

Scribbles Squibs¹# 79 (December 14, 2023):

“MAKING YOUR MASSACHUSETTS MECHANICS’ LIENS WORK HARDER”

By Massachusetts Construction Attorney Jonathan Sauer

I. INTRODUCTION.

I have been dealing with a lot of mechanics’ liens recently.² Very recently an electrical subcontractor called me looking for help in getting paid about 59k. But, he was working without a written contract and one needs a written contract to file a lien! That conversation and, unfortunately, very many like it suggested to me to write a short *Squib* on some of the basics one needs to understand in dealing with a Massachusetts mechanics’ lien.

This Squib discusses eight things that are helpful to understand about Massachusetts mechanics’ liens and how to use them to get paid. And, I’ve kept this as brief as possible - not even six entire pages of text. But, first

II. EARLIER RESOURCES.

There are four other articles presently on my website - www.sauerconstructionlaw.com - that discuss Massachusetts mechanics’ liens. Two of them are in my ‘Squibs’, which are my newsletters. And, two of them are in Construction Law Articles. Buttons for each of these can be found about 2/3rds of the way down my homepage.

As to the Squibs, we have Scribbles Squibs # 7 (March 26, 2013) “LIEN ON ME”. And, liens were also discussed in Scribbles Squibs # 77 (April 5, 2022) “MASSACHUSETTS

¹A ‘squib’ is defined as ‘a short humorous or satiric writing or speech’. Wiktionary defines a ‘squib’ as: “a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses.”

²These can only be filed on private projects. Most public projects require the general contractor to provide the owner with a payment bond, which is the resource material men and subcontractors can look to to get paid.

STATUTES TO HELP GET YOU PAID”.

As to my Construction Law Articles, we have “THE NEW MASSACHUSETTS MECHANICS’ LIEN LAW”. Another Article is MASSACHUSETTS MECHANICS’ LIEN LAW AS OF 2012, which has newer information.

I also have on my website various of the forms one needs to have to file a mechanics’ lien, including a notice of contract, a statement of account, a notice of identification, a dissolution of lien and a sample court complaint.

The 1000 pages plus of material on my site are there to help those involved with construction *before* trouble appears. Now, eight things to understand

III. THE EIGHT THINGS.

1. THE BASICS.

The following is *greatly* simplified here to just give the reader a sense of what is involved with filing mechanics’ liens.

Before a lien can be filed, various legal title work as to the ownership of the property will have to be researched, similar to the kind of work that is done before a mortgage is closed upon or a property is sold. This is not something that can be done quickly, as it has to be done right and titles can get very complicated. Sufficient time has to be allowed for this work to be done.

Material suppliers, subcontractors and general contractors have to file a ‘Notice of Contract’ at the appropriate registry of deeds within 90 days of the last date they performed work at the project. The various numbers listed within this document don’t establish the maximum amount of their lien. And, one has a mechanics’ lien at such point as the registry of deeds accepts for filing the ‘Notice of Contract’.

Within 120 days of the last date they performed work at the project, they have to file a ‘Statement of Account’ with the appropriate registry of deeds. This document *does* establish what the maximum amount of the lien is. Ideally, then, one’s contract work should be complete before a ‘Statement of Account’ is filed.

Second tier subcontractors and material men - those who work for a subcontractor who has a contract with the general contractor (first tier subcontractors) - have an additional step to take if they want to have the same lien rights as a first tier subcontractor. And, that is to serve the general contractor with a ‘Notice of Identification’ within 30 days of commencing performance under whatever contract they have with the first tier subcontractor. This is a simple form that doesn’t require a lawyer’s services to prepare. Second tier subcontractors and material men can still lien the project if they fail to take this step. But, the potential amount of their lien will be

reduced.

And, a lawsuit has to be filed within 90 days of the filing of the 'Statement of Account' in the appropriate court. It is the judgment that will issue from this litigation that will ultimately provide the lienor with final lien rights.

There is a mechanic's lien in place as long as one meets these various requirements within the appropriate time periods required. If a lienor misses one of these deadlines, its lien is dissolved as a matter of law.

2. WHY DO LIENS OFTEN WORK.

Understanding why liens often work can help you with the process.

The statutory purpose to be achieved in filing a lien is to attach the owner's ownership interest in the real estate. Technically speaking, if one gets a judgment issued by a judge confirming your lien, you can try to sell that piece of real estate. For various legal and practical considerations, a lien case hardly ever gets to the point of having a complete trial. And, even with a judgment awarding a contractor with a lien, such liens only rarely produce actual money.

But, there are three reasons *not* stated within any statute which explain why liens often work.

First, once a financing bank finds out that there is a lien on the property, it usually stops funding the project because having a lien on the property might impair the bank's collateral rights. Projects with no money come to a screeching halt. And, then, everyone is trying to figure out how to get rid of the lien.

Secondly, the owner of the property can not ordinarily sell the property or refinance it while there is a lien on the property.

Thirdly, and as strange as it may seem, when an owner has its property lienied, this embarrasses the general contractor with the owner. *This can be a **significant** factor, particularly for earlier liens!*

An irate owner - which will be involved with any lawsuit formalizing the lien as a defendant, incurring significant legal fees as it does so - might require the general contractor to post a payment bond. The owner might insist on issuing joint checks to the general contractor and its subcontractors. The owner might require the general contractor to get lien waivers from all of the material suppliers and subcontractors to accompany each requisition. The owner might start paying material suppliers and subcontractors directly, not through the general contractor. The owner might threaten the general contractor with termination if it is unable to get the lien dissolved. None of these things will be to the general contractor's liking!

