

## CONSTRUCTION LAW

## Expert Analysis

## Options Available for Owners To Challenge Mechanic's Liens

It happens all the time. The scenarios vary, but the basic premise is the same: an owner is faced with a mechanic's lien against its real property that the owner believes has been wrongfully or improperly recorded. The owner may have made full payment to its contractor, or work may have been performed on the owner's property without the owner's knowledge or approval or the owner may believe that the lienor's right to file the lien has expired. In any case, the owner<sup>1</sup> needs to remedy the encumbrance. Although an owner will ultimately have recourse or protection against a deficient or invalid mechanic's lien, the nature and extent of that recourse or protection depends on a number of factors, including the nature of the perceived deficiency in the lien. The following is a discussion of some of the options available to an owner aggrieved by what the owner believes to be an improper lien.

### The Lien Law

New York's Lien Law allows a contractor, subcontractor or other person that performs labor or provides material for the improvement of privately owned real property<sup>2</sup> to file a lien against the property for the value or agreed upon price of the work that is due or payable. The labor must have been performed or materials supplied with the consent of, or at the request of, the owner of the real property, or of the owner's agent, contractor or subcontractor. N.Y. Lien Law §3. The lien on the real property secures the amount due for the labor and/or materials supplied.

A mechanic's lien encumbers the title to the real property, and the owner of the real property typically has an interest in vacating or discharging the lien expeditiously. Of course the owner can always satisfy the lien by payment or the owner can execute a bond or undertaking as substitute security, thereby removing the lien from the real property. However, in cases where the owner believes that no money is owed or where the lien is believed to be either void, defective or otherwise improper, the owner may wish to challenge the lien



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or to have it dismissed summarily. The question is whether the owner has the ability to file a petition to have the lien dismissed summarily, or whether the owner must raise the challenge defensively in response to an action brought by the lienor to foreclose upon the lien.

Section 19 of the Lien Law authorizes the use of summary proceedings to discharge a mechanic's lien in a limited number of circumstances. An owner may, by petition, seek an order summarily discharging a mechanic's lien (a) where there are certain procedural defects in the recording, perfection or continuance of the lien, (b) where there are material defects that appear on the face of the lien, or (c) where the lienor has neglected to prosecute an action to foreclose the lien in accordance with a demand under Lien Law §59. Lien Law §§19(3) and 19(6). Otherwise, any challenge to "the validity of the lien must await trial of the foreclosure action." *8 Catherine St. v. NJC Constr.*, 29 Misc. 3d 1238A, 2010 N.Y. Misc. LEXIS 6099, 2010 NY Slip Op 52189U, \*\*7 (Sup. Ct. New York Cty. 2010) (internal citations omitted).

As a general rule, where facts extrinsic to the face of the lien are required in order to challenge the validity of the lien, summary discharge is not available. *Matter of Northside Tower Realty v. Klin Constr. Group*, 899 NYS2d 900 (2d Dept. 2010). In *Matter of Northside Tower Realty*, the Second Department reversed a lower court decision that granted an owner's petition to discharge a subcontractor's lien on the grounds that the owner had made full payment to its general contractor. The lower court granted the petition, despite the fact that proof of payment was not apparent on the face of the lien. The lower court found that the contractor clearly established the absence of any funds due and owing from the owner to the general contractor, and found that in the absence of admissible evidence to refute the proof of

payment, summary discharge should be granted. *Matter of Northside Tower Realty v. Klin Constr. Group*, 886 NYS2d 68 (Sup. Ct. Kings Cty. 2009). Although the court's analysis seemed logical, it ignored the fact that Section 19(6) of the Lien Law simply does not provide for summary discharge by petition where extrinsic facts are required to establish the right to relief. Accordingly, the Second Department reversed the lower court decision, holding as follows:

