# Liening Toward Clarity: Amendments to The Construction Lien Law

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After a year-long, intensive study by the New Jersey Law Revision Commission[1], the New Jersey Legislature and Governor Chris Christie enacted on January 5, 2011 a much needed revision to the New Jersey Construction Lien Law (N.J.S.A. 2A:44A-1, et seq.). The amendments clarify the statute, which was last amended in 1994, and align it with numerous appellate court decisions. The amendments, which take effect immediately,[2] include several significant changes which owners, contractors, subcontractors, and suppliers must understand and appreciate.

**Residential Construction Liens**

The amendments enlarge the time in which to assert residential construction lien claims. A claimant must file a Notice of Unpaid Balance and Right to File Lien ("NUB") within sixty (60) days from when it last performed work or supplied materials.[3] Then, within ten (10) days of filing the NUB, the claimant must serve a demand for arbitration to determine the amount of the claim.[4] The time in which to conduct the arbitration may only be extended upon consent of the parties and the arbitrator.[5] Within ten days of the arbitrator's determination, but within 120 days from when the claimant last performed work or supplied materials, the claimant must lodge the lien claim for the record.[6]

**Multiple Liens Against the Same Residential Project**

In response to concerns from attorneys involved in construction law, parties aggrieved by lien claims relating to the same residential construction project are now permitted to be joined in a single construction lien arbitration proceeding.[7] If possible, the same arbitrator shall determine all such claims, even if joinder in the same arbitration is not possible.[8] Finally, arbitrators determining lien claims must consider the outcome of all previous proceedings relating to the same construction project.[9] The overarching purpose of these new requirements is to avoid

inconsistent arbitration awards.

**New Statutory Forms**

New statutory forms were created for the NUB,[10] lien claim,[11] amended lien claim,[12] summary discharge affidavit[13] and bond.[14] The new lien forms clarify the manner in which a claim is calculated, so that the lien equals only the unpaid amount due the claimant for work actually performed. The statute now includes a standard form of affidavit to summarily discharge lien claims which have been satisfied[15] as well as a standard form of bond used to discharge a lien.[16] Moreover, when a lien is bonded off, the court will order that the owner is no longer a party (unless there are other non-lien related claims against the owner) and that the surety should be added as a necessary party.[17]

**New Definitions**

Many definitions in the statute have been clarified or added. A construction project on any mixed use property that includes residential units is now deemed a "residential" construction project.[18] Under the old statute, parties frequently litigated whether a project was "residential" in nature so as to require compliance with the additional statutory requirements.[19] Now, if residential units are part of a development, the claimant must follow the special statutory residential construction requirements. This new language is consistent with the Bankruptcy Court's opinion in *In re Kara Homes*.[20]

As a result of inconsistencies in processing liens in various county clerks' offices, the statute now has separate definitions for "filing," "indexing," and "lodging for record." "Filing" consists of the acts of "lodging for record" and "indexing."[21] The act of delivering a document to the county clerk and that document being marked by the clerk with a date and time stamp is now defined as "lodging for record."[22] A claim that is "lodged for record" is enforceable against parties with notice of the document, even if it has not been "indexed."[23] "Lodging for record" is distinct from "indexing," a term indicating when the clerk files or records the lien in a manner that puts the entire world on "record notice" of the lien.[24]

Additionally, the amended statute has a more detailed definition of a "delivery slip" that a supplier may use to support his lien claim. In the case of liens filed by suppliers, a "contract" now includes a delivery slip which refers to the site or project and is signed by the owner or its authorized agent.[25] "Signed" refers to a "writing that bears a mark or symbol intended to authenticate it."[26]

**Liens on Leasehold vs. Fee Interest**

A lien claimant generally prefers to file a lien against an owner's fee instead of a tenant's interest. The statute attempts to clarify the requirements that must be met to acquire a lien on the fee interest. When a tenant causes improvements to be made to real property, the leasehold interest is subject to attachment by a lien claim.[27] The fee interest (held by the landlord) is only subject to a lien claim in a limited number of situations: If, in writing, the landlord expressly authorizes the construction and provides that the fee interest is subject to a lien, or; if the landlord has paid or agreed to pay the majority of the costs in writing, or; if the lease or sublease, where the landlord was a party, provides that the fee interest is subject to a

lien for the improvement.[28] Prior to these amendments the lien would attach to the fee only if the landlord expressly gave permission for the improvements in writing.[29]

In *Cherry Hill Self Storage, LLC v. Racanelli Construction Company, Inc.*, the Appellate Division required the landlord to expressly authorize improvements in writing before it would attach a lien to the fee interest.[30] The court reached this conclusion notwithstanding that the lease permitted the tenant to make improvements and required the landlord to contribute to the project.[31] The amended statute counters the effect of *Racanelli*.

