

PROTECTING YOUR RIGHT TO PAYMENT: PART ONE LIENS

Second only to getting the work, getting paid is the most important aspect of long-term success. The law affords a contractor, subcontractor, or materialman several effective payment remedies, including lien, bond and Prompt Pay Act claims. This article is the first in a series and will discuss lien rights. Someone who provides work, services, or materials for the building or improvement of a private property may file a lien to secure the right to payment, thereby developing an interest in the property in the amount that is past due. Georgia's public policy prohibits individuals from developing such an interest in public property. Therefore, lien rights do not apply to public property or projects.

Who Has Lien Rights?

A contractor, subcontractor, materialman, along with other individuals who are involved in the construction process are protected when their work is "furnished at the instance of the owner, contractor, or some person acting for the owner or contractor." The contractual link to the owner does not have to be direct. For example, if the owner of the property hires a contractor, who hires a subcontractor, who hires a cement supplier, the supplier would have lien rights.

What Are The Prerequisites For A Lien?

If the owner, agent, or contractor filed a Notice of Commencement, with the Clerk of the Superior Court where the project is located and the notice was filed within fifteen days of beginning work on the project, then any subcontractor or materialman who does not have a direct contract with the contractor is required to provide a Notice to Contractor to the owner, the owner's agent, and the contractor.

The Notice to Contractor must be provided either thirty days after the Notice of Commencement is filed or thirty days after the subcontractor or materialman has first provided services, labor, or materials on the project, whichever date is later. The Notice to Contractor should identify the: (1) subcontractor contact information; (2) contact information for the person who ordered the work; (3) project name and location; (4) description of the labor, services or materials provided; and, if known, (5) the value of the work. This puts the owner, agent, and contractor on notice that the subcontractor or materialman is performing on the project and has payment rights.

If the Notice of Commencement is not properly filed, then the Notice to Contractor is not required. However, the Notice to Contractor should always be provided, because its absence can extinguish lien rights.

Establishing A Lien Claim.

The claim must be made within three months of the last performance of work. Additionally, the lien claimant must: (1) substantially comply with the contract; (2) record the lien claim with the Clerk of the Superior Court in the project's county and mail the lien claim by certified or overnight mail to the owner, agent, and contractor; (3) commence suit on the lien claim within one year of the date the payment became due; and (4) file notice of suit where the lien was filed, within fourteen days. The requirement to file suit is waived if the person who procured the work dies, leaves the state, files for bankruptcy, or there is a "pay-if-paid" provision. The Claim of Lien must include the: (1) claimant's name; (2) claim amount (3) address and/or legal description of the property; (4) project name; (5) service or materials provided; (6) payment due date (i.e., when services were last furnished); and (7) owner's name.

How To Enforce A Lien.

A lien limits the ability of the owner to utilize its interest in the property. For example, a lien can limit an owner's ability to get a mortgage on the property or to sell the property. Often this is sufficient to force payment. If payment does not result and all of the requirements for a lien claim have been met, the claimant has a right to foreclose on the lien and force the sale of the property to satisfy the lien claim.

Conclusion

Liens serve as effective incentive for an owner to make sure all parties working on a project are paid in a timely manner. It is advisable to establish a consistent system for establishing and enforcing your lien rights. The best way to do so is to seek the counsel of an attorney.