A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law §19 (6) (see *Dember Constr. v. P&R Elec.*, 76 AD2d 540, 546 [1980]; *Matter of Supreme Plumbing v. Seadco Bldg.*, 224 App. Div. 844 [1928]).... The petition to discharge the appellant's mechanic's lien was based upon the assertion that the owner of the property fully paid the general contractor for excavation and foundation work before the lien was filed by the appellant subcontractor. However, insofar as the petitioner sought summary discharge pursuant to Lien Law §19 (6), the notice of lien was not invalid on its face and, thus, was not subject to summary discharge. Accordingly, since there was no defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure, and the Supreme Court erred in directing summary discharge of the lien (see *Matter of Lowe*, 4 AD3d 476 [2004]; *Dember Constr. v. P&R Elec.*, 76 AD2d at 546; see also *Aaron v. Great Bay Contr.*, 290 AD2d 326 [2002]; *Mario's Home Ctr. v. Welch*, 275 AD2d 839, 840 [2000]; *Coppola Gen. Contr. v. Noble House Constr. of N.Y.*, 224 AD2d 856 [1996]; *Pontos Renovation v. Kitano Arms*, 204 AD2d 87 [1994]).<sup>3</sup>

Moreover, determining whether procedural or facial defects exist that will support summary discharge of the lien is not always easy and the lines are often blurred. Accordingly, careful analyses and knowledge of the current case law is important.

### Procedural Defects

Procedural defects are defects in the timeliness, filing, service and perfection of the lien. The right to a mechanic's lien does not exist under the common law. It is solely a creature of statute and strict adherence to statutory requirements

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is, therefore, necessary for the creation of a valid lien. For instance, Section 10 of the lien law requires that notice of the lien be filed prior to the expiration of eight (8) months (four months in the case of a single family residence) from the date of the last item of work performed or material supplied. Section 10 also requires that the notice of lien be filed in the clerk's office of the county or counties in which the property is situated.

A lien that is not filed timely or not filed within the proper county is deemed procedurally defective and is subject to summary discharge. Courts have also recognized that the failure to properly serve the owner with the notice of lien also subjects the lien to discharge by summary proceeding. *Manhan Constr v. 373 Wythe Realty*, 31 Misc. 3d 252 (Sup. Ct. Kings Cty. 2011). A lien is also considered procedurally defective and subject to summary discharge if the lienor fails to perfect the lien within the time limit required by the statute. *Cook v. Carmen S. Pariso*, 287 A.D.2d 208, 734 N.Y.S.2d 753 (4th Dept. 2001).

Not all procedural defects, however, will form grounds for the summary discharge of a mechanic's lien. For example, although a lien not timely filed is void, the failure to timely file must be apparent on the face of the lien in order to obtain summary discharge. *Melniker v. Grae*, 439 NYS 2d 409 (2d Dept. 1981). If extrinsic evidence must be introduced in order to establish that the lien is untimely, summary discharge will be denied. *Id.* at 411.

#### Facial Defects

In addition to procedural deficiencies, summary discharge of a mechanic's lien is typically appropriate in instances where material defects appear on the face of the lien. Lien Law §19(6). Examples of non-procedural facial defects are where the notice of lien fails to contain the identifying information required by §9 of the Lien Law. See *Fibernet Telecom Group v. East Coast Optical Services, a Mass. Partnership*, 195 Misc 2d 461, 760 N.Y.S.2d 621 (Sup. Ct. New York Cty. 2002). Among other things, the lien must properly identify the owner and the property against which the lien is sought. One example of where a lienor fails to properly identify both the property improved and the owner is where the lienor files a "blanket lien" against an entire condominium building without distinguishing among the various tax lot numbers attributable to the units improved. Such a lien is ordinarily invalid and subject to summary cancellation. *Myrtle Owner v. Ro-Sal Plumbing and Heating*, 2011 NY Slip Op 51376U; *Matter of MME Power Enterprises*, 613 N.Y.S. 2d 266 (2d Dept. 1994); *Country Village Heights Condominium (Group I) v. Mario Bonito Inc.*, 79 Misc. 2d 1088 (Sup. Ct. Rockland Cty. 1975).<sup>4</sup> Other examples of facial defects may include a failure to properly identify the lienor or the lienor's business address within the state as required by Lien Law §9. *Fibernet Telecom Group*, 760 N.Y.S.2d at 623.