**The Lien Fund**

The statute now defines the "lien fund" as the "pool of money from which one or more lien claims may be paid. The amount of the lien fund shall not exceed the maximum amount for which an owner can be liable."[32] N.J.S.A.§ 2A:44A-9 illustrates how to calculate the lien fund; it ensures that an owner will never pay more than once for completed work.[33] The statutory calculation is consistent with the detailed explanation offered by the U.S. District Court in *Riggs Distler & Co. v. Valero Refining Co.*[34]

**Suppliers to Suppliers May Not File Liens**

Nearly fifty years ago, the New Jersey Supreme Court held that suppliers to suppliers were ineligible to file a construction lien claim.[35] While some of the new statutory definitions appear to abrogate the Court's holding, a closer look at the definition of "supplier," which was not substantially amended, confirms that a supplier to supplier still may not file a construction lien.[36] Moreover, nothing in either the Law Review Commission's Final Report or the Legislative history for the recent amendments indicate an intent to permit a supplier to supplier to file a lien.

**Enforcement**

The statute spells out procedures to enforce a lien in Superior Court.[37] For claimants against a community association, liens placed on common elements may not be enforced by foreclosure and sale.[38] The only remedy for such a lien claimant is a court-ordered assessment against the unit owners.[39] Additionally, a claimant must file a Notice of Lis Pendens once suit has commenced.[40]Finally, the statute now follows the *Supreme Court's holding in Thomas Group, Inc. v. Wharton Senior Citizen Housing, Inc.* Where the parties' contract requires arbitration to determine the validity or amount of a lien claim, the court must stay the lien foreclosure action until the conclusion of the arbitration.[41]

**Allocation of Partial Payments and Discharge of Liens by Owner**

New procedures for the treatment and allocation of payments and discharging liens are now available. A residential lien claimant who receives a partial payment must release a proportionate share of interest in the encumbered real property.[42] Moreover, in the absence of an agreement stating otherwise, if the encumbered property is divided into subdivisions or tracts, then the allocation of released interest must be proportionate to each subdivision or tract.[43]

In situations where a lien claim has been paid in full, the claimant has failed to discharge the lien and thirteen months have passed since the date of the lien claim, the owner may now file a discharge certification and affidavit to discharge the lien without judicial intervention.[44] However, before doing so, the owner must notify the claimant by certified mail.[45] Thereafter, if no written objection disputing complete payment of the lien claim is received in ninety days, the owner may proceed with the expedient discharge procedure.[46] Finally, where a claimant has forfeited its lien claim and fails or refuses to discharge the lien upon demand, an owner may file an order to show cause to have the lien claim discharged and seek attorneys' fees and costs from the claimant.[47]

The recent amendments to the Construction Lien Law remove much of the ambiguity that became apparent over sixteen years of application. As a result of over a year of input by the Courts, the Bar, the Law Revision Commission, various interest groups, and the Legislature, the statute is now easier to understand and more comprehensive to the benefit of all parties and the construction process.

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[1] New Jersey Law Revision Commission, FINAL REPORT RELATING TO CONSTRUCTION LIEN LAW (Mar. 2009).

[2] A. No. 410, ¶ 26, 2010 Leg., 214th Sess. (N.J. 2010).

[3] N.J.S.A. § 2A:44A-21(b)(1).

[4] N.J.S.A. § 2A:44A-21(b)(3).

[5] N.J.S.A. § 2A:44A-21(b)(6).

[6] N.J.S.A. § 2A:44A-6(a)(2).

[7] N.J.S.A. § 2A:44A-21(b)(3).

[8] Id.

[9] N.J.S.A. § 2A:44A-21(b)(5).

[10] N.J.S.A. § 2A:44A-20(b).

[11] N.J.S.A. § 2A:44A-8.

[12] N.J.S.A. § 2A:44A-11(c).

