

# NEW YORK CONSTRUCTION LAW UPDATE

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## **CONTRACTORS BEWARE: EXAGGERATING YOUR MECHANIC'S LIEN CAN CAUSE BIG TROUBLE**

Contractors have become as familiar with using mechanic's liens on their New York construction projects as they are with issuing change orders. However, while issuing a change order that is exaggerated will simply result in denial of the change order; filing an intentionally exaggerated mechanic's lien can have a number of consequences that go beyond non-payment of the lien.

When a contractor is not paid one of the most common initial reactions is to file a mechanic's lien. Unfortunately, some of those liens do not accurately reflect the amount currently due and properly lienable. Of course there are certain contractors that intentionally inflate the lien thinking it will perhaps give them more leverage to negotiate or increase the chances of quick payment. Some contractors file the intentionally exaggerated mechanic's lien simply to irritate and infuriate the person that owes the money and refuses to pay. Still there are others that exaggerate the mechanic's lien but do so unintentionally. The unintentional exaggeration can result from accounting errors, believing that certain items may be liened when, in fact, they may not or liening for the entire contract balance (including work yet to be performed) rather than the value of the labor and materials actually performed and unpaid for at the time of the filing of the lien. All of these exaggerations can be trouble.

In New York, a mechanic's lien should only be filed for the amount of the labor and materials actually performed and unpaid for at the time that the lien is placed. You also should not file a lien for items such as delay damages or liquidated damages. While you can, of course, still sue for those damages under other theories, your mechanic's lien must be limited to the value of the labor and materials incorporated into the improvement of the real property.

An unintentional exaggeration of a lien may simply result in not being able to recover that portion which is not exaggerated. However, person challenging the lien will likely charge that the lien was intentionally exaggerated and you will be forced to defend yourself against this claim. In addition to dragging out the time and cost of the litigation, it will test the accuracy and adequacy of your book and record keeping practices. Challenging a lien that is exaggerated is a

common defense because if the mechanic's lien proves to have been intentionally exaggerated there are devastating consequences to the lienor.

First and foremost a mechanic's lien that has been found to have been intentionally exaggerated is void. You therefore lose your entire lien - even the legitimate portion. Also, the lienor faces liability equal to the amount of the exaggeration. In other words, if a lienor is properly owed \$20,000.00 but intentionally exaggerates the lien to \$50,000.00 then not only is that entire lien void, but the lienor can be held liable to the owner for the amount of the exaggeration (\$30,000.00). Some courts will even award treble damages meaning that the \$30,000.00 intentional overcharge becomes a \$90,000.00 liability. Intentionally exaggerating a mechanic's lien can also expose the lienor to attorneys' fees and other consequential damages. For example, an owner faced with an intentionally exaggerated mechanic's lien may assert a claim for slander of title. If successful, the slander of title claim could expose the lienor to significant damages - especially if the exaggerated lien prevented the sale of the property.

It is important to keep in mind that proving "intent" in the exaggeration can be very difficult. An unintentional exaggeration or an arguable charge will not provide the relief available in association with an intentional exaggeration. If faced with a potentially exaggerated mechanic's lien it is important to consult with competent construction law counsel that can guide you through this difficult area of law. Construction counsel can help you better understand your situation and your rights and liabilities.