

ANDERSON KILL

Construction Industry Advisor

Property Owners Beware: Mechanic's Liens May Tie Up Your Property, and The Law Varies From State to State



By Neil C. Schur and
Jason Kosek

Key points:

The requirements and procedures for a mechanic's lien vary from state to state, and the differences can be important.

For example, in New York, an owner should require a partial lien waiver with every payment, and once the owner is served with a mechanic's lien, a demand for an itemized statement should be served.

In Pennsylvania, after completion of the work, any owner or contractor may file a "rule" requiring the contractor or subcontractor to file a claim within 30 days after service or be "forever barred from so doing."

If you are a property owner making improvements, a contractor or subcontractor may file a mechanic's lien and prevent you from selling the property.

Anderson Kill's Construction Practice can help you navigate the highly technical process and remove the lien from your property. The requirements and procedures for a mechanic's lien vary from state to state, and the differences can be important. To illustrate the point, this article will discuss some of the issues facing property owners served with mechanic's liens in New York and Pennsylvania.

I. What Is A Mechanic's Lien?

First, owners need to know that a mechanic's lien is a legal tool that contractors and subcontractors can use to try to obtain payment for labor or materials that improve real property. Filing a mechanic's lien may give the contractor or subcontractor important leverage against the property owner because it makes a sale of the property subject to the lien, requiring payment before a clean title can transfer.

Property owners do have defenses and procedures available to defeat such a lien.

2. Property Owners' Potential Defenses to A Mechanic's Lien

A. New York Law

In New York, there are a few important considerations for a property owner anticipating or defending against a mechanic's lien.

1. Require Partial Lien Waivers with Each Payment. If you are an owner and have construction work being performed on your property, require a partial lien waiver with every payment that you make. A partial lien waiver relinquishes the right to file a mechanic's lien for the amount that has already been paid. This action limits the amount that can be asserted in a mechanic's lien.

2. Consider Demanding an Itemized Statement. New York Lien Law § 38 provides that on demand of the lienor, the lienor must provide a verified statement listing the items of labor and/or material which form the basis of the lien, and the value of such labor/material. In addition, the itemized statement must set forth the terms of the contract under which the labor/material were furnished. If the lienor fails to comply with a demand for an



itemized statement within 5 days, the owner has the right to move to vacate the lien. Under certain circumstances, it may be advisable not to demand an itemized statement, i.e., when the one-year deadline to foreclose the lien is approaching as discussed below.

3. Consider Arguing “Willful Exaggeration.” Under New York Lien Law § 39, the owner should consider arguing willful exaggeration by the contractor or subcontractor. Courts have interpreted “willful exaggeration” to mean that the amounts set forth were “intentionally and deliberately exaggerated.” The fact that a lien may contain improper charges does not, in and of itself, establish that a lienor willfully exaggerated a lien. If there is any intentional and deliberate exaggeration in the amount of the lien as filed, the entire lien is forfeited and the lienor is entitled to attorney’s fees for defending against the lien. An itemized statement is helpful to establish willful exaggeration because the itemized statement must be verified as truthful. This helps show the lien was willfully exaggerated. The demand for itemized statement and willful exaggeration are intertwined.

4. Lien May Be Discharged if Lienor Fails to Foreclose Within 365 Days.

Under New York law, a mechanic’s lien may be discharged if the lienor fails to foreclose the lien within a timely manner. A lien is ordinarily valid for 365 days. On demand, this deadline can be reduced to 30 days. If the lienor fails to foreclose the lien within the required period, the court will vacate the lien. If a mechanic’s lien was filed nearly 12 months ago, an owner may be better off not demanding an itemized statement. Instead, wait until the one-year deadline passes and then challenge the lien. The failure to foreclose on a lien within 365 days forfeits all rights of the contractor or subcontractor to bring an action to foreclose upon its lien and entitles the owner to an Order discharging the lien.

B. Pennsylvania Law

1. Owner Can File A “Rule” and Force a Contractor or Subcontractor to File a Mechanic’s Lien Claim. Under Pennsylvania law, the owner has a valuable procedural option to fight a mechanic’s lien before it is even filed. After completion of the work by a subcontractor, any owner or contractor may file a “rule” requiring the contractor or subcontractor to file a claim within 30 days after service or be “forever barred

from so doing.” 49 P.S. § 1506.

