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ENFORCING JUDGMENTS ON CONSTRUCTION LIEN CLAIMS IN NEW JERSEY

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Most contractors have at least a broad understanding of the procedures required to file a lien claim under New Jersey's Construction Lien Law (*N.J.S.A. 2A:44A-1 et seq.*, the "CLL"), although it should be borne in mind that some significant changes have been made in the recent amendments, effective January 5, 2011 (the "Amendments").

However, equal attention must be paid to events that may take place after the lien is filed: What happens if the property is transferred after the lien is filed? What additional steps must a contractor take to ensure that a valid lien claim is enforced? What parties are liable if a bond is filed to discharge the lien claim? These questions were the subject of two recent cases on the CLL (neither of which would have different outcomes in light of the Amendments).

The effect of property transfer after the lien has been filed

The purpose of the CLL is to provide security to contractors, subcontractors and suppliers who furnish labor or materials used to enhance the value of property. If the lien is found to be valid by a trial court, the lien claimant may enforce its judgment against the property owner by seeking issuance

of a writ of execution to recover the judgment by sale of the land. *N.J.S.A. 2A:44A-24* and *25*. However, the CLL also seeks to protect the interests of owners who have met their financial obligations. Protection is provided, in part, by the requirement that lien claimants serve a copy of the lien on the owner of the property and the contractor against whom the claim is asserted. *N.J.S.A. 2A:44A-7*.

Notice provisions to owners are even greater with respect to residential construction, which requires that, prior to filing a lien claim, the lien claimant must first file and serve a Notice of Unpaid Balance and Right to File Lien (NUB) on the owner and contractor. Simultaneously, the lien claimant must file and serve a demand for arbitration, wherein an arbitrator will determine whether or not certain procedures were met and sufficient proof exists to warrant the filing of the lien claim. *N.J.S.A. 2A:44A-21*. After the arbitrator issues an award, the claimant must file a lien claim not later than 90 days following the date the last work was provided for which payment is claimed. *N.J.S.A. 2A:44A-6*. (Under the Amendments, the time by which a lien claim must be filed on a residential project has been lengthened to 120 days from date of last work.)

In the matter *Marone Contractors, Inc. v. Colvin*, decided by the Superior Court of New Jersey, Appellate Division, on July 14, 2011, the contractor served the NUB and arbitration demand on the developer of two properties. However, *subsequent to service of the NUBs, the properties were sold to residential homeowners*.

The Court found that the NUBs were properly and timely served on the party then in ownership of the properties. With respect to the lien claims, however, the Court emphasized that "the proper parties to the lien claim are the person or persons holding title when the lien claim is filed." Since the lien claims were not filed against or served on the actual owners of the properties within the statutory time frame, the lien claims were unenforceable. The Court also noted that the contractor failed to name the real property owners when it filed its enforcement action, as required by the CLL. *N.J.S.A. 2A:44A-16a*. Ultimately, the Court ordered that the lien claimant pay all court costs and reasonable

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attorneys' fees in connection with the action brought by the homeowners, because it failed to timely discharge its unenforceable lien claims.

As the Marone case shows, while it is always good practice to run a title search prior to filing a lien claim, it is especially important to be vigilant about the possible transfer of title when the property is being developed for sale.

Recording of lien discharge bond relieves property owner of liability

Another mechanism for providing owner-protection is the option available to post a bond to discharge a lien claim. *N.J.S.A. 2A:44A-31*. The owner may itself post the bond or may require its general contractor to do so. In either event, the bond, which must equal 110% of the amount claimed by the lien claimant, stands as substitute security for the lien claim, and the land and improvements are released from the claim. *N.J.S.A. 2A:44A-32*. With the bond standing as substitute for the property, if the lien is determined to be valid, the lien claimant need not seek to recover its judgment by forcing a sale of the property — it can recover directly against the surety.

The question regarding what parties remain liable after a bond is posted to discharge a lien claim was the subject

of *Eastern Concrete Materials, Inc. v. Raritan Town Center, LLC*, decided by the Appellate Division of the New Jersey Superior Court on July 7, 2011. A bond was filed by the general contractor to discharge a lien claim filed by a supplier. The trial court rejected claims by the supplier against the general contractor and owner for breach of contract and unjust enrichment, but entered judgment against those parties on the lien claim. On appeal, the general contractor and owner asserted that after the lien discharge bond was recorded, security for the lien claim transferred from the real property to the bond. The Appellate Court agreed and reversed a trial court judgment on the construction lien claim against those parties, while affirming the judgment against the surety.

Practice Tips

Contractors and their counsel should endeavor to confirm who owns title to the subject property at several stages: prior to filing a NUB, prior to filing a lien claim, and prior to filing an enforcement action. Other interested parties, such as sureties, mortgage holders, tenants and other lien claimants, must be joined in any enforcement action. Care should be taken to seek to enforce judgment against the right party depending upon the facts at the time the action is filed.

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