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Construction & Surety Law Newsletter

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Bulletin

How Many Times Can a Mechanics' Lien Be Extended By Court Order?

Last August, the New York State Legislature amended the Lien Law with respect to the duration of mechanics' liens (Chapter 324 of the Laws of 2000). These amendments became effective on January 1, 2001.

The initial duration of a filed public improvement lien was extended from six months to one year (§ 18), the same duration accorded private improvement liens.

The amendments also addressed the issue of extending and continuing mechanics' liens after the original filing. Section 17 regarding private improvement liens and § 18 regarding public improvement liens still permit the lienor to extend the mechanics' lien for one more year by a filing made within one year after the original filing (unless the private improvement lien encumbers real property improved by a single family dwelling). But the Legislature sought to limit the number of times a mechanics' lien may be extended by court order.

The relevant portion of § 17 and the corresponding portion of § 18 were amended as follows:

> . . . No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien . . . . No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each *of two* successive ~~year~~ *years*. [amended language indicated.]

Prior to the amendments, there were no statutory limitations on the number of times a mechanics' lien could be extended by court order. Newsletters published last fall by a contractor's association and a title insurance company both interpreted the amendments to permit no more than two extensions by court order. Actually, the statutes as amended appear to permit a total of three extensions by court order—an original order of extension and two "new" orders!

Under this broader interpretation, a mechanics' lien not involving a single-family dwelling could have a five-year duration—one year after original filing; one year extension by filing; one year extension by original court order; and two one-year extensions by "new" court orders.

Is it common practice to repeatedly extend a mechanics' lien before ultimately commencing a lien foreclosure action? It would seem to be a risky practice because any missed deadline would cause the lien to expire.[1] In *Crossland Savings, FSB v. Sutton East Associates #88*,[2] the lien was extended four times by court order.

It would appear that legislative clarification or a judicial decision will be required to provide certainty that a mechanics' lien can be extended three times by court order and not just two times. Perhaps the question whether the amendments apply retroactively to all liens filed before or after January 1, 2001, or just prospectively to liens filed on or after January 1, 2001, should also be addressed.

Summary of Decisions and Statutes

ARBITRATION

27-1. Claimant was not required to demonstrate that its demand for arbitration was under a "color of right" in order to be entitled to the protection of CPLR 204(b) which tolls the applicable limitations period between the time a demand for arbitration is made and a final judicial determination is issued that the dispute is not a proper subject for arbitration. The burden rests with the respondent to show that the claimant's demand for arbitration was made in bad faith or with fraudulent intent, if the benefit of the tolling period is to be denied to the claimant. The running of the statute of limitations resumes when all nondiscretionary appeals have been decided or have expired. *Joseph Francese, Inc. v. Enlarged City School District*, 95 N.Y.2d 59, 710 N.Y.S.2d 315 (2000).

INSURANCE

27-2. Insurance certificates naming general contractor as an additional insured on subcontractors' policies, which contained express disclaimers that they were (1) issued for information only, (2) conferred no rights on the holder, (3) did not amend, extend or alter the coverage provided by the policies, and (4) were subject to all the terms, exclusions and conditions of the policies, did not overcome irrefutable evidence that the general contractor had not been named as an additional insured on the policies issued to the subcontractors. *American Motorist Insurance Company v. Superior Acoustics Inc.*, 277 A.D.2d 97, 716 N.Y.S.2d 389 (1st Dep't 2000).

LABOR LAW §§ 200, 240, 241

27-3. The Court of Appeals held that Labor Law §§ 200, 240(1) and 241(6) are not preempted by federal maritime law because they do not unduly interfere with the fundamental characteristics of maritime law nor unduly hamper maritime commerce. When a tort is maritime but local and there are no far-reaching implications for vessels, seafarers or entities engaged in maritime commercial transactions, there is no threat to the uniformity of federal maritime law sufficient to displace application of an important state health and safety measure. *Cammon v. City of New York,* 95 N.Y.2d 583, 721 N.Y.S.2d 579, (2000). *See* Labor Law §§ 200, 240, 241, 26-7**,** *Construction & Surety Law Newsletter* (Spring 2000).

27-4. A demolition worker, stepping down from the cab of his vehicle onto its track, slipped and fell three feet to the ground, injuring himself. There was no step to assist operators in entering or exiting the vehicle. The Court of Appeals held the risk of alighting from a construction vehicle was not an elevation-related risk that necessitated the use of protective devices listed in Labor Law § 240(1). *Bond v. York Hunter Construction, Inc.*, 95 N.Y.2d 883, 715 N.Y.S.2d 209 (2000).

