

# NEW YORK CONSTRUCTION LAW UPDATE

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## THE "SEVEN DEADLY SINS" OF MECHANIC'S LIENS

Mechanic's liens in New York are creatures of statute. Like most statutory creations there are a number of dos and don'ts when filing a mechanic's lien. Most mechanic's lien rules derive directly from the statutes: typically all found in the Lien Law. Of course there are also a few guidelines provided by the courts through case law. The following list, while by no means complete or comprehensive, represents the seven errors that I most commonly see that doom lienors (in no particular order):

1. The property described in the mechanic's lien is incorrect or incomplete. Most lienors know that they must list a description of the property in the lien. However, shockingly, not all of them take the time to verify that the information is correct. One of the easiest ways to validate and verify the subject property is to have a title company pull the information for you. The title work is usually cheap and quick and well worth the additional time and money. While not explicitly required by the statute, many careful practitioners will list the section, block and lot on the face of the mechanic's lien along with the common description by address. An incorrect address in your lien is in almost all instances a fatal defect that will doom the lien.
2. The lien is filed late. Mechanic's liens filed against one and two family residences must be filed within four months of the time that the lienor last provided labor or materials to the project. One very common error is to assume that a co-op or condo in a multiple unit complex is not a one or two family home and, therefore, the longer eight month lien period applies. In almost all instances courts have found that co-op and condo residences (the individual units) are subject to the shorter four month period. All other private commercial projects must be liened within eight months of the time that the lienor last provided labor or materials. Public liens must be filed within thirty days of the time that the public improvement was accepted by the public entity. Timeliness can come up in a variety of ways. First, a lien that is on its face untimely may be rejected by the clerk. Even if the lien is accepted, if it is not timely on its face a competent construction attorney can have the lien discharged through a fairly simple and straightforward action. Second, a lien that is timely on its face can be found to be inaccurate. This typically comes up in the context of a lien enforcement (a/k/a lien

foreclosure) actions. The lienor will need to prove that the last date that labor or services were provided, as set forth in the lien, is accurate. If the lienor's documents or testimony reveal that the lien is not accurate, and that, in fact, the lien was filed after the period to do so had expired, the lien can be discharged by the court. To avoid having to prove the exact date that you last provided labor or materials to a project it is highly advisable not to wait until the last minute to file your mechanic's lien.

3. The mechanic's lien was not properly served. The Lien Law provides for a very specific method of serving the lien on all of the necessary parties. First, the lienor must make sure that all proper parties are served. This usually includes, as a minimum, the owner and the general contractor. If the lienor is a lower tier subcontractor then everyone above it in the contract chain should be served with a copy of the mechanic's lien. Second, the lienor must make sure that the lien is served in the proper manner. The most common method of serving the mechanic's lien is to serve it on the parties via certified mail, return receipt requested.

4. The affidavit of service was not timely filed. After the mechanic's lien is served the affidavit of service must be filed in order to complete the filing process. The lien may be served up to five days before the lien is filed or within thirty days after it is filed. If the affidavit of service is not filed then the lien is defective and unenforceable.

5. The owner listed in the mechanic's lien is incorrect. This is a common error, especially for those who do not use a title company to verify the correct legal owner. If the owner set forth in the lien is completely incorrect the lien will, in almost all instances, be found to have a fatal facial defect. However, if the lien simply misdescribes the owner then the lien may survive. For example, if the owner is ABC 123 Corp. but the lien lists the owner as ABC 123 LLC the court may find the misdescription a curable error. However, if the lien lists XYZ 456 Corp. as the owner the lien will almost certainly be discharged due to this fatal defect.

6. The description of the labor and materials provided is insufficient. All mechanic's liens filed in the State of New York, whether on a commercial project, residential home or public improvement, must contain a concise statement describing the labor and materials that were provided. Personally, I prefer to be overly descriptive rather than using simple generic terms. In addition to assuring that the lien will not be challenged on the description, a detailed description can help the lienor get paid as everyone who gets the lien will have a better idea of what was done and will be able to investigate why payment was not made. General blanket descriptions should be avoided.

7. The amount of the lien is exaggerated. The lien should set forth the value of the labor and materials provided, the amount unpaid and the amount of the mechanic's lien. The lien should only be for labor and materials actually provided and not paid for and should accurately reflect the amount of such unpaid labor and services. In addition to voiding the entire lien, willful exaggeration of the lien amount exposes the lienor to liability at least in the amount of the exaggeration and also exposes the lienor to potential attorneys' fees awards and other damages.

Again, the above list is not intended to be a complete list of every error that can be found in a mechanic's lien and, indeed, there are numerous other defects that can cause the lien to be defective. However, by avoided the problems set forth in this list the lienor will be well on its way towards a valid and enforceable mechanic's lien. When in doubt, you should always consult with competent construction counsel about your particular situation in order to make sure that you have properly identified and protected your rights.