

MECHANICS' LIENS IN UTAH

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A mechanic's lien is an involuntary encumbrance against the title to real property. This encumbrance serves as security for a debt incurred while improving the encumbered property. Thus, the right to file a mechanic's lien arises when a person or company furnishes labor, materials, equipment and/or certain professional services that improve the property.

Perhaps the best way to illustrate how Utah's mechanic's lien law works is by hypothetical. Suppose Contractor agrees to build a building for Owner. The building is satisfactorily completed, but Owner does not pay Contractor in full. During the construction period, and for a limited time thereafter, Contractor has a right of lien against both the building and the property upon which the building was built.

Being familiar with Utah's mechanic's lien law, Contractor files a Notice of Lien with the county recorder in the county where the property is located within the time period allowed by statute, thus "perfecting" Contractor's mechanic's lien rights. Contractor also sends a copy of the lien to Owner by certified mail, within the time period allowed by statute, so Contractor can recover its costs and attorney fees.

Owner continues possession and use of the building without paying the balance due and Contractor sues in court, in the county where the property is located, to foreclose its lien within the time period allowed by statute. After filing suit, Contractor also files a Lis Pendens with the county recorder in the county where the property is located, within the time period allowed by statute.

In the court proceedings, Contractor proves its lien is valid and the amount claimed is properly due. The court orders the property sold publicly by the sheriff to the highest bidder. The property is sold to Purchaser for an amount sufficient to pay the balance due Contractor. The remaining proceeds, if any, are paid to Owner. Purchaser has title to the building and property free and clear of Contractor's lien. However, Owner may regain ownership of the building and property by "redeeming" it from the Purchaser after the foreclosure sale, within the time period allowed by statute.

While the foregoing illustration is oversimplified, it is due more to the lack of additional parties involved rather than the omission of procedural steps. Nevertheless, the hypothetical is sufficient to show the value of mechanics' liens to those entitled to them and the procedure that must be followed in obtaining and enforcing a mechanic's lien.

The remainder of this article will address Utah's mechanic's lien law in more detail. It should be noted that this article is not intended as a substitute for attorneys, nor should it be implied that after reading this article, readers can adequately perfect and enforce mechanics' liens without consulting an attorney. Lien rights are valuable, but they must be understood and respected, and strict compliance with the law is required. Due to the complexity of the Utah laws regarding mechanics' liens, the frequent amendments, and the narrowness of judicial interpretations, many contractors have lost their lien rights by failing to strictly comply with statutory requirements. While the material that follows should assist readers in avoiding many pitfalls associated with

mechanics' liens, readers are encouraged to consult with an attorney in assuring that their lien rights are fully protected and enforced.

PROJECTS SUBJECT TO MECHANICS' LIENS

Utah's mechanic's lien law does not apply to any public project, including property owned by the federal and state governments, cities, towns, counties, or improvement districts, etc. The bonding statute, rather than the mechanic's lien statute, provides the principal source of securing payment on public projects by not allowing a contract to be awarded until payment and performance bonds are provided.

Utah's mechanic's lien law does, however, apply to any privately owned property upon which the protected classes of people have rendered service, performed labor, or furnished materials or equipment. Therefore, a lien is a claim strictly on the improved property and cannot be filed against other real or personal property.

Residential projects can be exempted from mechanics' liens if the owner complies with certain requirements of the Residence Lien Restriction and Lien Recovery Fund Act. Residential projects include improvements to real property used or occupied as primary or secondary, detached, single-family dwellings up to and including two units.

PROPERTY INTERESTS SUBJECT TO MECHANICS' LIENS

When performing construction work, it is important to understand the respective ownership interests in the property. Under normal circumstances, work performed that improves the property allows the claimant to file a lien against the fee interest of the property. Depending upon the circumstances, however, there are other interests that may be liened, including buyers' interests, leasehold interests, interests in a condominium, interests in two or more properties owned by the same person, and portions of the property related to the ownership interest.

PARTIES ENTITLED TO LIEN RIGHTS

Generally, all persons performing labor or furnishing services, materials and/or equipment for the improvement of property have mechanic's lien rights for that property, except as barred by statute. The class of persons the law protects includes contractors, subcontractors, material suppliers, laborers, architects, engineers, and renters of materials and equipment. However, being within one of these protected classes does not mean that the person automatically will be able to enforce lien rights. For example, an unlicensed contractor may be barred from enforcing any mechanic's lien rights.