27-5. The Third Department affirmed that while Labor Law § 240(1) imposes absolute liability on an owner, contractor or agent for an injury proximately caused by a breach of the statutory duty to provide workers with proper safety devices, this statutory duty does not extend to recalcitrant workers who have adequate and safe equipment available to them but refuse to use it. *Harrington v. State of New York, 277* A.D.2d 856, 715 N.Y.S.2d 807 (3d Dep't 2000).

27-6. Labor Law § 240(1), which applies to contractors and owners at a work site, may also apply to a lessee where the lessee has the right or authority to control the work site. One way to prove such control is through evidence that the lessee actually hired the general contractor, but the right to control the work site may also be proved by other means such as contractual or statutory provisions. In the instant action, the lease authorized lessee to construct and install temporary structures. That authority rendered the lessee an agent of the fee owner for purposes of liability under applicable sections of the Labor Law. The mere fact that the lessee delegated the day-to-day construction tasks contemplated by the lease to a sister corporation was irrelevant. The determinative element was the right to control access to and work upon the premises and to insist that all necessary safety practices be followed, whether or not the lessee actually exercised that right. *Bart v. Universal Pictures,* 277 A.D.2d 4, 715 N.Y.S.2d 240 (1st Dep't 2000).

27-7. A construction worker, working on the third floor of a school renovation project, was pulling steel beams into the building. One beam was suspended at the third floor level between two walls 30 feet apart. As it was pulled by the worker, the free end of the beam fell three stories, while the opposite end pinned the worker against a wall, fracturing his left wrist and forearm and disabling him. The worker was not provided with any hoist, rope, or other device to move or support the steel beams. The First Department noted that the worker was at the third story and the force of gravity operating on the unsecured beam under these circumstances constituted a special elevation hazard within the meaning of Labor Law § 240(1). *Hawkins v. City of New York*, 275 A.D.2d 634, 713 N.Y.S.2d 311 (2000).

27-8. Worker, whose unsecured ladder lost contact with the building wall and turned sideways, ruptured a disc in his back while turning the ladder back against

the wall to avoid a fall. The fact that he did not fall was irrelevant. The harm flowed directly from the force of gravity on the ladder and person, and therefore the worker was entitled to recovery under Labor Law § 240(1). *Lacey v. Turner Construction Co.*, 275 A.D.2d 734, 713 N.Y.S.2d 207 (2d Dep't 2000).

27-9. Corporate lessee, whose president hired contractors to assist in a renovation, spent 11 to 15 hours per day at the work site, and had authority to stop work, was a contractor, owner or agent within the meaning of Labor Law § 240(1) and was strictly liable for injuries suffered by the employee of a renovation contractor as the result of a fall from an unsecured ladder. *Prass v. Viva Loco of 110, Inc.*, 275 A.D.2d 403, 712 N.Y.S.2d 620 (2d Dep't 2000).

27-10. The employee of an independent contractor, preparing to work on an aircraft at JFK International Airport, was seriously injured when he fell from an allegedly defective portable work platform. This worker brought suit against the airline alleging causes of action under Labor Law §§ 240(1) and (6). The airline argued that the Federal Aviation Act, the Airline Deregulation Act, and the Occupational Safety and Health Act superseded and preempted the New York Labor Law. The district court, dismissing a Third Circuit precedent as inapplicable and concluding that a parked aircraft is a "structure" within the meaning of Labor Law § 240(1), held that the Labor Law claims were not preempted by the federal standards in those acts. *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160 (E.D.N.Y. 2000). [The court traced New York's "scaffold act" to the Biblical instruction found in Deuteronomy 22:8, *"When thou buildest a new house, then thou shalt make a parapet for thy roof, that thou not bring blood upon thy house, if any man fall from thence."*]

MECHANICS' LIENS

27-11. A building loan contract affidavit under Lien Law § 22, which included in the statement of "the net sum available to the borrower for the improvement" amounts used by the borrower to make reimbursement for work completed prior to the procurement of the construction loan, was not rendered materially false by that inclusion. Accordingly, a mechanics' lien was not entitled to priority over the previously recorded mortgage lien. *In re Elm Ridge Associates*, 234 F.3d 114 (2d Cir. 2000).

