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The Lien & Bond Law Revolution Part I: Perfecting Liens Under the New Regime

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As 2012 draws to a close – faster than many of us can believe – the dawn of a new era under North Carolina's mechanic's lien and bond statutes quickly approaches. And that means it's high time for me to initiate a series of articles dedicated to helping construction industry participants throughout the state understand the changes that are rapidly coming down the pike, and will affect the industry for years to come.



By way of brief recap, legislation protecting general contractors from double payment liability on public projects and legislation protecting title insurers from "hidden liens" on private projects made splashy headlines this past summer. I'll be delving into the nuts and bolts of those significant changes as this series continues. This article, however, is dedicated to addressing a less-publicized, but no less substantial, alteration to the lien law that every potential lien claimant will need to bear in mind in 2013, and beyond: the process by which lien rights are "perfected."

What Does It Mean to "Perfect" Lien Rights?

A prime contractor's right to assert a mechanic's lien against the real property being improved arises from and relates back to the date the contractor first furnishes labor or materials at the site of the improvement. N.C. Gen. Stat. § 44A-10. The rights of subcontractors and suppliers to



assert claims of lien against real property through the lien rights of the prime contractor (so-called "subrogation liens") also relate back to the prime's date of first performance. N.C. Gen. Stat. § 44A-23. This "relation back" of lien rights has proven to be a powerful weapon in the battle to establish priority in the real property as against other creditors (including lenders, judgment creditors, etc.) when those creditors' respective interests in the property post-date the contractor's date of first furnishing.

Between the time of first furnishing and when the potential lien claimant actually files its claim of lien on real property, the claimant's lien rights are "inchoate." That's just a fancy lawyer term for "partially in existence" or "imperfectly formed." The lien right exists, but until the claim of lien is actually filed, the right is not fully formed, or not quite perfect. "Perfection" is the process by which the partially formed lien right becomes fully in existence, and at least in theory, fully known to the owner, as well as to the rest of the world.

How Are Liens Perfected Under Current Law?

Pursuant to the version of N.C. Gen. Stat. § 44A-12 currently in effect as of the date of this article, claims of lien on real property are perfected by filing such claims in the office of the clerk of the superior court in each county where the real property subject to the claim of lien is located. This may come as a surprise to some, but under current law, there is no requirement that the claim of lien actually be served upon the project owner, or anyone else for that matter. Rather, the owner – and the rest of the world – is put on constructive, if not actual, knowledge of a claimant's lien rights at the moment the clerk docket the claim of lien. Nothing more is required of the lien claimant to perfect its claim of lien under existing law. But that's changing.

How Does the 2012 Lien Law Legislation Impact Perfection of Liens?

Here's where you really need to be paying attention, potential lien claimants (and their attorneys). Effective for all private construction projects for which the initial permit is issued January 1, 2013 or later, you will have to jump through an additional hoop to perfect your lien rights. You will need to serve the claim of lien up the contractual chain.

Specifically, prime contractors (i.e., those having a direct contract with the owner of real property, including architects of record, GC's, construction managers at-risk, design-builders, etc.) will need to serve the owner of the real property subject to the improvement. Likewise, first-tier subcontractors and more remote subs/suppliers will need to serve the owner, and will also need to serve the prime contractor through whom subrogated lien rights are being asserted.

Assuming the statutory claim of lien form is followed, the names and address of these entities should be included in paragraph (2) of the claim of lien, just under the name and address of the lien claimant in paragraph (1). The statutory form can be found at N.C. Gen. Stat. § 44A-12.

Concerned about finding the proper addresses for service? The service address for the owner of the real property should be listed on the building permit and in the county tax rolls.



Additionally, and in the event the owner and/or contractor are incorporated entities, the addresses of their respective registered agents for service can be found through the [Corporations Division of the Department of the Secretary of State](#).

What Magic Language Should My Claim of Lien on Real Property Contain?

The claim of lien should include a certificate of service that states something like the following:

“I hereby certify that I have served the parties listed in paragraph (2) above in accordance with the requirements of G.S. § 44A-11.”

I'll be advising my clients to serve claims of lien on real property via certified mail, return receipt requested, and to save their green cards – just in case.

How Do I Effect Service of My Claim of Lien on Real Property?

At the same time the claim of lien is filed with the appropriate clerk(s) of superior court in all counties where the improvement is located, the lien claimant should also be sure the owner and (in the case of subcontractor liens) the prime contractor receive a service copy of the claim of lien. Service can be effectuated by personal delivery, the U.S. Postal Service or overnight delivery service, and will be considered complete upon delivery. While no receipt will be required, I'll probably be advising my clients to serve by certified mail, return receipt requested, and to save their green cards – just to be safe, and to have evidence that service was, in fact, effectuated, should such evidence ever be needed to rebut a claim that service was never made.

Do I Have to Serve My Claim of Lien on Real Property on the Same Day That I File It?

Not necessarily, but beware: both filing AND service will need to be effectuated within 120 days of the prime contractor's last performance. My view is the best practice will be to get in the habit of sending a service copy up the contractual chain on the same day you file the original claim of lien with the appropriate clerk(s).

What Happens If I Fail To Serve My Claim of Lien?

Bad things, my friend, bad things. Failure to serve the claim of lien under the new regime will be fatal to enforcing your lien rights in court. Stated another way: you can kiss your lien rights goodbye if you don't follow the new service requirements.

Given that the old regime (i.e., no service required) will be in place for projects commencing before 1/1/2013 and the new regime (i.e., service required) will be in place for projects commencing on or after 1/1/2013, contacting an experienced construction law practitioner prior to asserting your lien rights may be your best move.



This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at www.nc-construction-law.com.

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