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New Jersey’s Construction Lien Law

A Powerful Legal Remedy with Many Traps for the Unwary

by Martin P. Skolnick and John E. Icklan

It is a regrettable reality of the construction industry that all too often payment disputes arise between the various parties involved in a construction project; a general contractor claims the property owner has not paid him in full for services rendered, a subcontractor asserts the general contractor still owes it money, a supplier never received any payment for materials it delivered, etc. When utilized properly, the New Jersey Construction Lien Law (CLL) provides a powerful legal mechanism for contractors, subcontractors, and suppliers to obtain monies owed for services rendered and materials supplied. Indeed, the CLL was “enacted primarily to secure payment for contractors, subcontractors, and suppliers who furnish labor or materials used to enhance the value of the property to others.”

The CLL is also, however, a highly technical statute filled with numerous traps for the unwary. This article sets forth the general framework of—and common pitfalls associated with—the CLL provisions governing private improvement liens.

In a nutshell, the CLL provides that:

Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price.... The Lien shall attach to the interest of the owner in the real property.

In other words, under the CLL a contractor, subcontractor, or supplier (hereinafter each a CLL claimant) who remains unpaid for improvements it provided to real property pursuant to a written contract is entitled to record a lien against that property in a sum equal to the “unpaid portion of the contract price of the claimant’s contract.”

A CLL claimant’s lien is filed with—and thereafter recorded by—the county clerk of the county where the construction project is located. The filed lien creates a security interest in
real property that impacts the property owner’s rights. Indeed, a construction lien creates a cloud on title, similar to a mortgage, which impacts the owner’s ability to obtain financing for their property, such as when the owner seeks to convert the property’s financing from a construction loan to permanent financing.

Because private improvement projects often do not have payment and performance bonds in place that would provide an additional avenue of recovery for an unpaid CLL claimant, the filing of a construction lien is often a CLL claimant’s best avenue to receive payments owed for services rendered. This is especially true when a subcontractor contracts with a general contractor or construction manager who becomes insolvent or files for bankruptcy. As a practical matter, subcontractors rarely have any direct relationship—or direct contractual agreement—with the property owner; thus, without the subcontractor’s filing of a construction lien, the subcontractor may find it difficult to recover monies owed for work performed and materials provided.

Again, when payment disputes arise on private New Jersey construction projects, the CLL provides one of the most powerful legal remedies available to a CLL claimant seeking to receive payment for the work, services, material or equipment (collectively, improvements) furnished on a construction project. The remedy provided by the CLL, however, requires strict compliance with the CLL’s highly technical procedural requirements, strict filing deadlines, and specific language and terms.

For example, the terms “contractor,” “subcontractor,” “supplier,” “work,” “services,” “material,” “equipment,” “contract,” “contract price,” and “owner” are each precisely defined under the CLL. A potential lien claimant’s specific rights under the CLL are shaped by these definitions, and it is advisable for any potential CLL claimant to confirm that it fully understands each of these terms—and its resulting rights and obligations under the CLL—before filing a lien. By way of example, and as an initial matter, the CLL requires that a CLL claimant be in privity of contract with an owner, general contractor, or subcontractor in order to file a lien.

In addition, a potential CLL claimant must always be aware of the CLL’s strict filing deadlines, and must also be cognizant that the CLL imposes different and distinct filing deadlines and procedures for residential and commercial properties. Generally speaking, the CLL provides that:

In all cases except those involving a residential construction contract, the lien claim form shall then be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed.

As such, in order to know the applicable CLL deadlines, a CLL claimant must first determine whether the property it wishes to file its lien against is considered non-residential (e.g., commercial) or residential under the CLL. In most instances, this determination is straightforward.

Indeed, the definitions set forth in the CLL for “dwelling,” “real property development,” “residential construction,” “residential construction contract,” and “residential unit” provide useful guidance in determining whether a property is residential or non-residential for purposes of filing a CLL lien. As a general matter, all residential condominium properties, homes, and common areas related to residential properties, including co-op units, are subject to the CLL’s residential lien deadlines. Rental apartment buildings, on the other hand, are subject to commercial lien laws.

The residential/non-residential distinction is, however, less clear with respect to, inter alia, ongoing construction projects in which the ultimate future use of the property remains unknown, and on projects involving mixed-use properties. Because there is an absence of case law providing additional distinction and clarification on what constitutes residential versus non-residential property under the CLL, a conservative approach is recommended when it remains unclear whether the property is residential or commercial based on a close review of the CLL definitions set forth above (e.g., a CLL claimant should endeavor to concurrently satisfy the CLL’s disparate filing procedures and deadlines governing both residential and commercial liens).

The process to file a residential lien must be formally initiated by the CLL claimant within 60 days following the last date it provided unpaid improvements at that property. The process is initiated vis-à-vis the CLL claimants’ filing of a notice of unpaid balance and right to file lien (NUB). The NUB is not a formal lien; it instead sets forth the pertinent information regarding the lien that the CLL claimant wishes to formally record.

Once the NUB is filed with the county clerk, the CLL claimant must thereafter obtain approval through lien arbitration to file a formal lien against residential property. The period to obtain such approval is limited. Indeed, under the CLL, a formal lien against residential property must be filed with the county clerk not later than “120 days following the date the last work, services, material or equipment was provided for which payment is claimed.”

