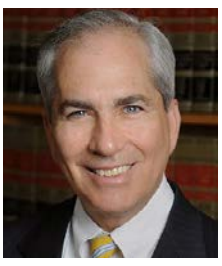
THE MECHANIC'S LIEN FOR RETAINAGE: IS THIS THE SOLUTION?



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It is no secret that the Subcontractors Trade Association is one of the most vocal and politically-active trade associations in New York. It was largely due to the persistence of the STA that in late 2011, Section 10 of the Lien Law of the State of New York was amended to provide some breathing room for "early" trades to file liens, at least for retainage, on private projects.

Prior to this change in the Lien Law, a contractor, subcontractor or materialman was required to serve and file a mechanic's lien on a private project, *including for unpaid retainage*, within eight (8) months (or four months for single-family dwellings) from when it last furnished labor or material on the project.

This pre-existing law worked for "finishing" trades because, more often than not, their claim for unpaid retainage would have ripened within the eight month period from when they last performed work. However, the "early" trades, who finish their work well in advance of the retainage being due and payable for the entire project, had no right to file a lien for any unpaid retainage, as such retainage would often time not be due to them within the eight months from when they last performed work on or furnished material to a project. Therefore, their right to file a mechanic's lien for retainage quite often had long since expired.

As noted above, the amendment is only applicable to private projects. On a public improvement contract, the subcontractor or materialman's right to file a Mechanic's Lien on a public improvement continues up to and including thirty days after *completion and acceptance* of the entire project by the public agency. Retainage on a public job, therefore, would become due and payable prior to the expiration of a subcontractor's right to file a lien. As such, the issue of a subcontractor or a materialman potentially losing his right to file a lien for retainage, if such retainage did not become due within eight month of him last performing labor or furnishing material, does not exist on a public project.

The Amendment to Lien Law Section 10 provides: ". . . where the Notice of Lien is for retainage, the Notice of Lien may be filed within ninety days after the date the retainage *was due to be released.*" This change, which again is applicable only to a private improvement project, was implemented, in part, to cure what many in the industry saw as a failure of the Lien Law to specifically address the release of retainage for the early trades.

While the language of Article 10 may appear to some to be clear and unambiguous, the ultimate meaning of this change will become subject to the interpretation of the courts. Some may read this new section as giving a contractor the right to file a Mechanic's Lien for the entire amount that is due and owing, including retainage, up to the ninety days after retention become due and payable. Those who interpret the change in that manner may point to the fact that the express language of the statute provides that the lien is for retainage. However, it doesn't say it is only for retainage.

While it does not appear that an appellate court has interpreted the new language of Section 10 to date, it is important to note that this amendment very likely applies *only to retainage*. The amendment, by its very language, *did not* alter the long-standing "eight-month rule" for *any other payments* due to a subcontractor or supplier.

For example, if Subcontractor X is owed $300,000, and $30,000 of that is retainage, Subcontractor X must still file its mechanic's lien for the $270,000 in contract balance due within eight (8) months (or four months for single-family dwellings) from when it last furnished labor or material on the project. However, the $30,000 in retainage can now, thanks to this new legislation, be the subject of a *second* mechanic's lien that may be filed up to ninety days after the time retainage was due to be released.

Additionally, while the amendment provides that a contractor may file a Mechanic's Lien for retainage within ninety days after the retainage becomes due, it does not alter the longstanding requirement that in order for a mechanic's lien to be legally *enforceable*, there must have been monies due and owing from the owner to the contractor upon which the lien would attach, at the time the lien is filed. As such, it is still imperative that a subcontractor or materialman file its lien within a timely manner, or run the risk that the owner may have paid the contractor all the funds to which it is entitled to under the contract, and, consequently, there would be no monies left unpaid upon which the retainage lien may attach.

Moreover, even if there were funds upon which a lien could attach, a subcontractor or materialman may not be entitled to the full amount of the lien filed. A lienor is only entitled to a proportional share of those funds due and owing to the contractor, based upon the amount of liens filed against the property. Insufficient funds are paid out on a pro rata basis.

G&C Commentary

While the amendment to Lien Law Section 10 allows for the "early" trades to maintain their lien law rights as to liens for retainage, subcontractors and materialman must still remain vigilant in the assertion of their Lien Law rights. While the amendment has yet to be interpreted by the appellate courts, the plain language of the amendment deals with *retainage only* and, as such, liens for *contract balance* must *still* be served and filed as per the "eight-month" (or "four-month") rules. Additionally, best practices dictate that a subcontractor or materialman should file their retainage liens as soon as possible after retainage is "due to be released" such that funds to which the lien can attach will be more likely to be available.

Brian P. Craig & Tara D. McDevitt of Goldberg & Connolly assisted with the preparation of this article.