LIENABLE AND NON-LIENABLE IMPROVEMENTS

Generally, only permanent, physical improvements to real property will give rise to lien rights. However, as long as the work is done in connection with a permanent, physical improvement, including off-site improvements benefiting the property, it need not be the type of work that would give rise to a mechanic's lien by itself. Non-lienable improvements include personal

property, which is temporary or movable property that may be easily moved from one property to another.

NOTICE REQUIREMENTS

In 2005, the Utah Legislature created the State Construction Registry (the “**SCR**”). The SCR is designed to provide a central repository for Notices of Commencement, Preliminary Notices, and Notices of Completion filed in connection with all privately owned construction projects as well as all state and local government owned construction projects throughout Utah. Primary filing and access to the SCR as well as notification to interested persons is done electronically.

Notice of Commencement

To claim the benefit of the Preliminary Notice requirements on a project to which they apply, a Notice of Commencement must be filed with the SCR. A Notice of Commencement should be automatically filed within fifteen (15) days of building permit issuance by the local authority issuing the permit. However, the original contractor should verify on the SCR that the local authority has filed the Notice of Commencement. For projects where no building permit is issued, the original contractor must file a Notice of Commencement with the SCR within fifteen (15) days of beginning physical construction work. Also, an owner, lender, surety, or other interested person may file a Notice of Commencement with the SCR, subject to the above timeframes. All notices filed on a project will be combined as one notice, which is effective for all labor, service, equipment, and materials furnished for the project after the Notice of Commencement is filed. If a Notice of Commencement is not timely filed, the Preliminary Notice and Notice of Completion provisions do not apply.

The Notice of Commencement must contain (a) the owner’s name and address; (b) the original contractor’s name and address; (c) the payment bond surety’s name and address or a statement that a payment bond was not required; (d) the project’s address, if it reasonably identifies the project, or the name and general description of the location of the project if the address does not reasonably identify the project; (e) a general description of the project; and (f) the lot or parcel number and any subdivision, development, or other project name of the property if the property is subject to mechanic’s liens.

Preliminary Notice

A Preliminary Notice is required from those potentially making mechanic’s lien claims on certain construction projects. If a preliminary notice is not given, a contractor waives its right to file a mechanic’s lien on the project.

A preliminary notice must be filed with the SCR before a Notice of Lien may be recorded. Subcontractors and suppliers of all tiers must file a preliminary notice within twenty (20) days of their first furnishing labor, equipment, or materials to a project or within twenty (20) days of the filing of the Notice of Commencement, whichever is later. Preliminary notices filed after this timeframe only become effective five (5) days after the date on which they are filed and preclude a subcontractor or supplier from filing a claim for compensation for labor, equipment, or

materials furnished prior to the effective date of the Preliminary Notice, except for claims against the person with whom the subcontractor or supplier contracted. Therefore, it is important for subcontractors and suppliers to timely file Preliminary Notices. Also, as described below, these timeframes change once a Notice of Completion is filed. It is the burden of the filer of the Preliminary Notice to prove that it was timely filed and substantially meets the filing requirements.

Only one Preliminary Notice is required for each project, unless a person is performing work for or supplying materials to two or more subcontractors on the project. In such a situation, a Preliminary Notice is required for the work performed for or the materials supplied to each subcontractor.

The Preliminary Notice must contain (a) the claimant's name, address, and telephone number; (b) the name and address of the person who contracted for the labor, equipment, service, equipment, or materials; (c) the name of the record or reputed owner of the project; (d) the name of the original contract under which the work is performed; and (e) the project address or a description of the location of the project.

Exemptions from Preliminary Notice Requirements

The Utah Preliminary Notice requirements no longer exempt residential construction. Therefore, subcontractors and suppliers on residential projects must comply with the statute to preserve their mechanic's lien filing rights.

While the revised Preliminary Notice statute does not specifically exempt laborers, the literal language of the statute only includes subcontractors and suppliers. It is anticipated that those who would be eligible for this exemption would be true employees. Thus, a person who contracted on a piece-work basis would still be required to comply with the Preliminary Notice requirements.

Notice of Completion

Upon final completion of a project, an owner, lender, or surety related to the project may file a Notice of Completion with the SCR. Final completion means (1) issuance of a permanent certificate of occupancy, if required; (2) the date of final inspection by the local government entity, if a permanent certificate of occupancy is not required; or (3) if neither a permanent certificate of occupancy nor final inspection are required, the date on which there remains no substantial work to be completed to finish work on the original contract.

Upon the filing of the Notice of Completion, the timeframes for filing Preliminary Notices change so that any subsequent Preliminary Notices must be filed within ten (10) days of the date on which the Notice of Completion is filed.