The CLL, therefore, requires that a residential lien claimant serve its demand for lien arbitration within 10 days from the date that the NUB is lodged for record (e.g., filed with—although not necessarily recorded by—the county clerk). In so doing, a residential lien claimant must fulfill all the requirements and procedures of the
American Arbitration Association.18

The lien arbitrator is then required to render a determination on whether the CLL claimant may file a formal lien claim against the property within 30 days of receipt of the CLL claimant’s arbitration demand.24 If the CLL claimant or the property owner is aggrieved by the arbitrator’s determination, then that party may institute a summary action in the superior court’s Law Division for the vacation, modification or correction of the arbitrator’s determination.29 The superior court is required to give due regard to the time limits and procedures set forth in the CLL in ruling on the validity of the arbitrator’s determination.21

If—and only if—the arbitrator issues a formal determination that the CLL claimant has established its right to file a formal lien against the residential property, the CLL claimant shall then, within 10 days of the lien claimant’s receipt of that determination, lodge for record with the county clerk the formal CLL for a residential project are to be fully understood by the CLL.Receipt of that determination, lodge for record with the county clerk the formal lien against the residential property can be declared void if, inter alia, a NUB is not timely filed and served, or proper demand for arbitration is not served and filed in accordance with the CLL’s filing deadlines, or a proper and timely arbitration award is not issued, or a proper and timely lien claim is not filed. There are numerous traps for the unwary, and any potential CLL claimant considering the benefits of filing a lien against residential property is well served to retain counsel who fully understands the CLL.

On commercial projects, a lien claim must be filed within 90 days of the last date the lien claimant provided materials or services for the construction project.25 A commercial lien does not require the filing of a NUB, and does not require an arbitration hearing prior to filing. Notably, the 90-day period to file a lien against commercial property cannot be extended for the completion of punch list or warranty items.26 Assuming the commercial lien satisfies the CLL’s form requirements—and the substantive information required therein—it will, in all likelihood, be accepted by the county clerk and recorded against the property.27

Once a lien is filed, there are essentially six avenues under the CLL that the affected property owner can pursue to get the lien discharged:

1. The owner can pay the CLL claimant what it is owed, or the party owing the CLL claimant can pay the CLL claimant; the CLL claimant must discharge the lien claim within 30 days of payment.29
2. The owner can serve a demand on the CLL claimant to bring a lawsuit to enforce its lien claim within 30 days.30
3. The owner can do nothing. Under the CLL, the CLL claimant must initiate a lawsuit to enforce its lien claim within one year from the date the last work was provided.31
4. The owner can file a summary action in New Jersey Superior Court seeking to discharge the lien.32
5. The owner or contractor can post a bond equal to 110 percent of the lien claim as substitute security for the liened property.33
6. The owner or contractor can deposit monies into court equal to 110 percent of the lien claim.

Once the owner or contractor discharges a lien against the owner’s property via bond or deposit of monies into court, the party that caused the lien to be discharged can either initiate litigation in order to resolve the lien dispute or wait for the lien claimant to take action as indicated above. Any such lawsuit will inevitably consider the veracity of the claims made in the construction lien filed by the CLL claimant. That is because the CLL provides, in pertinent part, that:

[] If a lien claim is without basis, the amount of the lien claim is willfully overstated, or the lien claim is not lodged for record in substantially the form or in the manner or at a time not in accordance with this act, the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in the lien claim. The claimant shall also be liable for all court costs, and reasonable legal expenses, including, but not limited to, attorneys’ fees, incurred by the owner, community association, contractor or subcontractor... in defending or causing the discharge of the lien claim. The court shall, in addition, enter judgment against the claimant for damages to any of the parties adversely affected by the lien claim.24

It is important that contractors, subcontractors and suppliers know the basics of the CLL before problems arise; once it becomes clear that a problem has arisen it may be too late to pursue one’s lien rights under the CLL’s tight filing deadlines. Any potential CLL claimant is well advised to assume that the party withholding money owed is also aware of the CLL’s short deadlines, and will do everything possible to run out the clock on that potential CLL claimant’s lien rights. There are, of course, business-related considerations that may support an unpaid contractor, subcontractor, or supplier’s decision to allow its CLL lien rights to expire; any such decision, however, should be done for business reasons, and not out of a lack of awareness of the CLL and its strict filing deadlines.29

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ENDNOTES

3. The CLL's application to public improvement projects is beyond the scope of this article.
6. These lien rights may instead attach to a leaseholder's interest in real property. See N.J.S.A. 2A:44A-3.e. A discussion regarding whether the lien rights are against the owner's interest or a leaseholder's interest is beyond the scope of this article.
7. See, e.g., Schadrack v. K.P. Burke Builder, LLC, 407 N.J. Super. 153, 164 (App. Div. 2009) (the "procedures under the CLL for a residential project are to be complied with strictly."). Accord N.J.S.A. 2A:44A-5.c. ("[n]o liens shall attach nor shall a lien claim be filed [f]or work, services, material or equipment furnished pursuant to a residential construction contract unless there is strict compliance with sections 20 and 21 of this act.").
21. Id.
28. After the lien is lodged for record it must be served in accordance with the CLL. See N.J.S.A. 2A:44A-7.