MECHANIC'S LIENS AS A COLLECTION TOOL

LIEN ON IT!

PRESENTED BY:

Michael Hynum, President, Hynum Law

Sue L. Chin, Borges & Associates, LLC

INTRODUCTION

Mike Hynum, Esq.

Hynum Law

P.O. Box 5620

Harrisburg, PA 17110

(717) 774-1357

mhynum@hynumpc.com

INTRODUCTION

Sue L. Chin, Esq.

Borges & Associates, LLC
575 Underhill Blvd., Ste. 118
Syosset, NY 11791
Tel: (516) 677-8200
Email: schin@borgeslawllc.com

DEFINITION: WHAT IS A MECHANIC'S LIEN?

- DEFINITION: A mechanics' lien is a lien created by law for the purpose of securing priority of payment for work performed or materials furnished in erecting or repairing a building or other improvement upon land and is intended to protect prepayment labor and materials that a contractor invests in another's property by allowing the contractor to obtain a lien interest in the property involved. A lien proceeding is not intended to settle the contractual obligations of the parties.

WHAT IS SUBJECT TO A MECHANIC'S LIEN?

- PENNSYVLANIA CRITERIA: Every **improvement** and the estate or title of the owner in the **property** is subject to a mechanics' lien for the payment of all debts due by the owner to the contractor, or by the contractor to any of his or her subcontractors, for labor or materials furnished in the erection or construction, or the alteration or repair of the improvement, provided that the amount of the claim, other than amounts determined by apportionment, exceeds $500.

WHAT IS SUBJECT TO A MECHANIC'S LIEN?

- NEW YORK CRITERIA: A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor…shall have a lien for the principal and interest, of the value, or the agreed price, of such labor... (NY Lien Law § 3)

IMPROVEMENT

- *Improvement:* includes any building, structure or other improvement of whatsoever kind or character erected or constructed on land, together with the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended.

EXPANSION OF IMPROVEMENT DEFINITION IN NEW YORK

- In New York, the "improvement "definition is expanded to include the following related services in connection with the construction:
  - Drawings by any architect, engineer or surveyor
  - Rental value of any machinery, tools and equipment
  - Compressed gas furnished for welding or cutting
  - Value of fuel and lubricants used by machinery or motor vehicles
  - Materials actually manufactured for but not delivered to the real property
  - Brokerage fees for any commercial leases for a term over 3 years (NY Lien Law § 2)

PROPERTY

- *PENNSYLVANIA Definition.* The improvement, the land covered thereby, and the lot or curtilage appurtenant thereto belonging to the same legal or equitable owner reasonably needed for the general purposes thereof and forming a part of a single business or residential plant.
- *NEW YORK Definition.* The improvement, real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, bridges and trestle work, and oil and gas wells and any leases for oil and gas lands.

CURTILAGE?

PENNSYLVANIA: The land immediately surrounding a house or dwelling, including any closely associated buildings and structures (like a yard, shed, driveway, or garage). In the eyes of the law, it is treated as an extension of the home and is legally protected as part of your private living space.

EXPANSIVE DEFINITION OF PROPERTY IN NEW YORK

No mention of curtilage, but the definition of Property is expansive and will encompass the yard, shed, driveway and garage, and air rights.

INTERESTING FACT: Air rights are part of the real property, but can be separated and transferred by owner to another.

WHO IS ENTITLED TO SUCH A LIEN?

- IN NEW YORK, THE LIST OF PEOPLE WHO ARE ELIGIBLE TO FILE A MECHANIC'S LIEN IS QUITE EXPANSIVE:
  - CONTRACTOR
  - SUBCONTRACTOR
  - LABORER
  - MATERIALMAN
  - LANDSCAPE GARDENDER
  - NURSERY OR PERSON SELLING FRUIT OR ORNAMENTAL TREES, ROSES, SHRUBBERY, VINES AND SMALL FRUITS

-LOWER TIER SUBCONTRACTORS AND SUPPLIERS CAN FILE TOO

-ARCHITECTS, ENGINEERS, SURVEYORS, AND REAL ESTATE BROKERS WHO SECURE COMMERCIAL LEASES OVER 3 YEAR TERMS, CAN FILE TOO (NY LIEN LAW § 2).

PERFECTING THE LIEN - STEPS

- NEW YORK: NO NOTICE REQUIRED PRIOR TO FILING OF MECHANIC'S LIEN
  - No preliminary notice
  - No statement of intent to file a lien
  - No statement of completion of work

- CAVEAT: IF AN OWNER OR GENERAL CONTRACTOR HAS NO DIRECT RELATIONSHIP WITH THE LIENOR, THE MECHANIC'S LIEN MAY BE THE FIRST TIME THAT THE OWNER OR GENERAL CONTRACTOR LEARNS ABOUT THE LIENOR'S IDENTITY AND CLAIM

PERFECTING LIEN – CONT'D

- NEW YORK:
  - MECHANIC'S LIEN HAS TO BE SUBSTANTIAL COMPLIANCE

  PA – 30 DAY NOTICE REQUIRED PRIOR TO FILING
- DESCRIPTION OF WORK & MATERIALS PROVIDED
- TIME OF COMPLETION
- DESCRIPTION OF IMPROVEMENT
- DESCRIPTION OF PROPERTY