27-12. A second notice of lien for the same payment claim, timely filed to cure a fatal defect in the first notice of lien, could not support a damage action for willful exaggeration under Lien Law §§ 39 and 39-a. Neither could a lien voluntarily discharged by stipulation between the parties. *Wellbilt Equipment Corporation v. Fireman*, __A.D.2d__, 719 N.Y.S.2d 213 (1st Dep't 2000).

27-13. A public improvement lien filed by a subcontractor's unpaid supplier had priority over payments made by the general contractor against the subcontractor's union benefit obligations where the subcontract balance owed to the subcontractor exceeded the amount of the lien at the time it was filed, the filing of the lien preceded the payment of union benefits, and no lien was filed by the union payees. The lienor was entitled to recover against a lien discharge bond by proving that it had a valid lien. *C.S. Behler, Inc. v. Daly & Zilch, Inc.*, 277 A.D.2d 1002, 716 N.Y.S.2d 506 (4th Dep't 2000).

27-14. The mere acceptance of construction debris or waste at a disposal facility does not constitute an "improvement" within Lien Law § 2(4). Conducting none of the waste removal itself, the purported lienor did not perform labor or furnish material for the improvement of real property under Lien Law § 3 and is not entitled to a mechanics' lien. *Claudio Perfetto, Inc. v. Waste Management of New York, LLC*, 274 A.D.2d 389, 710 N.Y.S.2d 120 (2d Dep't 2000).

PRINCIPAL AND SURETY

27-15. A payment bond whose issuance is induced by the fraudulent misrepresentations of the contractor/principal and of the owner is *void ab initio*. However, claimant suppliers who had no knowledge of or participation in the fraud may enforce the bond against the compensated surety so long as they relied on the bond in choosing to extend credit to the contractor/principal. The District Court also concluded that union benefit fund trustees have standing to sue on a contracting (payment) bond for their fund beneficiaries. *Mountbatten Surety Co., Inc. v. Kips Bay Cinemas, Inc.*, __F. Supp. 2d__, 2000 WL 1752916 (S.D.N.Y.).

PUBLIC CONTRACTS

27-16. ". . . , if a town, on behalf of a water district, contracts with a water authority for the construction of a water system by a contractor engaged by the authority, the authority must solicit bids in accordance with Town Law § 197 for the construction of the town's particular water system as a discrete project. The authority may not solicit bids for individual categories of estimated construction work to be performed in the aggregate for districts in several towns." Opns St Comp, No. 2000-17 (November 2, 2000).

[The Editor thanks Paul W. Reichel of Bond, Schoeneck & King, LLP, Syracuse, New York, for reporting this State Comptroller's opinion.]

STATUTES

27-17. Chapter 116 of the Laws of 2000 adds paragraph aa to section 3-0301(2) of the Environmental Conservation Law and authorizes the Commissioner of

Environmental Conservation to declare a "construction emergency" when damage to, imminent danger of failure of, or malfunction of buildings, structures, or property caused by a sudden and unexpected occurrence creates a pressing necessity for immediate repair, reconstruction, or maintenance to permit the safe continuation of necessary public use or function, or to protect the property of the state or the life, health, or safety of any person. Under a construction emergency, the Commissioner may immediately contract to have work performed under procedures developed by the Department of Environmental Conservation and approved by the State Comptroller. Such procedures shall provide for consideration of solicitation of sufficient competition to the extent practicable from responsible contractors representative of the contracting community. Notice of an emergency award shall be submitted for publication in the Procurement Opportunities Newsletter as soon as practicable after the award. Emergency work is reasonably expected to be completed within 30 days, and emergency contracts may include only the work necessary to remedy or alleviate a construction emergency. Emergency work may be undertaken within existing contracts as additional work. Notice of the estimated cost and duration of emergency work must be promptly given to the State Comptroller, the Attorney General, and the Division of the Budget. Effective July 11, 2000.

27-18. Chapter 164 of the Laws of 2000 adds paragraph c to section 1265-a(2) of the Public Authorities Law and authorizes the Metropolitan Transportation Authority to establish standards for prequalifying bidders on the East Side Access Project to bring the Long Island Railroad into Grand Central Terminal. The Authority is directed to consider experience and past performance, ability to undertake the work, participation in state approved apprenticeship programs, utilization of employees represented by labor organizations, financial capability and responsibility, and record of compliance with existing labor standards. Effective July 18, 2000.

