

***Residential Construction Liens in New Jersey:
The Nuts & Bolts***

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Introduction

The New Jersey Construction Lien Law (“CLL” or “Act”), N.J.S.A. 2A:44A-1, et seq., provides that a lien pursuant to a residential construction contract shall not attach unless there is “**strict compliance**” with the procedural requirements of N.J.S.A. 2A:44A-20 and 2A:44A-21. See N.J.S.A. 2A:44A-5 (emphasis added).

A. *Who Can File a Residential Construction Lien*

The CLL establishes the procedure by which contractors, subcontractors and suppliers may place liens on property in the amount of the work, services or material they have provided, and for which they have not been paid.¹ See N.J.S.A. 2A:44A-1, et seq.; Thompson Group, Inc. v. Wharton Senior Citizen Housing, Inc., 163 N.J. 507, 509 (2000). Noting that the ability to sell and purchase residential housing is essential for the economy of the state, the legislature established different requirements and special procedures for the filing of a lien on residential construction than on commercial projects. See N.J.S.A. 2A:44A-21; Mansion Supply Co., Inc. v. Bapat, 305 N.J.Super. 313, 317 (App. Div. 1997), certif. den., 153 N.J. 49 (1998). Pursuant to N.J.S.A. 2A:44A-3, a written contract is a prerequisite to the filing of a lien claim under the CLL, and thus the

¹ “The amount of a lien claim shall be limited to the contract price, or any unpaid portion thereof, whichever is less, of the claimant for the work, services, material or equipment provided.” N.J.S.A. 2A:44A-9.

Act provides no remedy for unwritten contracts.² Moreover, nothing in the statute “shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.” Id.³

B. Procedural Requirements

N.J.S.A. 2A:44A-21 sets forth the additional requirements for filing a lien for work, services, material, or equipment furnished pursuant to a ***residential construction contract*** or a ***residential purchase agreement***.

Thus, as defined in N.J.S.A. 2A:44A-2, “residential construction contract” means and refers to “***any written contract for the construction or improvement to a one- or two-family dwelling, or any portion of the dwelling***, which shall include any residential unit in a condominium subject to the provisions of P.L.1969, c. 257 (C. 46:8B-1, et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c. 168 (C. 46:8A-2), and any residential unit

² See Gallo v. Sphere Constr. Corp., 293 N.J.Super. 558 (Ch. Div. 1996).

³ Note, in this regard, that use of the lien claim procedure is not mandatory and it is not the exclusive remedy available to contractors, subcontractors or suppliers. See e.g., Orefice v. ADR, 315 N.J.Super. 493 (App. Div. 1998)(where the Appellate Division held that a builder who had previously filed a lien claim pursuant to the CLL was not barred from pursuing alternative, co-extensive relief and remedy by filing a demand for arbitration under the arbitration clause in its contract with the homeowners. The Court affirmed the lower court’s holding that, “. . . if the contractor, having secured the right to file a lien claim fails to proceed upon it, the contractor loses only the right to enforce the lien, itself a valuable right which would secure the eventual recovery of the sum owed. The contractor does not, however, lose the right to arbitration of the entire dispute as set forth in the contract, nor does the homeowner secure the right to resist the demand for arbitration of the claim in preference for a trial on all of the issues in a Superior Court action.”). See also N.J.S.A. 2A:44A-14d (“Any disputes arising out of the improvement which is the subject of a lien claim but which are unrelated to any action to enforce a lien claim may be brought in a separate action.”).

contained in a planned unit development as defined in section 3.3 of P.L.1975, c. 291 (C. 40:55D-6).” [Emphasis added].

A “residential purchase agreement” is further defined therein to mean and refer to “*a written contract between a buyer and a seller for the purchase of a one- or two-family dwelling*, any residential unit in a condominium subject to the provisions of P.L.1969, c.257 (C. 46:8B-1, et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C. 46:8A-2), and any residential unit contained in an planned unit development as defined in section 3.3 of P.L.1975, c. 291 (C.40:55D-6)”. [Emphasis added]. N.J.S.A. 2A:44A-2.

A lien claimant must first file a “Notice of Unpaid Balance and Right to File Lien”, or “NUB”, as an express *condition precedent* to the filing of any lien arising under a residential construction contract.⁴ N.J.S.A. 2A:44A-21b(1) (emphasis added). See also Mansion Supply Co., 305 N.J.Super., supra at 318 (noting that “a NUB must always be filed when a potential lien claim affects residential real estate . . .”).

Next, unless the parties have agreed to an alternative dispute mechanism in the contract between them or otherwise, the lien claimant must serve, by the statute, a demand for arbitration and fulfill the requirements of the American Arbitration Association to institute an expedited proceeding before a single arbitrator. N.J.S.A.

⁴ In addition, N.J.S.A. 2A:44A-21b(2) requires service of the NUB be made upon the property owner in accordance with N.J.S.A. 2A:44A-7.

2A:44A-21b(3).⁵ The arbitrator appointed in accordance with N.J.S.A. 2A:44A-21b(3) is obligated to hold a hearing – either in person or on the papers submitted -- and to determine, within thirty (30) days, the validity and amount of any lien claim which has been filed pursuant to the NUB. N.J.S.A. 2A:44A-21b(4) and (6).⁶

In the event of a determination, through either arbitration or an alternate dispute resolution mechanism, that there is an amount pursuant to which a valid lien may attach, the lien claimant must, within ten (10) days of the receipt of the determination, “file such lien claim” with the county clerk in the form prescribed by N.J.S.A. 2A:44A-8; otherwise, the lien claim shall be invalid. N.J.S.A. 2A:44A-21b(8).

