

NEW YORK CONSTRUCTION LAW UPDATE

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THE MECHANICS OF ENFORCING YOUR MECHANIC'S LIEN

You've completed your contract and you weren't paid so you properly and timely filed a mechanic's lien against the owner's property. You naturally ask yourself "now what?" A common misconception among some in the construction industry is that the mechanic's lien, in and of itself, gets you paid. While it may give you leverage in negotiating a payment, it most certainly does not get you paid without taking the next step. That next step is known as enforcing, or foreclosing on, your mechanic's lien. But just what does it mean to foreclose on your mechanic's lien? Here are the basic minimum things every contractor should know about the lien enforcement process:

1. *A mechanic's lien foreclosure action is a lawsuit.* That lien on the property is great but without the enforcement lawsuit the lien can ultimately be useless. A complaint must be prepared (preferably by an attorney), it must be filed and it must be served on the defendants. Each defendant will have the chance to appear and explain why you are not entitled to your claim or why their claim should be paid before your own.
2. *A mechanic's lien foreclosure action is complicated.* You should not try to prepare a foreclosure action yourself and I strongly suggest you find an attorney that is familiar with lien foreclosure practice rather than going to your brother that does divorce law, your cousin that does real estate closings or your neighbor that is a criminal attorney. You wouldn't go to a podiatrist for your headaches and attorneys are like doctors, we all have our own specialties. The New York Lien Law is very strict and the slightest mishap can doom your claim.
3. *A mechanic's lien foreclosure action can involve a lot of people that you have never heard of.* One of the reasons that mechanic's lien foreclosure actions are complicated is that there are a number of "necessary" parties you must bring into the lawsuit in order to

ensure that if you ultimately succeed on your claim, you will in fact be able to have the property sold to pay your claim. Common necessary parties that may have had nothing to do with your contract are the owner, any bank that has a mortgage on the property, any other mechanic's lien holders, municipalities or other government entities holding tax liens, other parties claiming rights to the property through lis pendens, and the list goes on. The best way to make sure you pull in everyone that you need is to get a good title report from a good title company and hire a good attorney that knows how to read the report and pull in the necessary parties.

4. *A mechanic's lien foreclosure action takes time.* You finished the project and weren't paid. You filed your mechanic's lien and weren't paid. Surely you file your foreclosure action and then get paid...right? Not quite. While the ultimate goal of the foreclosure action is to sell the property and get you paid on your claim, the process can be time consuming so don't expect payment within thirty days of commencing the action. While every case is different, 18 months from start to finish is a fast moving case and 3-4 years in New York is not unheard of. The best way to make sure you move the claim along as quickly as possible is to hire an attorney that knows what he or she is doing. If your attorney has to learn on the job your case can be unnecessarily delayed.

5. *A mechanic's lien foreclosure action can be (very) expensive.* See numbers 1 through 4 above. You are hiring an attorney to file a complicated action that may involve a number of parties, that will likely take more than 18 months to complete and at the end of the day your goal is to forcibly take somebody else's property without their permission and have it sold off so that you can take the proceeds. All of this adds up to lots of legal fees. Again, and I cannot stress this enough, hiring a good construction attorney with experience in foreclosure actions is the best way for you to go. They might charge a little more than the general practitioner that you normally use for legal issues but their expertise will almost certainly save you time and money in the long run as they will not have to "reinvent the wheel." Also, a good construction attorney can probably get a good idea of the time and expenses that will be involved in your particular case early on. This will allow you to budget and know what and when to expect results.

6. *A mechanic's lien foreclosure action might not help you.* I will give you an example: Connie Contractor completes a \$100,000 project for Andy Owner. Andy Owner doesn't pay Connie. Connie Contractor files a mechanic's lien against Andy Owner's property. Connie then hires Lilly Lawyer, the best construction attorney in New York, to foreclose on the mechanic's lien. But, Lilly, knowing her craft, first orders a title report. The title report shows that Andy Owner has a \$10,000,000 open construction loan on the property (that was properly recorded in all respects), that Andy has been ignoring the New York City Department of Finance and there are \$100,000 in tax liens against the

property, and that Sally Subcontractor has a mechanic's lien on the property for \$500,000 and is already foreclosing on her lien. So just from the title report you now know that there are probably \$10,600,000 in claims that are going to be paid before Connie Contractor sees a penny. Let's assume that Connie also knows that the property in the current market and in the condition it is in probably isn't worth more than \$8,000,000. If you do the simple math you quickly see there is probably not going to be enough money left in the pot to pay Connie Contractor even after Lilly forecloses on the lien for her. Maybe Connie will want to proceed hoping that the market turns around before the property is sold. Or maybe Connie hopes that Andy will resurrect the project and pay her if she just keeps her lien alive. But maybe Connie decides she would rather spend her money on mobilizing Donny Developer's new project rather than throwing good money after bad. The point is, Connie Contractor, even with a great claim and a great attorney, might not benefit from a mechanic's lien foreclosure action.

A mechanic's lien foreclosure action, in the right hands, can be a powerful tool in the contractor's toolbox - but make sure you know what you are getting into.