

New Jersey Construction Lien Law Revisions Clear First Hurdle

Posted at 9:59 AM on June 30, 2010 by Adam Sklar

Last week (on Monday, June 21, 2010), the New Jersey Assembly unanimously passed the long-awaited revisions to the New Jersey Construction Lien Law (N.J.S.A. 2A:44A-1, et seq.) (the “Lien Law”). Next up is the parallel Senate bill which, after its introduction in early May 2010, was referred to the Senate Commerce Committee, where it is expected to remain for review until the Fall. The proposed Lien Law revisions, based almost entirely on the March 2009 final report of the New Jersey Law Revision Commission, seek to fill the gaps in, and improve on the practical application of, the original 1993 Lien Law. Some of the proposed amendments are a codification of decisions of federal and state courts, including the New Jersey Supreme Court, which have sought to interpret the Lien Law since its enactment.

The proposed Lien Law revisions are comprehensive. Among the more critical Lien Law amendments contained in the new legislation are:

1. an increase in the time within which a potential lien claimant may assert a construction lien claim relating to a residential construction contract from 90 days to 120 days from the claimant’s last date of work. The current 90-day period has, in practice, been problematic for prospective lien claimants, who must also file and serve a Notice of Unpaid Balance and Right to File Lien (“NUB”) and a demand for arbitration -- and then obtain an award in arbitration – before they may file lien claims. The extra 30 days provides additional breathing room for the lien claimant to fulfill all of the statutory prerequisites, particularly the

arbitration proceeding. Note, however, that the proposed amendment sets a deadline for filing a NUB at 60 days from the claimant's last date of work and a 10-day deadline thereafter to serve the required demand for arbitration on all parties against whom the lien is asserted. If those deadlines are not met, the extra 30 days to file the lien means nothing, as the lien claimant will be barred from filing its lien.

2. the addition of statutory definitions of "residential construction," "residential unit," "real property development," "community association," and "dwelling," and the amendment of the statutory definitions of "residential construction contract" and "residential purchase agreement," which, together, seek to better reflect the types of construction subject to the residential rules of the Lien Law. For example, settling a contentious issue under the existing Lien Law, the revisions provide that, in general, large-scale residential condominium, coop and townhouse development projects, including, without limitation, mixed-use projects and the common elements of such projects, would be subject to the Lien Law's residential filing requirements. Projects designed to contain rental units or non-residential units, however, would not be subject to the Lien Law's residential filing requirements.

3. the clarification of a number of other statutory definitions, as well as the addition of other new definitions, including, without limitation, new definitions of "lien claim" (and the term "value" within the "lien claim" definition), which allow for the inclusion of retainage in the amount of a lien claim, and incorporating within the definition of "contract" the requirement that the lien claimant's contract be a writing signed by the party in direct privity with the lien claimant and evidencing the consideration to be paid and a description of the improvement subject to the lien;

4. a substantially more thorough description and calculation of the "lien fund" - that is, the amount of money available for distribution among valid lien claimants performing work under any particular line of contracting - and an explanation of how that lien fund is to be distributed among multiple lien claimants at different contracting levels. In fact, the term "lien fund" is not defined or

otherwise used in the current Lien Law, so the proposed revisions provide the basic definition of the term. Most of these proposed revisions are a reflection of court decisions interpreting the Lien Law and formulating the concept of the “lien fund.” Among other things, the proposed revisions would make clear for the first time under the Lien Law that the lien fund is not to be reduced by: (i) payments not made according to written contract provisions; (ii) payments made but not yet earned by the time the first lien is filed; (iii) liquidated damages; (iv) collusive payments; (v) the use of retainage to pay a replacement contractor after the filing of the lien claim; or (vi) setoffs or backcharges not agreed to in writing by the claimant or adjudicated in an arbitration. 5. a clarification that the date on which the County Clerk has marked the lien claim as received (rather than when the Clerk has actually indexed the lien claim – which is not within the control of the lien claimant) is to be used to determine whether a lien claim has been timely filed;

6. a much-needed expansion of the existing deficient statutory forms and/or procedures for filing, amending or discharging a lien claim or NUB, and prosecuting a suit to enforce a lien claim; and

7. clarification: (a) of when lien claims may be filed against the owner of real property for tenant improvements ([See this article](#)) (b) that work performed on common elements of a real estate development may be filed against “community associations” such as condominium or homeowners’ associations; and (c) that a mortgage takes priority over a lien claim, even when recorded after the filing of that lien claim, where the funds are used for the purchase of and/or improvements to the subject property.

We will likely have to wait until the Fall at the earliest before these proposed revisions, and possibly others the Senate Commerce Committee recommends, are presented for vote in the Senate. In light of the Assembly’s unanimous vote, it is probable that the bill, in its present or slightly modified form, will pass and be sent to the Governor for his review and signature (or improbable veto). The proposed amendments to the Lien Law have been well thought out and debated and are long overdue.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North
25 Main Street
Hackensack, NJ 07601
Phone: (201) 489-3000

900 Third Avenue
16th Floor
New York, NY 10022
Phone: (212) 752-8000

500 Delaware Avenue
Suite 1410
Wilmington, DE 19801
Phone: (302) 652-3131

300 East Lombard Street
Suite 2000
Baltimore, MD 21202
Phone: (410) 230-0660

301 Commerce Street
Suite 1700
Fort Worth, TX 76102
Phone: (817) 810-5250