FILING THE LIEN

- TIME OF FILING

  -in PA, must be filed within 6 months

  -in NY, must be filed within 8 months (unless single family dwelling which is 4 months)

- NOTICE OF FILING

  -After filing, must send to affected property owner

  -in NY, also have to send copy to upstream contractors

PA- WAIVER, DISCHARGE & RELEASE

- The right to a mechanics' lien may be waived, either expressly or by necessary implication.
- Subcontractor generally bound by waiver agreed upon by contractor with waiver
- A mechanics' lien, upon which a judgment has not been entered, is merely a specific lien, over which the courts have no power, except as provided by the acts creating and relating to such liens, and the courts have no authority to vacate or in any way interfere with regularly and properly entered mechanics' liens

PA - WAIVER, DISCHARGE & RELEASE

- a mechanics' lien must be discharged on payment into court or entry of security
- a claimant, upon payment, satisfaction, or other discharge of the claim, must enter satisfaction of the claim upon the record. Upon failure to do so within thirty days after a written request to satisfy, the court upon petition of a party in interest may order the claim satisfied, and the claimant will be subject to a penalty in favor of the party aggrieved

NY- WAIVER, DISCHARGE & RELEASE

- MECHANIC'S LIEN RIGHTS CANNOT BE WAIVED.
  - Lienor cannot prospectively contract away lienor's lien rights (LL § 34)

- MECHANIC'S LIENS CAN BE DISCHARGED
  - if lienor fails to commence lawsuit to foreclose on the lien within one year of the lien filing date
  - If lien is willfully exaggerated (LL § 39)
  - If lienor does not provide an itemized statement (LL § 38)
  - If lienor does not commence suit within 30 days of demand to do so by owner/contractor (LL § 59)
  - If lienor wants to remove the lien from the property, can file discharge bond to replace the lien.
    - This is beneficial for the trade creditor as the bond guarantees payment should the trade creditor succeed on its claim. Whereas, with a lien, the trade creditor would have to sell the property to satisfy its lien, which generally involves more time and money.

WAIVER, DISCHARGE & RELEASE

- A mechanics' lien may be released, but, in order to be effective, such release must be supported by sufficient consideration.
- A release signed by the claimant does not operate as a waiver of the right to file a claim for labor or materials subsequently furnished, unless it appears that that was the express intent of the party signing the same.

- Practice Pointer: If a release was signed by an upper tier contractor that may bind the lower tier trade creditor, ask for the complete documentation surrounding the release. It could be that the release was conditional on payment and no payment was received by the upper tier contractor after the release was signed.

PA- ENFORCEMENT OF LIEN

PARTIES

- In a mechanics' lien enforcement proceeding, the plaintiff must name as defendant the owner named in the claim and the owner, if known, at the time the action is commenced.
- While a contractor may not be a necessary party to a proceeding on a mechanics' lien filed by a subcontractor, he or she may be permissively joined as a defendant.

TIME TO SUE

- an action to obtain judgment on a claim must be commenced within two years from the date of filing, unless the time is extended in writing by the owner; and a verdict must be recovered or judgment entered within five years from the date of filing of the claim

NY- ENFORCEMENT OF LIEN

- NECESSARY PARTIES: owner, all prior lienors (mechanic's lien claimants, mortgage, judgment)
    - NY Lien Law §44
    - If the owner obtains a discharge bond, substitute the bond company for the owner.

- TIME TO SUE: one year from the lien filing date, unless the lien is extended:
  - 1st Extension: file and serve a notice of extension in the same manner as the original lien. This extends lien by one year.
  - 2nd Extension: requires court approval upon motion for a 2nd extension.
  - Single family dwellings require Court approval for extensions

- Practice Pointer: Perform a search of the subject property to ensure that it is a single family dwelling that is being used for personal use. Developers may try to allege the property is subject to the shorter 4 month deadline for single family dwellings even though the property is part of a lot consisting of multiple single family dwellings.

PA- ENFORCEMENT OF LIEN

PLEADINGS

- An action to obtain a judgment on a mechanics' lien claim must be commenced by filing with the prothonotary a complaint or an agreement for an amicable action
- plaintiff must set forth in the complaint: (1) the name and address of each party to the action and, if the action is commenced by a subcontractor, the name and address of the contractor; (2) the court and number and the date of filing of the claim, and a copy thereof as an exhibit; and (3) a demand for judgment

JUDGMENT

- A judgment may be entered on a verdict for a claimant in a mechanics' lien proceeding at any time within five years after its recovery without loss of the lien.

NY- ENFORCEMENT OF LIEN

- PLEADINGS: Separate cause of action for foreclosure of mechanic's lien. Can plead lien foreclosure and any other causes of action, including breach of contract, in same complaint.
  - Lien foreclosure elements: labor or materials furnished, pursuant to contract/purchase order, timely filing and service of the mechanic's lien, and lack of payment .