What I have seen happen in many such situations is that the general contractor *may* say to the owner something like this: “This lien was caused by a misunderstanding with the subcontractor. I’ll get this resolved quickly.” The general contractor now pays the subcontractor, which files a ‘Dissolution of Lien’ and, for now, everyone goes on their merry way!

3. FILE YOUR LIENS EARLIER.

Under the lien law, a subcontractor’s lien will not exceed the amount of money the owner owes the general contractor from the time of the lien filing to the end of the project. So, five subcontractors filing liens for a lot of money when the job is 95% done are probably just wasting their money with their legal fees, as the owner may not owe the general contractor enough money to fund the various liens at that point in the job.

Also, generally speaking, the relationship between the general contractor and the owner is better earlier in the project before the general contractor and the owner develop construction and/or design problems or payment issues. Everything being equal, assuming the owner has paid the general contractor for the subcontractor’s work, the general contractor is more inclined to make a payment to maintain its relationship with the owner, which it may value to a greater extent earlier in the project, less so as the project goes on.

4. SECOND TIER SUBCONTRACTORS SHOULD UNDERSTAND NOTICES OF IDENTIFICATION.

As discussed briefly above, a second tier subcontractor should serve the general contractor with a ‘Notice of Identification’ within thirty days of commencing its performance under its contract. It’s a very simple form that one doesn’t need a lawyer to fill out. If the second tier subcontractor serves the ‘Notice of Identification’ upon the general contractor in a timely manner, it will have the same lien rights as a first subcontractor. If the second tier subcontractor does not serve the general contractor with the ‘Notice of Identification’ in a timely manner, it still has lien rights. But, those rights are reduced.

It should be understood that a ‘Notice of Identification’ does not create a mechanics’ lien. It is not filed at any registry of deeds and is simply a notice requirement second tier subcontractors need to comply with in order to have the same lien rights that first tier subcontractors have.

5. SUBCONTRACTORS MAY HAVE DIFFERENT LIEN RIGHTS THAN GENERAL CONTRACTORS HAVE IN SITUATIONS WHERE THE GENERAL CONTRACT IS WITH A TENANT AND NOT WITH THE OWNER OF THE PROPERTY.

The lien law potentially gives general contractors more lien rights than a subcontractor would have in situations such as tenant fit-up work at a mall, where the general contract is with a tenant and not with an owner.³

Generally speaking, a subcontractor can only lien the tenant's interests in the property and not the owner's interests in the property, even though the owner benefits from the subcontractor's work.

For general contractors, even when their contract is with the tenant, when the owner is aware of the construction being undertaken and does not object to that construction, the general contractor *may* be able to lien the owner's interests in the property.

6. LIENING COMMON AREAS IN CONDOMINIUMS.

The last time I researched this matter, neither subcontractors nor general contractors can lien the common areas in condominium projects.

7. LANGUAGE IN A SUBCONTRACT OR GENERAL CONTRACT SAYING THAT THE SUBCONTRACTOR OR GENERAL CONTRACTOR WAIVES ITS RIGHTS TO FILE A MECHANIC'S LIEN.

Under Massachusetts laws, such provisions are unenforceable, as they violate Massachusetts 'public policy'.

8. LIENS CONTRACTORS HAVE FILED BUT HAVE AT SOME POINT STOPPED PURSUING.

As mentioned above, at such time a subcontractor or general contractor misses one of the required steps in filing a lien, the lien is dissolved as a matter of law.

³The mechanics' lien law was substantially rewritten in 1996. The principal party initiating this legislation was the Associated General Contractors. Provisions that differ between subcontractor lien rights and general contractor lien rights as contained within the statute give general contractors more rights with these types of projects.

What I often see is that a subcontractor might file its 'Notice of Contract' and even, sometimes, the 'Statement of Account' but then does not take the next required step of bringing a lawsuit. This type of strategy often makes financial sense because taking the first two steps in filing a lien is comparatively inexpensive as compared with the legal fees and costs associated with starting a lawsuit.

Legally, when that next required step is not taken, the lien is dissolved.

Banks, however, take a different view. If they are reviewing the title to a piece of property one wishes to sell or refinance, banks tend to treat *any* lien on file as a valid lien, even when it is clear that the lien no longer has any legal validity. They don't usually lend money in such situations, as the title is ostensibly impaired with an outstanding lien, whether the lien has legal significance or not.

So, one way or another, that lien will have to come off of the title. And, the bank's insistence on this is often within a matter of a few days before a closing on a loan has been scheduled.

So, if a contractor has filed a lien but then did not pursue and it was not dissolved by the filing of a 'Dissolution of Lien', it may make legal sense to file a 'Dissolution of Lien' form when that contractor is abandoning its lien. That is to avoid what can often be *significant* pressure brought against the contractor near a closing to take the lien off the title, with all kinds of threats being made against the contractor for potentially ruining whatever deal there is and with all kinds of lawsuits being threatened because the contractor is impairing the title to a piece of property it no longer has any legal interest in.

By filing a 'Notice of Contract' and 'Statement of Account', the contractor may or may not have gotten paid. But, I think good practice - but not a legal requirement - is to consider filing a 'Dissolution of Lien' as to a piece of property the contractor liened but no longer has any legal interest in at the time it is abandoning its interest in the lien. The form isn't complicated because most of the necessary information will come from the earlier documents on file and the filing fee is only \$105 as of the date of this writing.

Doing so is a good way to avoid the *agita!*

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