Bixby Admissions, Set One, No. 12  
19 (admitting that Bixby did not pay CLP Resources) and No. 17 (admitting that Bixby did not  
20 pay Inline Plumbing); Bixby Admissions, Set Two, No. 9 (admitting genuineness of June 20,  
21 2001 letter in which Bixby admits that Bixby had "suggested to any and all unpaid sub-  
22 contractors to immediately pre-lien and lien [the Ernnces'] house . . .").

23  
24  
25  
26 <sup>12</sup> *See* Bixby Admissions, Set Two, No. 14 (admitting genuineness of Second Lien).

27 <sup>13</sup> *See* Bixby Admissions, Set One, No. 20 (admitting June 19, 2001 was the "approximate last  
day" worked by Bixby).

28 <sup>14</sup> *See* Bixby Admissions, Set Two, No. 15 (admitting genuineness of Inline Plumbing lien).

1 **K. The Ernces' Expert Estimates It Will Cost \$11,000 To Repair And Correct The**  
2 **Defective Workmanship**

3 The Ernces' counsel retained Dick Reed, who is a licensed general contractor  
4 and a certified building inspector with 12 years of experience with the Contractors State  
5 License Board, as a consultant to review the work performed by Bixby and to estimate the  
6 amount that the Ernces will have to pay to repair and correct the defective workmanship on  
7 the kitchen remodel. Toledo Decl., ¶ 7. Mr. Reed prepared a report for the Ernces in which  
8 he found that Bixby's work was of poor workmanship and estimated that it would cost the  
9 Ernces \$11,000 to correct the most significant workmanship defects. *See id.*, Exs. E and F.

10 **III.**

11 **ARGUMENT**

12 **A. A Motion To Expunge Is The Proper Procedure To Remove A Fraudulent Lien.**

13 An owner may file a motion for removal of an invalid or fraudulent lien.

14 *See Lambert v. Superior Court*, 228 Cal. App. 3d 383, 387 (1991). Under California law, the  
15 sanction for filing a fraudulent lien is forfeiture of the entire lien. Cal. Civ. Code § 3118.

16 California Civil Code section 3118 provides as follows:

17 Any person who shall willfully include in his claim of lien labor,  
18 services, equipment, or materials not furnished for the property  
described in such claim *shall* thereby forfeit his lien.

19 Cal. Civ. Code § 3118 (emphasis added).<sup>15</sup> Significantly, the express language of section  
20 3118 is mandatory, not permissive. The statute uses the mandatory word "shall." *Common*  
21 *Cause of California v. Board of Supervisors*, 49 Cal. 3d 432, 443 (1989) ("shall" is ordinarily  
22 construed as mandatory"). Thus, under the plain language of section 3118, once an owner  
23 proves a willful misstatement in a lien, forfeiture of the lien is mandatory – not a discretionary  
24 remedy. As set forth below, because the false statements in the Second Lien are willful  
25 and were made with the intent to defraud, the Second Lien should be expunged and forfeited.

26  
27 <sup>15</sup> This statute does not apply to inadvertent mistakes made in the filing of a lien. *See* Cal.  
28 Civ. Code § 3261. Section 3261 confirms that mechanics' liens filed with "intent to defraud"  
are void. As discussed below, this case involves fraud, not an unintentional mistake.

1 **B. Bixby's Second Lien Was Willful And Filed With Intent To Defraud.**

2 **1. Bixby's Claim For \$35,000 Is Patently False.**

3 In cases where the work has not been completed, a contractor may file a lien  
4 for the reasonable value of his labor, services, equipment or materials or the price agreed upon  
5 in the contract, whichever is less. *See* Cal. Civ. Code § 3123(a). In any action to enforce the  
6 lien, the contractor bears the burden of proving the validity of his lien. *Basic Modular*  
7 *Facilities, Inc. v. Ehsanipour*, 70 Cal. App. 4th 1480, 1485 (1999). However, the law does  
8 not allow contractors to file fraudulent liens. Indeed, the filing of a fraudulent lien is  
9 actionable as malicious prosecution. *See Albertson v. Raboff*, 46 Cal. 2d 375, 382-85 (1956).

10 Bixby's claim for \$35,000 is unsupportable and false. Relying solely on facts  
11 admitted and claimed by Bixby, the lien is fraudulent. Here, the contract price was \$17,964.  
12 Bixby claims in the Second Lien that it performed 97% of the contract, which would translate  
13 to \$17,425.08 (*i.e.* 97% of \$17,964). Bixby admits that the Ernces paid \$13,000.<sup>16</sup> Thus, the  
14 remaining sum allegedly owed to Bixby (under Bixby's version of the facts) would be  
15 \$4,425.08. Yet, Bixby filed the Second Lien against the Ernces' home for \$35,000.

16 However, Bixby's admissions do not tell the whole story. The sum of  
17 \$4,425.08, even if supportable, is subject to substantial offsets for Bixby's incomplete work  
18 and defective workmanship. Mr. Reed, a construction expert, has estimated that remediation  
19 of Bixby's defective workmanship would cost \$11,000. Toledo Decl., Ex. F. Thus, if the  
20 Court considers the proper offset for Bixby's defective workmanship, it is the Ernces, not  
21 Bixby, who are owed money in this case.