NOTICE OF LIEN

The Notice of Lien is a document that is recorded in the public records as a notice to the world of intent to claim a lien against the named property. A filed Notice of Lien does not prove the

existence of the lien, but rather it is one of the statutory requirements for bringing a mechanic's lien in to existence. A lien claimant for any project type must file a Notice of Lien within ninety (90) days from the date of final completion of the original contract under which the lien claimant claims a lien. Amendments, if substantial, must also be filed before the time period elapses. A substantial amendment is one that would make an otherwise invalid lien valid.

The Notice of Lien must be filed with the county recorder for the county in which the property is located. It becomes a part of the recorded history of that property, and a copy is permanently preserved as a public record.

Within thirty (30) days after filing the Notice of Lien, the lien claimant must deliver or mail by certified mail a copy of the Notice of Lien to either the reputed owner or record owner of the property. Failure to deliver or mail the Notice of Lien precludes the lien claimant from an award of costs and attorney fees in an action to enforce the lien.

CONTENTS OF THE NOTICE OF LIEN

The mechanic's lien law requires that a Notice of Lien contain (a) a statement of the amount claimed; (b) the name of the record or reputed owner of the property; (c) the name of the person or company to whom the materials were delivered; (d) the first and last dates of work or materials delivered; (e) a description of the property sufficiently definite to enable a person familiar with the locality to identify the property with reasonable certainty; and (f) the signature of the lien claimant or his agent and an acknowledgment of the same.

ENFORCEMENT OF LIEN

Once filed with the county recorder, a mechanic's lien encumbers the property until one of several things happens. If satisfaction of the claim is achieved, then a Release of Lien is recorded and the cloud on the title is removed. If a lawsuit to enforce the lien has been filed within one hundred eighty (180) days from the day on which the lien claimant filed a Notice of Lien, the lien claim remains in effect indefinitely until the lawsuit is brought to a conclusion. If a lawsuit is not filed within the requisite time period, the lien claim automatically lapses and is of no effect. Any recovery under the mechanic's lien after that time is not allowed.

After a lawsuit to enforce the lien has been filed, the lien claimant is required to file a Lis Pendens with the county recorder in the county where the lien is recorded. If the lien claimant fails to file the Lis Pendens within one hundred eighty (180) days from the day on which the lien claimant filed a Notice of Lien, the lien is void except as to persons who have been made parties to the lawsuit and persons having actual knowledge of the lawsuit.

The prevailing party in a mechanic's lien action is entitled to recover reasonable attorney fees and costs if the lien claimant sent a copy of the Notice of Lien to the property owner, by certified mail, within thirty (30) days of filing the Notice of Lien.

Once the claimant has prevailed in a lien enforcement action, the court will grant foreclosure of the property, and it may be sold at a sheriff's sale. If the proceeds of sale after the payment of

costs are not sufficient to satisfy the whole amount of liens included in the court's decree, the proceeds are paid in the order designated by statute.

LIEN WAIVERS AND RELEASES

Waiver

The right of a person to claim a mechanic's lien is a statutory privilege that may or may not be exercised and, therefore, is subject to waiver.

If a potential lien claimant tells the property owner that it will not file a lien, it may likely have waived the right to file any lien. To be valid and binding, a waiver by contract or agreement must be supported by legal consideration or the party asserting the waiver must have relied on the waiver to his detriment.

A lien waiver applies to work and materials for the period of time prior to the date of the waiver and does not apply to future lien rights that might be acquired unless otherwise altered by the conduct, circumstances, and intentions of the parties.

Release

A release of lien is the relinquishment or giving up of a right or claim to a lien by the person in whom it exists, to the person against whom it could have been enforced. Once the lien claim is satisfied, the lien creditor has an obligation to record a Release of Lien if the request is properly made by any person with an interest in the property. This release must be made within ten (10) days of the request.

RESIDENCE LIEN RESTRICTION AND LIEN RECOVERY FUND ACT

In 1994, the Utah Legislature enacted the Residence Lien Restriction and Lien Recovery Fund Act (the "**Act**"). In its simplest terms, the Act protects homeowners from mechanic's liens and provides an alternate avenue of recovery for unpaid subcontractors and suppliers. Thus, if the homeowner complies with certain requirements and a claimant makes a procedurally correct claim, mechanics' liens cannot be maintained against the improved property, and the claimant may apply for payment from the Lien Recovery Fund.

The Lien Recovery Fund exists to protect homeowners from having to pay twice for construction work on their homes. Additionally, the Fund provides a remedy for subcontractors and suppliers who lose income due to the homeowner protection. However, the Fund does not (1) protect homeowners who fail to pay a contractor with whom they contract directly; (2) assist contractors or suppliers in collecting accounts receivable from homeowners or other entities; or (3) reimburse homeowners who pay mechanics' liens for any reason.

