

NEW YORK CONSTRUCTION LAW UPDATE

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ENFORCING YOUR MECHANIC'S LIEN: IS IT NECESSARY?

A mechanic's lien is a simple yet effective tool in any contractor's tool box. But if you are not paid, and you file a mechanic's lien and still are not paid you then have a choice to make: foreclose or don't foreclose. There are those that think if you are going to file a lawsuit then you might as well foreclose on your lien. I am not in that group.

At the end of the day the purpose of filing a mechanic's lien is to make sure you get paid. Presumably you don't want the property and have no interest in harassing the owner - you simply want the money for the work you performed and you will be on your way. Many times a lien is used to achieve payment. But if placing the lien on the property doesn't get you paid you do not have to enforce the lien as the sole method of getting paid. Yes, the lien foreclosure process puts a lot of pressure on the owner and can help push a quick and favorable settlement your way. But foreclosing on a mechanic's lien is a time consuming and often expensive process. Certainly there are times when foreclosing on the mechanic's lien is a must. If the owner does not have the money to pay then you must foreclose and hope that the equity in the property will be enough to get you paid. Similarly, if you are a subcontractor you must foreclose on your lien if the general contractor does not have the funding to pay you. But what if the owner is wealthy and could easily pay any judgment?

Suing for straight breach of contract can often be easier and cheaper than foreclosing on your mechanic's lien. When you foreclose on a mechanic's lien there are a number of other people that you must bring into the lawsuit. Most significantly, you must bring in any bank that has a mortgage on the property. You must also bring in other lienors, including any taxing entity that has a tax lien. In the City of New York if there are open ECB violations you often have to bring the City in as a defendant as well. Serving all of these parties is one added expense. But you also then have a bunch of other people that are now going to fight over what is likely a very small pool of equity. All the fighting amongst the parties means more discovery, more motions and more time. More importantly, it means more litigation expenses. If the person you are suing has the means to pay you can avoid these fights and go after that person and that person alone. Why make it more difficult? Far too often attorneys jump right to recommending foreclosing on a mechanic's lien without even explaining to their client that there are other options.

The case of subcontractors is a bit more complex. A subcontractor generally cannot sue an owner directly. The lack of a direct relationship between the owner and the subcontractor (a concept known as "privity") almost always prevents a direct action. A subcontractor cannot sue an owner for breach of contract and cannot sue for unjust enrichment. That means even if the owner is wealthy and could pay absent the mechanic's lien, the only way for the subcontractor to bring the owner into the equation is to foreclose on a mechanic's lien. In this instance, the costs cannot be avoided (this is not to say that foreclosing on a mechanic's lien is the ONLY way to go after an owner if you are a subcontractor).

The long and short of this is that each individual claim should be evaluated to determine what is the best, and most time and cost effective, way to enforce your claim. Sometimes foreclosing on your mechanic's lien may be necessary and the best way to proceed. But sometimes you may want to avoid foreclosing on the mechanic's lien so that you can avoid a drawn out expensive legal battle. The only way to know what the best course of action is for you is to discuss your particular situation with a competent construction attorney.