It should be noted, however, that similar to procedural defects, not all defects appearing on the face of a mechanic's lien will support summary discharge of the lien. Courts have held that "minor mistakes that do not prejudice any substantial right of any interested property

[sic] can be disregarded and/or amended." *Matter of Superior Maintenance Group*, 2009 N.Y.Misc. LEXIS 5094, 2009 NY Slip Op 31041U (Sup. Ct. New York Cty. 2009), 18, citing *Lycee Fancais de New York v. Calaona*, 26 Misc 2d 374, 379-380, 204 N.Y.S.2d 490 (Sup. Ct. New York Cty. 1960). A court may grant leave to amend the notice provided that there is no prejudice to existing lienors, mortgages or good faith purchasers. *East Coast Electric v. 1200 Fifth Associates*, 2009 N.Y. Misc. LEXIS 4640 (Sup. Ct. New York Cty. 2009). Where the lienor is deemed to have substantially complied with the lien law, an order permitting amendment of the lien will be granted. *Matter of Superior Maintenance Group*, 2009 N.Y. Misc. LEXIS 5094, 2009 NY Slip Op 31014U (Sup. Ct. New York Cty. 2009).

Moreover, where there are defects on the face of the lien that cannot be established except by facts outside of the four corners of the lien, summary discharge will typically be denied. Accordingly, when extrinsic evidence was required to establish whether a lienor was a valid corporation (as was stated on the face of the lien), summary discharge was denied. *Matter of Superior Maintenance Group*, NY Slip Op 31041U, \*29-30.

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#### Expiration of the Lien

The fact that there exists no facial or procedural deficiencies to justify summary discharge of a mechanic's lien does not mean that an owner must either bond the lien or wait indefinitely for the lienor to bring an action to foreclose. An owner may obtain summary discharge of a mechanic's lien if the lienor allows the lien to expire or if the lienor fails to prosecute an action to foreclose the lien within the time limit established in a demand served pursuant to Lien Law §59.

If the owner is in no particular hurry and is not aggrieved by the lien upon the real property, the owner has the luxury of waiting to see whether the lienor will foreclose upon the lien. Lienors sometimes rely upon the leverage that the lien itself provides and may never intend to incur the cost to foreclose. If the lienor fails to either foreclose upon the lien or to extend the lien within the time limit provided by statute (typically one year from filing, with certain rights to extend), the lien will expire. Lien Law §17. Although a discharge by expiration should be self-executing, an owner may nevertheless seek an order of discharge in order to clear title and to satisfy lenders or potential purchasers.

On the other hand, if the owner does not wish to wait, the owner can force the lienor's hand by making a demand that the lienor commence an action to foreclose the lien. Section 59 of the Lien Law permits the service upon the lienor of a notice requiring the lienor to commence an action to

foreclose upon the lien within a time specified in the notice, not less than 30 days. Lien Law §59. If the lienor fails to commence an action to foreclose the lien within the time specified in the notice, the owner can seek an order discharging the lien. Lien Law §19(2). A Lien Law Section 59 demand to foreclose can be a powerful tool in the event that the lienor never intended to foreclose upon the lien. For example, the lienor may never have intended to incur the cost to foreclose or the lienor may know that its lien can be challenged successfully by evidence admissible in the action to foreclose. The lienor may also be aware that it has exaggerated the amount of its lien and by commencing an action to foreclose upon the lien, the lienor may be subject to damages in addition to the discharge of its lien. Lien Law §§39 and 39A.

#### Conclusion

A real property owner seeking to challenge the encumbrance of a mechanic's lien must be made aware of all available options. An owner with a strong legal challenge to a mechanic's lien must be made aware that summary discharge is not always available and that, before incurring the cost of an unsuccessful petition, the owner must first properly characterize the nature of the lien's deficiencies in order to assess the proper procedure for seeking its removal.

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1. The party opposing a mechanic's lien may be an owner or any other "party in interest," such as a contractor who is under a contractual obligation to discharge liens filed by its subcontractors. For the purposes of this article, we will simply use the term owner.

2. This article discusses only liens filed against privately owned real property. Mechanic's liens for work performed in connection with the construction or demolition of a public improvement do not attach to real property and are subject to a somewhat different set of rules.

3. 899 NYS2d at 900-901.

4. For a discussion concerning the rules applicable to mechanic's liens filed against condominium properties, see Kenneth M. Block and John-Patrick Curran, "Special Rules Govern Condo Mechanic's Liens," *NYLJ*, July 29, 2009, p. 5, col. 2.