

THE NEW JERSEY CONSTRUCTION LIEN LAW: A PRIMER

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For builders and contractors alike, the words “construction lien” can be anxiety inducing. Contractors, on the one hand, know that a lien can be a valuable tool for recovering outstanding money; however, the requirements of a lien claim are not intuitive, and failure to strictly comply with statutory requirements may result in a waiver of lien rights. Owners, on the other hand, know that encumbrances, even wrongfully filed ones, may threaten the timing of a transaction and cause unforeseen expenses.

The New Jersey Construction Lien Law, N.J.S.A. § 2A:44A:1 et. seq. (“Lien Law”), contains many specific provisions and must be carefully followed. A few essential pointers are highlighted below.

FOR LIEN CLAIMANTS:

1. The filing requirements for lien claims in commercial and residential projects are very different. For commercial construction projects, a lien claim must be filed in the county where the project is located within 90 days of the last date that work, services or material were provided to the project. For residential construction projects, a Notice of Unpaid Balance (“NUB”) is a prerequisite to the filing of a lien claim and must be filed within 60 days of the last date that work, services, or material were provided. There are numerous additional requirements that flow from these preliminary deadlines. Claimants must be cognizant of the type of job they are performing in order to ensure that they do not violate filing deadlines.
2. Be aware of the “last date” of work. Under the Lien Law, the “last date” on which work, services or materials were provided marks the date on which the clock starts ticking on a contractor’s right to file a lien. For practical purposes, contractors should interpret the “last date” as the date on which they achieve substantial completion. Contractors often mistakenly assume that because they were still “on the job,” that the clock did not start to run on their lien rights. This is an incorrect assumption. “Punch list,” warranty, or other corrective work will not extend the deadline for the filing of a lien claim or notice of unpaid balance.
3. Be sure that the contract and all change orders are accepted in writing. Contractors have no right to file a lien claim in connection with work that was not performed pursuant to an executed contract or change order. Handshakes and verbal directives in the field will not pass muster, regardless of whether the work was accepted and approved. Contractors that do not have written agreements may be able to recover payment through a separate lawsuit for breach of contract, however, they will not have lien rights.

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4. Do not forget to actually file suit on the lien claim, and to do so on time. A lien claim is a pre-requisite to a lawsuit, but it is not an actual lawsuit. Short of settlement, in order to obtain payment after the filing of a lien claim, the claimant must file a legal action based upon the lien claim. This must be done, not within 1 year of the filing of the lien claim, but within 1 year of the last date of work. It is critical that a claimant understand this distinction and meet the deadline for filing.

FOR OWNERS:

1. Obtain a lien release and waiver with each payment. Owners should not make payments for work, services or material without simultaneously receiving corresponding progressive, written lien releases and waivers from their contractors and suppliers. Contractors should, in turn, should be required to obtain releases and waivers from their own subcontractors and suppliers.
2. Consider using joint checks. Making payment by joint check can help ensure that funds reach their intended destination and prevent claims for non-payment by lower tier subcontractors and suppliers.
3. Consult with counsel to scrutinize the filing. Experienced counsel will be able to determine whether any number of substantive or technical requirements have been violated by a given lien claim, including but not limited to: filing deadline errors, service errors, improper identification of the property or project, whether a balance is overstated, whether a claimed balance is based upon a sufficient writing, and whether the claimant is a proper claimant given its tier. Claimants who file improper or overstated lien claims may be forced to pay costs associated with discharging the wrongfully filed lien, such as attorney's fees.
4. Post a bond. Particularly in instances in which a property is pending sale or transfer, the owner or its contractor (if the lien is filed by a lower tier subcontractor) may post a bond with the clerk of the county where the lien was filed in an amount equal to 110% of the lien claim. The county clerk will then mark the lien as discharged. The claimant's rights will be unaffected, but the property will be free of the lien, and the pending transaction should be able to proceed. There are carrying costs associated with the posting of a bond; however, use of a bond can be a valuable tool in many instances. If a bond is posted, consider the option of demanding that the claimant file suit within 30 days in order to accelerate resolution of the matter.

The Lien Law is a highly technical statute with numerous requirements; however, when used correctly, it can be a tremendous vehicle for recovery. Claimants and owners should always confer with counsel in order to ensure that their rights and interests are effectively guarded.

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