22 **2. The Sequence Of Events Establish Bixby's Fraudulent Intent.**

23 Fraud can be established based on reasonable inferences to be drawn from the  
24 circumstances and the actions of the parties. *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th  
25 354, 368 (1997); *see Vogelsang v. Wolpert*, 227 Cal. App. 2d 102, 111 (1964) ("Fraud and  
26 conspiracy are not generally practiced in the open light of day and for that reason are not  
27

28 <sup>16</sup> *See* Bixby Admissions, Set One, Nos. 4, 5 and 6 (admitting payments made)

1 ordinarily susceptible of direct proof but must be spelled out from circumstantial evidence.”).  
2 Here, the sequence of events relating to the filing of the First Lien and the Second Lien  
3 compel the conclusion that Bixby filed the Second Lien willfully and with intent to defraud.

4 Despite the fact that the contract price was \$17,964 and that Bixby had already  
5 been paid \$13,000, on June 22, 2001, Bixby recorded the \$20,000 First Lien against the  
6 Ernces’ home. Ernce Decl., Ex. H. The Ernces petitioned to release the First Lien on the  
7 grounds that Bixby failed to file an action to foreclose the lien within the 90-day limitations  
8 period. This Court released the First Lien. *Id.*, Ex. J

9 On September 27, 2001, the same day that Bixby filed a letter with the Court  
10 stating that it would not oppose the release of the First Lien (*Id.*, Ex. I), Bixby recorded the  
11 Second Lien against the Ernces’ home. *Id.*, Ex. K. Although Bixby had not performed any  
12 work at the Ernces’ home after June 19, 2001 (*Id.*, ¶ 12 and Bixby Admissions, Set One, No.  
13 20), the Second Lien is in the amount of \$35,000 – almost twice the amount of the First Lien.  
14 The Second Lien also claims interest at the rate of 9% per annum – an increase of 2% over the  
15 interest rate stated in the First Lien – which exceeds the 7% interest rate statutorily allowed by  
16 California law. *See id.*; Cal. Const. Art. XV, § 1; Cal. Civ. Code § 3287.

17 Not only is the Second Lien almost twice the amount of the contract price,  
18 but Bixby has admitted to being paid \$13,000.<sup>17</sup> In response to requests for admission, Bixby  
19 further admitted that he did not perform any work at the Ernces home after approximately  
20 June 19, 2001. *See* Bixby Admissions, Set One, No. 20. Therefore, the \$15,000 increase  
21 between the First Lien and the Second Lien cannot be explained away as additional work  
22 performed. The only logical explanation for the increase is Bixby’s fraud.

### 23 3. The Language Of The Second Lien Itself Is Further Evidence Of Fraud.

24 The fraud is also apparent from the face of the Second Lien and Bixby’s own  
25 admissions. The Second Lien recites that “[a]fter deducting all credits and offsets, the sum of  
26 \$35,000.00 . . . is due . . . .” Ernce Decl., Ex. K. However, it is clear that the \$13,000 that  
27

28 <sup>17</sup> *See* Bixby Admissions, Set One, Nos. 4, 5 and 6 (admitting payments made)

1 Bixby admitted he was paid was not deducted as a credit to the \$17,964 contract price, as  
2 \$17,964 minus \$13,000 does not equal \$35,000.

3 Moreover, Bixby's description in the Second Lien of the work that forms the  
4 basis for his claim is a concession that the only basis for any lien is the April 17, 2001  
5 contract. *See id.* Indeed, Bixby admits that his relationship with the Ernces was governed by  
6 the April 17th contract and the absence of any reference to change orders as a basis for the  
7 lien is quite telling. In the Second Lien Bixby describes, under penalty of perjury, the reason  
8 for the Second Lien as follows:

9 Violating contractual agreement entered into on 4-17-2001. Greater  
10 than 97% of home improvement (kitchen) project having been completed,  
11 having been paid to date for less than half of these services, D. & L. Ernce  
12 terminated agreement without cause and are refusing to allow project to be  
completed, as well as make payment for services & materials all ready  
(sic) received.

13 *Id.* Thus, Bixby clearly bases the Second Lien claim on the written contract for \$17,964.  
14 Yet, Bixby filed a lien for almost double that amount when, admittedly, the Ernces, had  
15 already paid \$13,000 on the contract price.

16 In sum, Bixby's claim for \$35,000 is blatantly false and unsupportable.  
17 Because the Second Lien is fraudulent, Bixby must forfeit the Second Lien in its entirety.  
18 *See Cal. Civ. Code 3118.*

19 **C. Public Policy Supports Expunging Bixby's Lien.**

20 The purpose of a mechanics' lien is to prevent unjust enrichment of a property  
21 owner at the expense of laborers or material suppliers. *Basic Modular Facilities*, 70 Cal. App.  
22 4th at 1483. Here, Bixby turns this protection on its head and attempts to improperly use it as  
23 a coercive weapon in a construction dispute. In addition to the fact that Bixby filed the  
24 Second Lien with fraudulent intent, the following facts support expunging the lien.

25 First, Bixby failed to complete the Ernces' kitchen remodel and the  
26 workmanship was poor and defective. *See Toledo Decl., Ex. F.* The cost to the Ernces to  
27 remediate the shoddy workmanship will be at least \$11,000. *Id.*