C. Applicable Time Periods

The time period for the establishment of all lien claims is limited to ninety (90) days following the date the last work, services, material or equipment was provided for which payment is claimed, in order to reduce “undue delay and uncertainty” in the

⁵ See the American Arbitration Association’s “New Jersey Residential Construction Lien Arbitration Rules” at www.adr.org , at “State Specific Rules – New Jersey”, http://www.adr.org/index2.1.jsp?JSP...fic\nj_construction_lien_rules.html.

⁶ Note further that Sections 21b(9) and 10 provide:

(9) Except for the arbitrator’s determination itself, any such determination shall not be considered final in any legal action of proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable. Any finding by the [NUB] arbitrator pursuant to the provisions of this act shall not be admissible for any purpose in any other action or proceeding.

(10) If either the lien claimant or the owner is aggrieved by the arbitrator’s determination, then either party may institute a summary action in the Superior Court, Law Division, for the vacation, modification or correction of the arbitrator’s determination. The arbitrator’s determination shall be confirmed unless it is vacated, modified or corrected by the court. The court shall render its decision after giving due regard to the time limits and procedures set forth in this act. [Emphasis added].

acquisition and financing of residential housing by families. N.J.S.A. 2A:44A-6; 2A:44A-21(a). The Appellate Division has interpreted this to mean that the arbitration or alternative dispute resolution mechanism for the NUB is to take place ***within*** the 90-day period, so that a resulting lien claim may be filed and recorded with the county clerk in the form required by N.J.S.A. 2A:44A-8, ***before*** the 90-day period expires. Mansion Supply Co., 305 N.J.Super., supra at 321. “It therefore behooves a residential lien claimant to file ***both*** a NUB and a demand for arbitration for the required NUB arbitration proceeding sufficiently in advance of the expiration of the 90-day window to allow a final determination to be made by the NUB arbitrator, or by means of the alternative dispute resolution mechanism, ***before*** that deadline expires.” Id. See also Robert S. Peckar, et al., New Jersey Institute for Continuing Legal Education, New Jersey Lien Laws: A Second Look, 27 (1997)(noting that “[d]ue to the arbitration requirement for residential construction, the 30-day period for an arbitrator to make its determination and the 10-day period to conform to it, the NUB for residential construction should be filed not later than 50 days following completion of the work. Otherwise, there may not be adequate time to file a lien.”).

After filing a lien claim, the claimant must then commence an action to establish the lien claim in the Superior Court ***in the county in which the real property is situated*** within one (1)-year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed. N.J.S.A. 2A:44A-14a(1). The property owner, however, may demand the lien claimant institute an action to establish

the lien claim, and under such circumstances, the lien claimant must commence the action within thirty (30)-days of receipt of the demand by the property owner. Id.

D. Impact of Filing a Residential Lien

Unless or until discharged of record upon payment made by the owner or other agreement reached between the owner and the lien claimant, the lien claim shall attach to the interest of the owner in the real property from and after the time of filing of the lien claim. Thus, a lien claim properly filed and recorded pursuant to the CLL will place the world on notice of the lien claimant's unpaid claim and amount, and thereby defeat any other or competing claim filed subsequently, unless the estate or interest in the owner's real estate is acquired by a bona fide purchaser for value without notice first recorded or lodged for record, or, is the subject of any mortgage, judgment or other lien first recorded, lodged for record, filed or docketed. N.J.S.A. 2A:44A-10.

However, N.J.S.A. 2A:44A-15 provides that, under certain circumstances, the improper filing of a lien may result in the lien claimant's forfeiture of its lien rights, and liability for the owner's expenses in defending or discharging the lien. Specifically, it states as follows:

If a lien claim is without basis, the amount of the lien claim is willfully overstated, or the lien claim is not filed in substantially the form or in the manner or at a time not in accordance with the provisions of this act, the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in the lien claim. The claimant shall also be liable for all court costs, and reasonable legal expenses, including attorneys' fees, incurred by the owner, contractor or subcontractor, or any combination of owner, contractor and subcontractor, in defending or causing the discharge of the lien claim. The court shall, in addition, enter judgment

against the claimant for damages to any parties adversely affected by the lien claim.

N.J.S.A. 2A:44A-15(a)(emphasis added).

The Appellate Division has stated that a “willful overstatement” of the amount of a construction lien “connotes an intent to recover that to which the claimant knows he is not entitled; in other words, a claim made in bad faith.” Legge Industries v. Joseph Kushner Hebrew Academy/JKHA, 333 N.J.Super. 537, 561 (App. Div. 2000) (citing Friedman v. Stein, 34, 44 (1950)).

Conclusion

As with any statutory or regulatory scheme that is in derogation of the common law, ***strict compliance*** with the procedural and other requirements of the CLL is not only imperative, but also explicitly mandated by the statute. If properly prepared and filed, the lien claim can be a very effective means by which to secure payment from owners of sums incurred or unpaid balances owed to those involved in providing materials or equipment, and in performing work or services, in connection with the construction and improvements made to real property that arise out of or result from a residential construction contract or residential purchase agreement.

If ignored or abused, however, the CLL accords the aggrieved or adversely affected owner with equally as powerful remedies to redress such conduct, not the least of which includes an award of damages suffered, court costs and reasonable attorneys’ fees incurred against the lien claimant in having to defend against or to cause the discharge of an improperly filed lien. Careful consideration of the statute, the residential carve-out components, and vigilant compliance with its pertinent timing and procedural

requirements will go a long way toward expediting payment to the unpaid contractor, subcontractor or supplier, as well as toward policing and enforcing against abuse by an aspiring, but non-compliant lien claimant that devolves to the detriment of or damage to the property owner.

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