Scribbles Squibs # 7 (March 26, 2013) - Lien on Me

*By 'Professor' Jonathan Sauer**

The Problem: As much as they might complain, the physicians have it over most of the rest of us. You don't even get to *see* them until you prove that you have insurance, which will pay the lion's share of the bill. For many of us, the monthly insurance premium for health insurance rivals or exceeds our mortgage payment. As to that portion you are responsible for? The deductible? Increasingly, this has to be paid *up front*, even before 'the doctor will see you now.' The net result being that before the physician has even *seen* you, his/her bill has been completely paid. And, that's all before the misdiagnosis and subsequent visits to kinda' clean up the malpractice, all of it subject to the aforesaid payment rules. Nice work if you can get it. Maybe, you shoulda' listened to your mother as to your career choice. I mean, she brought you into this world, clothed and fed you. What is exactly the basis for complaint here? I mean, I'm hopin' we're not discussin' ingrate. Then again, none of God's children is exactly perfect. Except, maybe, for you and me.

The Construction Industry's Big Problem: One of the AIA general contract documents specifically says that the general contractor has the right to inquire of the owner as to the details of the financing of the private construction project before the work is actually done. (In Massachusetts, mechanics' liens only apply to private projects, not public projects, which are covered by payment bonds.) But, how many generals *actually* do this? And, how does this help the first and second tier material suppliers and subcontractors who don't have any similar language in their contractual agreements? Where most construction billing is done a month at a time, before one can even render a bill, you have already incurred liabilities (or paid) for a lot of labor, materials and equipment. So, accepting the fact that this is a monthly business, before one can even realistically hope to see a check, you are (at minimum) two months out. What happens if the architect is a bit slow (or cranky, a condition to be anticipated), the owner *slow* in making payment and/or the general contractor even *slower* still? What if your contract has a pay-when-paid clause in it and, for some reason, your line items aren't being recognized for payment by the general contractor, the owner, the architect or some combination of this unholy trio? What if the general contractor is buying a new boat or, more expensively, arranging for a new wife? One month can become three months out at that point. And, from that point forward, the balance of power between the party incurring the costs and the party filtering the money down have almost inevitably irrevocably changed, only to potentially get worse the farther out the subcontractor or material supplier gets. For, whoever has provided ninety days of as-yet unpaid for labor and materials and equipment is hardly likely to withdraw from the project, if only to protect the *engorged* receivable. Possibly a pleasant image under certain circumstances: just not *here*. And, let's face it. For some of us, particularly those of us who are of the *older* persuasion, not exactly a realistic picture. What the hey? Get over it!

A Mechanic's lien*:* The Professor is speaking: Pay attention and put down your I-Phones and, if you are driving, look out the windshield. The change might do you good. The first thing that needs to be said about this is that, in all likelihood, if push comes to shove, a mechanic's lien simply won't work. All's that a mechanic's lien is is an opportunity to get a piece of the owner's equity (ownership interest) in the real estate. For this to be of any value, there has to be *some* value in the real estate above and beyond what is owed on the real estate. Generally speaking,

senior (earlier) security interests such as mortgagees (bank mortgages)- with one key exception - will take ahead of the lienor. And, the larger the project, the less possible will it be for a subcontractor (or, even, a general contractor) to sell the project at a forced sale, paying off all senior security interests, plus the myriad fees of lawyers, auctioneers, real estate appraisers, sheriffs and a variety of legal costs involved with an action to foreclose the mortgage, which is what a mechanic's lien ultimately offers. (Hey, however parasitic some of these may appear to be, we all gotta' eat!) For a lienor to be successful, all of these costs will have to be paid off at one hundred cents on the dollar before the lienor *collects a dime!*

At the same time, the foregoing notwithstanding, mechanics' liens can be breathtakingly effective in some circumstances for **two reasons**. ***First,*** a lienor will come ahead of a prior-recorded mortgage as to all monies that have not yet been disbursed or committed to when the lien is filed. Example. A bank has given ten million dollars' worth of construction financing. At the time a lien is filed, the bank has paid out three million dollars and has committed to a further payment of five hundred thousand dollars. You, the lienor, will come ahead of the bank for the next six and one-half million dollars of financing, a situation a bank will never knowingly tolerate. ***Secondly,*** most financing agreements state that a mortgagor's (the one who borrows the money) not discharging a mechanics' lien within thirty days of being notified of the same commits a 'breach of mortgage' which 'accelerates the note' meaning that this individual now owes the bank *all* of the money he/she has borrowed notwithstanding that the job is not done. It is these two facts – the bank won't pay any more draw and the borrower now owes all of the money – that cause most mechanics' liens to work. If these two factors are unsuccessful, your mechanic's lien will probably not ultimately be successful due to the difficulties of selling commercial property at a forced sale at a sufficient price and due to the fact that most smart homeowners have homestead protection on their homes to the tune of $500,000 for a filing fee of $35.00. (For more information on homesteads, go to our website: wwwsauerconstructionlaw.com and read *Squib# 5.) Such a deal!*

