

WHAT IS A MECHANICS' LIEN?

Whoever furnishes labor and/or materials into property improvements during the construction process are given lien rights against the property in the event they are not paid by the party who has promised to pay them. The public policy behind mechanics' lien laws is to prevent the owner of the property from being unjustly enriched when the owner of the property has not paid for the work performed. These lien rights are a creature of the legislature and vary considerably from state to state. In some states, architects, design engineers, construction managers, and rental equipment companies are also afforded lien rights.

One who has perfected a mechanics' lien has the right to enforce its lien by pursuing a judicial foreclosure or sale of the property and be paid out of the proceeds.

The Owners Perspective

An owner not familiar with the construction process may end up paying for the same work twice. What happens when the owner pays the general contractor for the work, but the general contractor fails to pay its subcontractors, material suppliers, or another person who has furnished labor and/or materials to the project? Well, that depends on the lien law of the state where the property is located. In Massachusetts, for example, the amount of the lien is limited to the amount due or to an amount that may become due to the general contractor from the owner after the owner receives "Notice" from the unpaid party."¹ If the owner disburses monies to the general contractor after receipt of a notice of lien, the property owner may become liable to the unpaid lien holder and end up paying for the same work twice.

An owner can take several steps to protect itself from a mechanics' lien. One remedy is for the owner to "cut" joint checks where both the general contractor and the subcontractor and/or material supplier are named payees. This requires both payees to sign the check before it is cashed. In theory the subcontractor and/or material supplier will not endorse the check unless it has been paid. Another solution is for the owner to require "lien waivers" be executed by the subcontractor and/or material suppliers to substantiate that they have been paid before making any further progress payments to the general contractor. This will bar the subcontractors and/or material suppliers who executed the lien waivers from asserting mechanics' lien(s) on the property in the future.

The Contractors Perspective

Generally, mechanics' lien claimants must assert their lien rights within a specified timeframe or will forfeit their lien rights. Your state's statutory procedural requirements must be followed exactly to perfect your lien rights. For example, in Massachusetts, lien rights can expire in as little as 90-days after the date a contractor last worked on the project, in some instances in as short as 60-days, if certain procedural steps are not followed. It is imperative that a contractor understand their state's procedural requirements to prevent forfeiture of these important lien rights.

¹ *Bloomsouth Flooring Corp. v. Boys & Girls Club of Taunton, Inc.*, 440 Mass. 618 (2003).

So you have perfected your lien rights – now what. Well, chances are that you are not the only contractor who has filed a mechanics' lien on the project. Most troubled projects have multiple liens filed against the property by the various participants in the construction process (e.g., lenders, architects, contractors, material suppliers, etc). A majority of states require the lien claimant to file a lawsuit to enforce its lien and if the claimant prevails then the claimant can initiate foreclosure proceedings to sell the property at auction. But which lien claimant gets paid first from the auction proceeds. Generally, depending on your state's law, whoever filed first stands at the head of line to get paid first. This is usually the project lender.

In a declining real estate market mechanics' liens can become valueless if trouble with the project develops and prior security holders (i.e., usually the Lenders) foreclose on the property. In construction projects that fail it is most likely that lien claimants will find their claims wiped-out because prior security holders have foreclosed and funds left over for lien claimants are non-existent.²

Conclusion

Mechanics' liens are very complex and failure to follow your state's statutory requirements exactly may result in your lien being dissolved. Additionally, there are exceptions and not all work that would be considered part of the construction process can qualify for a lien. Whether you are an owner or a contractor you should consult with an attorney familiar with your state's mechanics' lien law to fully understand your rights and obligations. So when the stampede of lien claimants begins, you can be proactive instead of reactive.

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² Sweet Justin, *Legal Aspects of Architecture, Engineering and the Construction Process* § 28.07 (6th ed. 2000).