

A Lawyer Discusses Mechanic's Liens in Commercial Buildings

By C. Jaye Berger, Esq.



Mechanic's liens is one of the topics I am most frequently called about. They are the contractor's best tool for getting paid and can be a nightmare for a property owner or a developer. Just when you are about to close on financing, a mechanic's lien can show up on a title search and put a hold on everything. Most lenders and

title companies will want the mechanic's lien to be removed or bonded before a closing can occur. Occasionally, if the lien is small and there is no closing about to occur, an indemnity letter from the owner assuring the lender or the managing agent that it will be taken care of shortly will suffice; however, this is more the exception rather than the rule.

Bonding a mechanic's lien is now a rather simple process that is more clerical than anything else. The lienee has to apply to a bonding company for a bond and show the requisite financial statements to the underwriting department. A corporation might have to show financial reports for the two prior years. Usually this means showing liquid assets of three times the lien amount. For your "average" size mechanic's lien, this should not be a problem. However, when there is an enormous mechanic's lien for hundreds of thousands of dollars or more, the lienee may not be able to show enough liquid assets as security and that can present a problem. Some owners will not be able to bond the lien. Having to deposit the sum in controversy with the court is not much of an alternative, if the property owner is short on cash because the closing has not occurred.

If they are able to obtain a bond, the bonding company immediately issues a bond directly to the company, which is 10 percent higher than the mechanic's lien amount. A fee is paid for this bond. This mechanic's lien bond has to be served on the lienor pursuant to statute, and then filed with the County Clerk, along with proof of such service. As legal counsel, we usually take care of all of that.

Once the mechanic's lien is bonded, it clears up the title issues so that a closing can occur, but does not eliminate the underlying problem that led to the mechanic's lien in the first place. The contractor can still sue the owner on a variety of legal theories, including breach of contract. Foreclosures of mechanic's liens takes place in court. However, if there is a contract with a provision requiring arbitration of any disputes, the issues in controversy will have to be arbitrated before the mechanic's lien issues will be dealt with. The court will have to be asked to stay the court action pending the determination of the arbitration. Often the arbitration process leads the parties to a point where the mechanic's lien can then be resolved. When that does not happen, the arbitration proceeds and is concluded, then the parties go back to court to litigate the issues surrounding the mechanic's lien.

The clerks do not check to see that the lien contains all the correct information. If it appears to be correctly filled out, it will be filed and it is up to the parties to raise any issues about incorrect information. I have seen liens where there was an incorrect name of the owner. This happens a lot with co-op corporations. There may be an incorrect lot. The lien may be filed against the wrong property all together and the other owner does not even realize it. Notice of the filing of the mechanic's lien must be sent to the property owner, but many property owners report that they have never received such notice, even though the lien is recorded. None of these problems may be apparent until someone tries to foreclose on the lien. If the time for filing a lien has passed, these errors cannot be corrected and the mechanic's lien may be voidable. The contractor still has his other legal theories to fall back on, but obviously loses some leverage by not having the mechanic's lien.

Mechanic's liens should be prepared by attorneys experienced in doing so. This is a complicated area of the law. Both contractors and owners are well-advised to seek an attorney who is knowledgeable in this area before proceeding.

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