[13] N.J.S.A. § 2A:44A-30(d).

[14] N.J.S.A. § 2A:44A-31(d).

[15] N.J.S.A. § 2A:44A-30(d).

[16] N.J.S.A. § 2A:44A-31(d).

[17] N.J.S.A. § 2A:44A-33(d). Other state courts have held that when a bond is filed to discharge a private lien, the owner is no longer a necessary party to an action to enforce the lien. *See M. Gold & Son, Inc. v. A. J. Eckert Inc.*, 667 N.Y.S.2d 460, 461 (3d Dep't 1998); *Frank Curran Lumber Co. v. Eleven Co.*, 76 Cal. Rptr. 753, 758 (Cal. Ct. App. 1969); *Mesch v. Berry*, 528 So. 2d 1250, 1252 (Fla. Dist. Ct. App. 1988); *Vector Co., Inc. v. Star Enters., Inc.*, 206 S.E.2d 636, 638 (Ga. Ct. App. 1974); *Shelton Eng'g Contractors, Ltd. v. Hawaiian Pac. Indus., Inc.*, 456 P.2d 222, 226 (Haw. 1969).

[18] N.J.S.A. § 2A:44A-2.

[19] *See, e.g., Michael J. Wright Constr. Co. v. Kara Homes, Inc.*, 396 B.R. 131 (D.N.J. 2008), affirming *In re Kara Homes, Inc.*, 374 B.R. 542, 552 (Bankr. D.N.J. 2007).

[20] *In re Kara Homes, Inc.*, 374 B.R. at 549-50.

[21] N.J.S.A. § 2A:44A-2.

[22] Id.

[23] N.J.S.A. § 2A:44A-6(b)(2).

[24] Id.; N.J.S.A. § 2A:44A-2.

[25] N.J.S.A. § 2A:44A-2.

[26] Id.

[27] N.J.S.A. § 2A:44A-3 (e).

[28] Id.

[29] N.J.S.A. § 2A:44A-3(2009).

[30] *CherryHill Self Storage, LLC v. Racanelli Constr. Co.*, No. A-5727-05T5, 2007 WL 1756914 (N.J. App. Div. Jun. 18, 2007).

[31] Id.

[32] N.J.S.A. § 2A:44A-2.

[33] N.J.S.A. § 2A:44A-9; *Riggs Distler & Co. v. Valero Ref. Co.*, Civ. A. No. 03-5854 (FLW), 2005 WL 2897483 (D.N.J. Oct. 31, 2005).

[34] *Riggs Distler & Co., Inc.*, Civ. A. No. 03-5854 (FLW), 2005 WL 2897483.

[35] *MorrisCountyIndus. Park v. Thomas Nicol Co.*, 35 N.J. 522, 530-33 (1961).

[36] The new statutory definitions for first, second and third tier lien claimants are a source of confusion. A "first tier lien claimant" is a contractor. N.J.S.A. § 2A:44A-2. A "second tier lien claimant" is either a subcontractor or a supplier to a contractor. Id. A "third tier lien claimant" is "is a subcontractor to a second tier lien claimant or a supplier to a second tier lien claimant." Id. Applying these definitions, it may seem at first glance that a third tier claimant could be a supplier to a second tier supplier. However, notwithstanding these new definitions, the definition of "supplier" reveals that a supplier must have "direct privity of contract with an owner, community association, contractor or subcontractor in direct privity of contract with a contractor." Therefore a supplier, by definition, cannot be a supplier to a supplier. Thus, a supplier to supplier may not file a lien.

[37] N.J.S.A. § 2A:44A-23.

[38] N.J.S.A. § 2A:44A-24(h).

[39] Id.

[40] N.J.S.A. § 2A:44A-24(d).

[41] *Thomas Group, Inc. v. Wharton Senior Citizen Hous., Inc.*, 163 N.J. 507, 521-22 (2000); N.J.S.A. § 2A:44A-24(c).

[42] N.J.S.A. § 2A:44A-18.

[43] N.J.S.A. § 2A:44A-18(a).

[44] N.J.S.A. § 2A:44A-30(d).

[45] N.J.S.A. § 2A:44A-33(a)(3).

[46] N.J.S.A. § 2A:44A-30(d).

[47] N.J.S.A. § 2A:44A-30(b).