

**New Jersey
N2K Hour:**

**Construction
Lien Law in
New Jersey**

**Webex Presentation:
November 12, 2019**

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What is a Construction Lien?

- A construction lien is a claim made against real property by a contractor, subcontractor, or supplier who has supplied labor or materials for work on that particular property.
- The lien protects the claimant from the risk of not being paid for services rendered on the property.
- The lien law is governed by The New Jersey Construction Lien Law (CLL), N.J. Stat. § 2A:44A-1 et seq.
- This statute permits a lien claimant performing work or services or furnishing materials or equipment to file a construction lien under certain circumstances.

NJ Construction Lien Law

- The current Construction Lien Law replaced the former Mechanic's Lien Law as the statutory scheme in NJ, since it applies to all work for which building permits were issued on or after April 22, 1994.
- The NJ Construction Lien Law outlines the filing requirements, including who is entitled to file a lien, the timing requirements and the types of work that give rise to lien rights.
- This law became effective on April 22, 1994, and was substantially amended by legislation enacted on January 5, 2011.

NJ Construction Lien Law (cont.)

- The new CLL effectively remedied two significant defects of the old law, by eliminating the requirement of a Mechanic's Notice of Intention, and the contractual waiver of lien rights, except where payment was received.
- The Notice of Intention was the filing of the Prime Contract before the commencement of any work or shipment of any materials.
- This requirement was a burden for potential claimants since it could significantly impact their business relationship with property owners and cause a disruption in their work.
- Due to economic factors, the requirement was abolished.

What Does the Lien Law Cover?

- A construction lien attaches to any interest that the property owner has at the time and after the filing of the lien claim.
- The statute defines an “interest in real property” as ownership, possession, or any other enforceable interest including fee simple title, easement rights, covenants or restrictions, leases, or mortgages. N.J.S.A. 2A:44A-2.
- Please keep in mind that a construction lien can only attach to real property that is privately owned in NJ.
- Under the Construction Lien Law, public land is exempt from the attachment of a construction lien. This includes real property owned by the State of NJ; a county or municipality; or a public authority or political subdivision.

Municipal Mechanic's Lien Law

- There is a distinction between the Construction Lien Law (CLL) and the Municipal Mechanic's Lien Law (MMLL).
- On July 25, 1996, the Governor signed into law revisions to the "Municipal Mechanic's Lien Law", N.J.S.A. 2A:44-125, et. seq., which implemented new notice procedures.
- Pursuant to N.J.S.A. 2A:44-125, a contractor or supplier has a right to file a Municipal Mechanic's Lien if they meet the statutory requirements.
- Under the MMLL, a contractor or subcontractor can file a lien against counties, municipalities and other public entities in relation to public construction projects.

Municipal Mechanic's Lien Law (cont.)

- Even if a contractor or subcontractor files and perfects a lien, the claimant can still lose its right to payment from the municipality or county if the prime contractor abandons the project or a deficient performance leads to a cost increase or budget overrun on the project.
- The non-completion of the project by a general contractor or subcontractor can also require the municipality to pay out all project specific funds to a second prime contractor in order to complete the project, which can affect a claimant's right to payment for a perfected lien.

Municipal Mechanic's Lien Law (cont.)

- Contractors and suppliers' rights to payment by the municipality on a Municipal Mechanic's Lien are limited to the amount earned by the prime contractor to the extent that money has not already been paid out by the municipality. Johnson v. Fred L. Emmons, Inc., 115 N.J. Eq. 335 (Ch. 1934), aff'd o.b., 119 N.J. Eq. 88 (E. & A. 1935).
- If a project is abandoned, and the municipality must pay remaining project specific funds that have not been earned by the initial prime contractor, to a second contractor in order to complete the project, the initial lien claimants have no right to those funds, and may be unable to collect any money from the municipality even if its lien claim is valid.

Filing a Municipal Mechanic's Lien

- A municipal mechanics lien can be filed against any public agency in NJ, but it cannot be filed against the State of NJ.
- “Public agency” is defined in N.J.S.A. 2A:44-126 as any county, city, town, township, public commission, public board or other municipality in this state authorized by law to make contracts for the making of any public improvement in any city, town, township or other municipality.
- Pursuant to N.J.S.A. 2A:44-133, the Notice of Lien Claim must identify, among other things, the amount of the claim and the party from whom the monies are due.

Filing a Municipal Mechanics Lien (cont.)

- Once such a Lien Claim is filed, the public agency can compel the Contractor to show cause why the Claim should not be paid and, if the Contractor fails to demonstrate that the Claim is unfounded and untrue, the public agency can pay the Claimant out of funds due the Contractor. N.J.S.A. 2A:44-136.
- Once a municipal mechanics lien is filed, the public agency or municipality can establish a contractor trust fund to hold any money that is due, or that will become due under the contract, to the full value of the amount claimed by the lien in accordance with N.J.S.A. 2A:44-148.