Homeowner Responsibilities

It is the responsibility of the homeowner to obtain a Certificate of Compliance from the Utah Department of Commerce, Division of Occupational and Professional Licensing ("**DOPL**"), the

agency charged with administration of the Act and the Lien Recovery Fund, by establishing that (1) there was a written contract, (2) with a properly licensed contractor, (3) who was paid in full.

If the homeowner establishes the foregoing, as determined by DOPL, a Certificate of Compliance is issued and the homeowner is protected from liability that might otherwise result from a mechanic's lien claim against the property.

Claimant Responsibilities

Registration with the Lien Recovery Fund and payment of the requisite fees allows a party to be a qualified beneficiary, and such a claimant is allowed to collect from the Lien Recovery Fund. Thus, failure to register or pay the fees bars recovery from the Fund.

Qualified beneficiaries are those persons or businesses that provide qualified services, pay all requisite fees or assessments, and are registered with DOPL. Registration is a relatively simple process.

Claims Process

The claims process required to receive payment from the Lien Recovery Fund can be cumbersome. The Board that reviews the claims is strict in its interpretation of the rules and requirements. There are numerous ways a claimant can inadvertently make an error that will prevent payment from the Fund.

Unfortunately, a detailed analysis of the claims process is beyond the scope of this article. Briefly, however, the claimant must file a lawsuit against the nonpaying party within the earlier of one hundred eighty (180) days of the date that the qualified beneficiary filed its lien, or two hundred seventy (270) days from the completion of the original contract, against the nonpaying party to recover monies owed for qualified services. With the Complaint, the lien claimant is required to serve upon the property owner instructions as to the property owner's rights under the Act along with a form to enable the property owner to exercise its rights for protection from the Lien Recovery Fund by obtaining a Certificate of Compliance. Failure to provide the instructions and form affidavit to the property owner bars the lien claimant from maintaining and enforcing the lien.

The claimant must obtain a judgment against the nonpaying party and make reasonable efforts to collect the judgment, including the filing of a motion and order in supplemental proceedings. Finally, within one (1) year after the judgment is entered, the claimant must file a claim form with the Lien Recovery Fund.

If the person with whom the claimant contracted files bankruptcy before a judgment can be obtained, the claimant must file a claim form with the Lien Recovery Fund within one year after the bankruptcy filing. Since the claimant is prevented from obtaining a judgment that would establish the amount of the Lien Recovery Fund claim, the Lien Recovery Fund must hold an evidentiary hearing.

If the claim is approved, the Lien Recovery Fund will pay the claim in the amount that has been approved by the Board, including interest and reasonable attorney fees up to a statutory

maximum provided there was a contract with an attorney fee provision or the court has awarded attorney fees in the underlying judgment against the nonpaying party. The process can take anywhere from a few months to a few years to successfully pursue a claim through payment from the Lien Recovery Fund. Although this may not be as fast as claimants would like, it may be the best available option since the Act may prevent collection through filing or maintaining a traditional mechanic's lien.

PENALTIES FOR WRONGFUL MECHANIC'S LIEN

It is unlawful to wrongfully file a mechanic's lien. Any person filing a mechanic's lien against any property, with the intention of receiving an unjustified windfall of money or other benefit, or with the intent of clouding the title to the subject property is guilty of a class B misdemeanor. A person who is found to have wrongfully filed a mechanic's lien is not only liable for criminal sanctions, but is also liable to the person affected by the lien for the greater of twice the amount by which the lien actually exceeds the amount due or the actual damages incurred by the owner of the property. Moreover, a person who files a wrongful lien is not entitled to attorney fees.

BONDING/ALTERNATIVE SECURITY REQUIREMENTS

An owner of property that is the subject of a mechanic's lien may, either before or after the commencement of an action to enforce the lien, record a Notice of Release of Lien and Substitution of Alternate Security with the county recorder for the county in which the lien was originally recorded.

A Notice of Release of Lien and Substitution of Alternate Security must include a surety bond or evidence of a cash deposit. The alternate security must be equal to a statutory percentage of the lien claim and must be made payable to the lien claimant. Additionally, the alternate security must be conditioned for the payment of the judgment and must have the person affected by the lien as the principal. Once the Notice of Release of Lien and Substitution of Alternate Security is filed, the property is released from the lien and the claim proceeds against the surety bond or cash deposit.

In conclusion, we hope that you have found this overview of Utah's mechanics' lien law to be helpful. Should you have questions, we suggest that you contact a competent construction attorney.

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