How to file a mechanics' lien. OK, pilgrim! We're just gonna' do this once. So, put down the 2013 boat catalogue and pay attention. (You can always place an order later. I mean, like, it's too cold to worry about boats just now anyway and if the current wife learns of this, you might have difficulties even before we begin to discuss the property settlement.) Get a pen and paper. There's , like, a buncha' things you gotta' know about. Ready? OK. Here goes! ***First,*** you need a 'written contract'. If you don't want to do written contracts, then go elsewhere. It's a statutory requirement. So, if you have a written contract and you are second tier – your contract is with a first tier subcontractor – then you need to give the general contractor written notice of your position, a 'notice of identification', this being the ***secondary*** requirement and one that has to be exercised within thirty days of your 'commencing performance' under that contract, which should be interpreted as calculated from the date you have a written contract. All of the necessary forms are on our website. Now, pay attention to the remaining 'rules'. Now, here's what more you gotta' do. You have to file a 'notice of contract' at the registry of deeds within 90 days of the general contractor's last performance of work at the project, figured conservatively, which is figured from the date that the general contractor or any of its subcontractors last works at the project. So, that's like the ***third*** requirement. Then, you have to file a 'statement of account' within 120 days of the general contractor's last performance of work at the project, as defined previously. (That's like the *fourth* requirement.) Next, within 90 days

of your filing the statement of account, you have to file an action to 'foreclose the lien', which means a civil action filed in court (the *fifth* requirement). The ***sixth*** thing you gotta' do is file an 'attested-to' copy of your complaint in the registry of deeds governing the real estate you are liening, meaning, basically, the county where the real estate is located. All that means is that when you file your complaint in court, you ask the clerk to give you a certified copy of the complaint, so you can file this in the Registry of Deeds. You now have a litigation. That means a 'law case'. Now, follow the procedures outlined by the court (see "The Litigation Process" on our website.) Thereafter, hopefully you will pass "Go" and collect more than two hundred dollars. (We know: the rules are harder to understand now that they have changed the *Monopoly* pieces!)

Along the way, you may need help from someone familiar with this procedure. And, be sure to ascertain somewhere along the way whether or not a project-wide lien bond was filed by the general contractor at the registry of deeds pursuant to MGL C. 254, s. 12. That can change *all* of the rules! Then again, once a 'party in interest' bonds off your lien in accordance with MGL C. 254, s. 14, the rules might change *once again!* Does this sound complicated? We suspect that estimating jobs with the intent of covering costs and making a profit might be somewhat harder. Then again, we are always interested in exchanging notes!

**(Attorney Jonathan Sauer was awarded in 2013 the Little Chair for Construction Studies by Ivy Tower University (ITU) in acknowledgment of his long-standing efforts in educating those working in the construction industry. First cousin to Spiderman, for a number of years he has maintained a significant web presence, which has assisted him in handling sticky legal problems. Over the next forty years, he will be very gradually phasing out his law practice to head ITU's Construction Industry degree program as Dean. Also, his cousin has invited him to go to LA and do a movie with him. The first dailies of his flying up and down buildings in a tight red and blue suit show promise. The Professor maintains office hours at ITU for enrolled students by appointment only. These materials are general information only, not legal advice. For more information, see www.sauerconstructionlaw.com.)*

Boston Office: Sauer & Sauer, Suite 500
75 Arlington Street, Boston, MA 02116; Phone: 617-848-4538
Email: jonsauer@sauerconstructionlaw.com; sallysauer@sauerconstructionlaw.com

Main Office: Sauer & Sauer, 15 Adrienne Road, East Walpole, MA 02032
Phone: 508-668-6020; jonsauer@verizon.net ; sallysauer@verizon.net

Worcester Office: Sauer & Sauer, Suite 1000, 255 Park Avenue, Worcester, MA 01609 Phone: 508-797-3066

HERE ARE SIX THINGS TO KNOW ABOUT OUR FIRM:

1. We guarantee our billing rate for five years in writing and give a 25% discount as to the fees on the first file for new clients.

2. We endeavor to maintain wherever possible future business relationships with your contracting party by emphasizing a fair and reasonable approach, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'.

3. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first and, where possible, mediation. (We recently obtained 1.5 million dollars for a subcontractor against a bankrupt general contractor's payment bonds (three projects) without a single deposition ever being taken and without having to even answer interrogatories!)

4. No charge for quick answers to *general* Massachusetts construction law questions.

5. Being a smaller firm, our attention is *solely* on our clients, not on feeding the overhead of a fancy office and many partners and associates. We only have to feed our five dogs, most of which are *quite large!* (The Rottie , by the way, says '*hey*!') A Rottie is kind of like Charles Schwab: when she speaks, you had better listen. Especially, if you have an abiding interest in retaining all of your appendages in more-or-less original equipment condition. A hungry gal, she.

6. Uh, there were only five things to know. Our bad!

"Knowledge is Money in <u>Your</u> Pocket"

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