- - Have to file a notice of *lis pendens* at the same time, giving notice to the world that there is a lawsuit pending concerning the real property

  -The Notice of lis pendens remains on the property for 3 years from its filing date

JOINT CHECK AGREEMENTS

- A **joint check agreement** in construction is a signed contract where a payer (like a general contractor) agrees to write payment checks to two payees together (such as a subcontractor and a material supplier). Both parties must sign the check to cash it, which stops lower-tier groups from going unpaid or filing property liens

PAYMENT/PERFORMANCE BONDS

- A payment and performance bond is a pair of financial guarantees used in construction projects to ensure the job gets finished and workers get paid

Key Differences

- **Performance Bond:** Guarantees that the contractor will finish the project according to the contract rules. If the contractor fails, the issuing company steps in to fix or finish the work.
- **Payment Bond:** Guarantees that the contractor will pay all laborers, subcontractors, and material suppliers. This stops workers from filing legal claims or liens against the property owner.

  -Most useful for trade creditors to look to payment bond to collect on their debt .

Three Parties Involved

- **Principal:** The contractor who does the work.
- **Obligee:** The project owner who hires the contractor.
- **Surety:** The financial company that backs the bond

NY ARTICLE 3-A TRUST

- TO FURTHER PROTECT LOWER TIER SUBCONTRACTORS, MATERIALMEN AND LABORERS, NEW YORK TREATS FUNDS IN A CONSTRUCTION PROJECT AS TRUST FUNDS.
- TRUST FUND LAW: Owner/ general contractor/subcontractor are trustees of any funds they receive pursuant to the improvement of real property
  - Funds received are automatically deemed assets of a trust
  - Each subcontractor, materialman, and laborer is deemed a beneficiary of the trust
  - Pursuant to the trust, owner/general contractor/subcontractor are required to pay all trust claim from the assets or until all assets of the trust have been applied to the trust claims.
  - NY Lien Law § 70 (aka Article 3-a Trust)
  - Owners/general contractors can be personally liable if the trust funds are misspent.

PUBLIC IMPROVEMENT LIENS

IN NEW YORK, THERE ARE DIFFERENT FILING DEADLINES AND REQUIREMENTS IF THE IMPROVEMENT IS A PUBLIC IMPROVEMENT.

-FILING DEADLINE: WITHIN 30 DAYS AFTER THE ENTIRE PROJECT HAS BEEN COMPLETED AND ACCEPTED BY THE STATE OR PUBLIC CORPORATION (LL § 12)

-THERE MAY BE CONDITION PRECEDENTS THAT HAVE TO BE SATISFIED BEFORE A LIEN CAN BE FILED (SUCH AS FILING A NOTICE OF CLAIM WITH THE APPROPRIATE AUTHORITY)

-PROJECTS OVER A CERTAIN DOLLAR AMOUNT ARE REQUIRED TO BE BONDED AND NO LIEN CAN BE FILED

REPLEVIN?

- Mechanics liens are an alternative
- Replevin is typically used for personal property (such as a car at a repair shop where you dispute the charges and the shop will not release the vehicle)

- -REPLEVIN IS ANOTHER FORM OF RELIEF IF THE MATERIALS FURNISHED CAN BE RECOVERED BY THE LIENOR WITHOUT CAUSING DAMAGE TO THE REAL PROPERTY (E.G. A PORTABLE HVAC UNIT THAT IS USED DURING THE CONSTRUCTION OF A BUILDING)

UCC-1?

- Again typically not applicable because:
- **Collateral:** UCC-1 covers personal property and business assets; mechanics' liens cover land and buildings.

TAKEAWAYS

- -MECHANIC'S LIENS ARE POWEFUL SINCE THEY CLOUD TITLE TO THE REAL PROPERTY
- KNOW YOUR TIME DEADLINES AND PROCEDURAL REQUIREMENTS
- -ALWAYS FILE A MECHANIC'S LIEN IF THE CLIENT IS SUPPLYING MATERIALS/PROVIDING SERVICES TO A CONSTRUCTION PROJECT
- -DO NOT WAIT TO FILE THE LIEN. FILE AS EARLY AS POSSIBLE., EVEN IF THE DEBTOR PROMISES TO PAY. YOU SHOULD ASSUME THE DEBTOR IS AWARE OF THE FILING DEADLINE.
- -MECHANIC'S LIENS ARE A THORN FOR DEBTORS SINCE THEY KNOW THAT OWNERS AND GENERAL CONTRACTORS MAY WITHHOLD FUNDS UNTIL A FILED MECHANIC'S LIEN IS SATISFIED.
- IF YOU AREN'T SURE, SPEAK TO COUNSEL OR RETAIN CO-COUNSEL THAT IS EXPERIENCED WITH THE ISSUES.

QUESTIONS?

Mike Hynum

mhynum@hynumpc.com

Hynum Law

PO Box 5620

Harrisburg, PA 17110

717-774-1357

Borges & Associates, LLC

575 Underhill Blvd., Ste. 118

Syosset, NY 11791

Tel: (516) 677-8200

Email: schin@borgeslawllc.com

THANK YOU FOR JOINING US!