

# NEW YORK CONSTRUCTION LAW UPDATE

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## **MECHANIC'S LIENS DISCHARGE BONDS: WHAT HAPPENS AFTER THE BOND IS OBTAINED?**

A few months ago this blog posted an article about the process for obtaining a mechanic's lien discharge bond. The next logical question is "what now?". The primary reason for obtaining a discharge bond is to remove the lien from the property. You may do this because you are contractually obligated to keep the property lien free (for example if you are a general contractor and your subcontractor filed a lien), because you want to sell the property and the mechanic's lien is causing a problem and holding up the closing, because the mechanic's lien is a default under your mortgage or a variety of other reasons. But bonding a lien does not get rid of the lien. The name of the bond - a mechanic's lien discharge bond - causes a lot of confusion to those unfamiliar with the intricacies of the Lien Law. The bond does not discharge the mechanic's lien in the sense of extinguishing it, it discharges the lien in the sense of removing it from the property. But the lien remains live and well.

The mechanic's lien, having been removed from the property, is now attached to the discharge bond. If you posted the bond you have a few options. Of course one option is to simply wait it out. The lien will expire by operation of law in the same manner as it would expire against the property. A mechanic's lien, as a general rule, lasts for a period of 1 year from filing. If it is not extended or foreclosed upon it expires and is no longer enforceable. If this happens the surety that issued the bond should then return the collateral to you (either by extinguishing the letter of credit or returning the cash collateral). However, some sureties will require you to obtain a court order explicitly cancelling and vacating the mechanic's lien before they release the bond collateral back to the principal. Unfortunately this adds a bit of time and cost to the process but is certainly easier and more cost effective than litigating and defending a full blow lien foreclosure action.

There are two things that can happen to the mechanic's lien before it expires: 1) the lienor can foreclose upon it; or 2) you (or anyone with standing) can attempt to have the lien cancelled and vacated by a Court order. Challenging the lien and attempting to have it cancelled and vacated occurs in the same manner as if the lien were still attached to the property - the mechanic's lien discharge bond does not alter the process. The person desiring to discharge the mechanic's lien so that the bond collateral can be released must either attack the mechanic's lien

on its face or challenge the underlying validity of the lien (i.e. argue that the amount is not owed). A challenge to the face of the lien can be made via petition. A challenge to the amount of the lien can only be made in a foreclosure action.

A mechanic's lien that has been bonded can be foreclosed upon in generally the same manner as a lien that has not been bonded and is still attached to the real property. The lienor simply files a foreclosure complaint and names all of the necessary parties. Notably, if a mechanic's lien has been bonded the owner of the real property is no longer a necessary party. But the surety that issued the bond is now a necessary party as is the principal under the bond. Other than the parties to the action, an action to foreclose upon a mechanic's lien that has been bonded will follow generally the same course as a lien that was not bonded.

The New York Lien Law, the bonding process and the foreclosure process can be a mine field for novices. Small errors can spell doom in certain instances and it is therefore advisable to consult with competent construction counsel to make sure that everything has been done properly along the way.