

NEW YORK CONSTRUCTION LAW UPDATE

This article is written and published by Vincent T. Pallaci, Esq. Mr. Pallaci is a construction attorney with the law firm of Kushnick & Associates, P.C. and he practices construction law in New York State. Mr. Pallaci is also the publisher and author of the New York Construction Law Update blog (<http://newyorkconstructionlawupdate.blogspot.com>) and the New York Mechanic's Liens blog (<http://nymechanicsliens.blogspot.com>)

TO LIEN OR NOT TO LIEN: THAT IS THE QUESTION

Well, at least it would have been if Shakespeare was a contractor. But modern day contractors would probably agree that it is one of the most difficult questions they have to answer. Filing a mechanic's lien is often a necessary evil. If you have done work and have not been paid, filing a mechanic's lien may be the only way to protect and preserve your ability to get paid. Mechanic's liens though do not always lead to smooth sailing; in fact, they rarely do.

There are negative aspects to filing a mechanic's lien that, often, contractors are aware of and, therefore, sometimes the contractor waits too long to file its lien. The obvious problem with filing a mechanic's lien is that you are undoubtedly going to cause your client trouble. For example, a subcontractor that files a mechanic's lien will cause the general contractor to incur the wrath of the owner; a supplier to a subcontractor that files a mechanic's lien will cause that subcontractor problems with the general contractor; and a general contractor that files a lien for a property developer may not find himself in the developer's good graces for much longer. Of course if the project was a one shot deal then the lienor probably does not care if it is paid: it just wants to be paid. But if this is a long term relationship then that mechanic's lien can be a heavy burden on the relationship.

Mechanic's liens often become problems because they usually lead to a freeze up the payment process. Once a lien hits, the owner is going to refuse to pay the general contractor, the general contractor is going to refuse to pay the subcontractor and the subcontractor is going to refuse to pay his supplier. This stalemate can often increase the chances that the lienor is not going to be paid short of litigation. Another related problem is that the general contractor is almost certainly contractually obligated to keep the property free and clear of mechanic's liens. So once a lien hits, if the general contractor does what he is supposed to do, the lien is going to be bonded off and those costs are going to be passed on to the subcontractor and down the chain to the supplier that filed the lien. In this situation, not only does the supplier not get paid, but he is back charged for filing the lien. Undoubtedly the supplier will fight the back charge but it is nonetheless not an enviable position to be in. The lien was filed to secure payment and yet the supplier still has not been paid and has instead been backcharged and potentially picked a fight with a contractor that is going to pull the supplier into costly litigation. In addition, the lienor

may have lost a good source of business by irritating his customer with the filing of a mechanic's lien. This raises the question: why file the mechanic's lien in the first place?

All of these thoughts are going through a smart contractor's head before he, she or it files a mechanic's lien. Letting these thoughts linger too long can lead to other problems. These problems include: 1) wait too long and you may miss your lien period; 2) wait too long and the person that owes you the money may have been paid already thus, under New York law, extinguishing any right you have to file a mechanic's lien; 3) the project, if it is already financially burdened, may go under and at that point you are much less likely to be paid because of a lien; or 4) others ahead of you may not have been paid and filed liens before you thus, giving them priority over your claim. It's a lot to think about and there is a lot of risk.

If you file your lien too quickly you may slow the payment process down and lose a future customer. Wait too long and you may lose your ability to use the mechanic's lien as an effective payment tool. At the end of the day it is a legal and a business question. From a legal standpoint, file your mechanic's lien before your time to do so expires and before your client is paid and the lien fund is extinguished. From a business standpoint, pick just the right time to file your lien without hurting chances for future business (admittedly, not an easy thing to do). Keep in mind that if you file the mechanic's lien at the appropriate time and have given your client ample warning then there is a good chance they will understand your decision to file a lien. Your client should understand it is a business decision and that you simply cannot take the risk of missing your lien window. If your client were in the same position, and it likely has been at some point, they would have done the same thing (at least that is what you will tell them).