27-19. Chapter 288 of the Laws of 2000 amends section 10(1) of the Lien Law to exclude from the term "single family dwelling" any dwelling which is part of a subdivision filed with a municipality and owned by a developer who does not use the property as his personal residence at the time a lien is filed. By this amendment, "developer" is defined as one who improves two or more parcels of real property, rather than five. The limitations period for filing a mechanics' lien against a single family dwelling is four months, while the limitations period is eight months for all other private improvements to real property. Effective October 22, 2000.

27-20. Chapter 324 of the Laws of 2000 amends section 17 of the Lien Law to limit the continuation of a private improvement mechanics' lien by court order to a total of three years from the expiration of a one-year extension by filing, or a total of two years from the expiration of the lien originally filed against real property improved by a single family dwelling, with new court orders having to be granted and entered in each successive year. It also amends section 18 of the Lien Law to extend the duration of a public improvement mechanics' lien from six months to one year from the time of filing, and to permit continuation of the public improvement lien by court order for a total of three years from the expiration of a one-year extension by filing, with new court orders having to be granted and entered in each successive year. Effective January 1, 2001.

27-21. Chapter 478 of the Laws of 2000 adds new section 408-b to the Education Law and obligates the appropriate authorities to submit the most current plans and specifications for each public and private school building to the local fire and law enforcement officials. Effective March 19, 2001.

WORKERS' COMPENSATION

27-22. A journeyman dock builder was injured while working on the repair of a bridge from a barge chartered by his employer. Because the employer was not shown to be negligent in its role as the owner of a vessel, and only negligent in its capacity as an employer, an action for negligence against the employer would not lie under section 5(b) of the federal Longshore and Harbor Workers' Compensation Act of 1972, as amended. The injured employee was limited to statutory workers' compensation payments required by section 4 of the Act. *Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 2000).

27-23. An autopsy disclosed previously undiagnosed coronary artery disease in a construction supervisor who had died from cardiac arrest shortly after using a jackhammer, work more strenuous than his normal duties. The Third Department held that apportionment of workers' compensation benefits is not appropriate where a claimant was fully employed and functioning effectively despite a noncompensable preexisting condition. *Ricci v. W.J. Riegel & Sons, Inc.*, __A.D.2d__, 717 N.Y.S.2d 751 (3d Dep't 2000).

Endnotes

1. *See Contelmo's Sand & Gravel, Inc. v. J & J Milano, Inc.*, 96 A.D.2d 1090, 467 N.Y.S.2d 55 (2d Dep't 1983).
2. 271 A.D.2d 276, 707 N.Y.S.2d 147 (1st Dep't 2000).

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Mechanic's Liens*

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The nature of construction work often leads to disagreements and resultant delays. These delays in construction can mean that a contractor won't be paid right away or, worse, at all. Mechanic's liens are intended to protect the interest of a contractor or supplier. A property owner will see the filing of a mechanic's lien as a nuisance and, implicitly, as a threat. A thorough understanding of mechanic's liens is crucial whether you represent the construction industry or a property owner.

Mechanic's Liens, written by George Foster Mackey and Norman Alvy, is an invaluable guide to what can be a volatile area of practice. The methods of preparing, filing and enforcing mechanic's liens on both private and public works construction are covered. This book also discusses how to substitute other security for the encumbered property or fund and discusses defenses and methods for vacating liens.

In addition to updating case and statutory references, this latest edition includes discussion of the technical differences between private mechanic's liens and public improvement mechanic's liens and how they can result in forfeiture of the lien; the federal preemption doctrine under ERISA; and, a surety's rights to an Article 3A trust fund.

Numerous practice guides and forms commonly used in connection with Lien Law procedures are provided, making *Mechanic's Liens* an invaluable reference for all attorneys who practice in this field.

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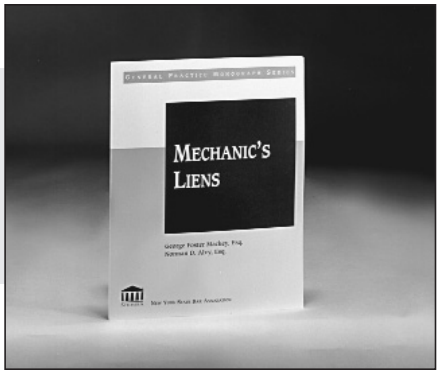

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