2. Owner Can Prove Contractor or Subcontractor Waived a Lien. A property owner can defend against a mechanic’s lien based on a lien waiver signed by the lienor, though Pennsylvania distinguishes between residential and non-residential properties. On residential property, a contractor or subcontractor may waive the right to file a mechanic’s lien claim by a signed written instrument, or “by any conduct which operates to equitably estop the contractor or subcontractor from filing a claim.” 49 P.S. § 1401(a); i.e. contractor’s conduct that demonstrates a waiver of any right to a lien.

On non-residential buildings, such a waiver *by a contractor* is against public policy, unlawful and void unless it was given in consideration for payment for the labor or materials provided and only to the extent that such payment is actually received. (i.e., a partial lien waiver). 49 P.S. § 1401(b)(1). Similarly, such a waiver by a subcontractor is against public policy, unlawful and void unless given in consideration for payment for the labor or materials provided and only to the extent that such payment is actually received (i.e., a partial lien waiver), or unless the contractor has posted a payment bond guaranteeing payment for labor and materials provided by contractors. 49 P.S. § 1401(b)(2).

3. Owner Can File Preliminary Objections to a Mechanic’s Lien Claim. A property owner in Pennsylvania can file preliminary objections to the lien, essentially asking for a dismissal, upon a showing of exemption or immunity of the property from lien, or for lack of conformity with the Mechanic’s Lien Law. 49 P.S. § 1505. Among other things, an owner can assert the following preliminary objections:

- The lienor failed to comply with the state’s notice provisions for mechanic’s liens. See 49 P.S. §§ 1501.1 – 1501.5.
- The lienor failed to comply with the filing deadline. 49 P.S. § 1502.
- The claims of subcontractors exceed in the aggregate the unpaid balance of the contract price specified in the contract between the owner and the contractor. 49 P.S. § 1405.

4. Owner’s Right to Retain Funds of Contractor. An owner who has been served with a notice of intention to file or a notice of the filing of a claim by a subcontractor may withhold from the contractor, a sum sufficient to protect the owner from loss until such time as the claim is finally settled, released, defeated, or discharged. 49 P.S. § 1601. The owner must give notice of this retention to the contractor. 49 P.S. § 1602.

5. Owner Can Discharge the Lien. An owner can deposit the amount of the claim with the court for application to the payment of the amount finally determined to be due. 49 P.S. § 1510(a). This deposit will result in a discharge of the lien. 49 P.S. § 1510(a). Any excess will be refunded to the owner. 49 P.S. § 1510(c). The lien also can be discharged by the filing of a bond. The filing of a bond may be desirable for large disputes where performance issues must be addressed before payment can be made.

6. Additional Remedies. Should the contractor fail to settle, discharge, or defend against a subcontractor’s claim, the owner has two options. It can pay the claim of the subcontractor, upon which payment the owner obtains the rights of the subcontractor against the contractor. 49 P.S. § 1604(1). In addition, the owner can undertake a defense against the subcontractor’s claim in which case the contractor becomes obligated to the owner for all

There are significant differences in the mechanic’s lien laws from state to state, as illustrated by highlighting key differences between the relevant laws of New York and Pennsylvania.

costs, expenses and charges incurred in such defense, including reasonable attorneys' fees, whether the defense is successful or not. 49 P.S. § 1604(2). The undertaking of the defense does not prevent the Owner from retaining funds of the contractor until the sub-contractor's claim is finally defeated or discharged. 49 P.S. § 1604(2).

Be Prepared

There are significant differences in the mechanic's lien laws from state to state, as illustrated by a few differences between New York and Pennsylvania. Every property owner should be prepared to respond to a mechanic's lien. Anderson Kill's Construction Practice can help you prepare for such an event

and defend against a mechanic's lien wherever your project is located. ▲

NEIL SCHUR concentrates his practice in complex commercial litigation and has litigated cases at the trial court and appellate levels before federal and state courts in several states. He is a shareholder in Anderson Kill's Philadelphia office.

nschur@andersonkill.com
(267) 216-2713

JASON KOSEK focuses his practice on insurance recovery, exclusively on behalf of policyholders, as well as on regulatory and white collar practice. He is an attorney in Anderson Kill's New York office.

jkosek@andersonkill.com
(212) 278-1028

We are interested in your feedback on topics for future articles and seminars. Please email us.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes – with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Boston, MA, Denver, CO, Los Angeles, CA, Newark, NJ, Philadelphia, PA, Stamford, CT, and Washington, D.C.

This publication was prepared by Anderson Kill P.C. to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the authors with any questions. © 2023 Anderson Kill P.C.