Filing a Municipal Mechanics Lien (cont.)

- The municipality or other public agency is obligated to hold the money for the purpose of paying the full amount of the lien to the lien claimant, but the municipality or public agency is not required to pay a greater amount than the contract price of the labor performed and materials furnished.
- During the pendency of a civil action, the public agency can also pay into the superior court the amount which it admits to be due to the principal contractor under the contract. N.J.S.A. 2A:44-141.

The Effect of a Municipal Mechanics Lien

- Once a lien is filed, the public agency has the option to notify the general contractor or other parties with an interest in the funds subject to the lien.
- If the public agency does exercise this option, then the interested parties have 5 days to file papers with the public agency explaining why the lien claim should not be paid.
N.J.S.A. 2A:44-135.
- If no explanation is timely filed, then the public agency can pay off the lien claim.

The Effect of a Municipal Mechanics Lien (cont.)

- A notice of Municipal Mechanics' Lien must be filed within 60 days of the time that the work is completed or the project is accepted by resolution of the public agency. N.J.S.A. 2A:44-132.
- If the lien claim is not paid by the agency, the lien claimant can proceed to file a lawsuit in the NJ Superior Court to enforce the claim. N.J.S.A. 2A:44-137.
- The lien claimant may then proceed in obtaining a judgment ordering the public agency to release the lien funds to the claimant. N.J.S.A. 2A:44-140.
- If you come across a municipal mechanics lien in your title search, please consult an underwriter for further guidance.

Underwriting Construction Liens in NJ

- New Jersey is actually one of the better states in terms of underwriting construction liens.
- Since NJ is a race-notice jurisdiction, a construction lien only enjoys priority as of its filing date, unless a Notice of Unpaid Balance (NUB) was previously filed.
- Other states, such as North Carolina and Pennsylvania, do not have this luxury, as the lien claimant is given a certain timeframe to file the mechanic's lien, and once the lien is filed, it relates back to when the construction first commenced on the property.
- This type of lien priority is problematic, since title insurers in these states will require lien waivers from the lien claimant in order to insure a loan.

Underwriting Construction Liens in NJ (cont.)

- In NJ, a mortgage enjoys priority over a Construction Lien Claim (CLC) or Notice of Unpaid Balance (NUB) as long as the mortgage is recorded before the filing of the CLC or NUB.
- Also, a recorded Notice of Settlement will defeat the priority of a construction lien claim if the NOS is recorded first.
- As a result, lien waivers are not required from NJ title insurers if your title search does not disclose any filed construction liens or Notices of Unpaid Balance.

Lien Waivers

- However, a contractor, subcontractor, or supplier may still waive the right to claim a construction lien by executing a lien waiver only to the extent that payment is actually received by the person signing the lien waiver.
- Pursuant to N.J.S.A. 2A:44A-38, a waiver is not effective unless it is made in exchange for payment to the contractor for work performed or materials supplied to the project.
- However, in NJ, there is no statute or case law that prohibits a contractor from waiving his or her right to file a municipal mechanic's lien on a public job, so if a waiver clause is added in a contract for a public construction project, the waiver may be deemed enforceable.

Enforcement of Construction Liens

- An action to enforce a New Jersey construction lien claim must be initiated within 1 year from last providing labor or materials, and a notice of lis pendens must be filed.
- If the property owner or other interested party serves a notice requiring the claimant to commence an action to enforce the lien claim, the claimant must do so within 30 days.
- A suit resulting from a construction lien claim is procedurally similar to a foreclosure action, and a final judgment in the action can direct the sheriff to sell the property.

Enforcement of Construction Liens (cont.)

- Like a foreclosure, the claimant must join in the action the property owner and all other parties having an interest in the property which would be adversely affected by the judgment.
- A construction lien claim can be discharged by a filed certificate of discharge after payment or satisfaction of the lien claim or after settlement of the lien dispute within the earlier of 30 days after payment, satisfaction, or settlement; or 7 days after demand by any interested party. N.J.S.A. 2A:44A-30.

Discharge of Construction Lien Claim

- If you are recording a certificate of discharge, the lien claimant must sign and acknowledge the certificate, and the certificate must include the following:
 - (1) The date of filing of the lien claim.
 - (2) The book and page number where the lien was recorded.
 - (3) The name of the property owner or any community association named in the lien.
 - (4) The location of the property.
 - (5) The name of the person the work, services, materials, or equipment was provided to.

Discharge of Construction Lien Claim (cont.)

- If the claimant fails or refuses to file the certificate, any party with an interest may also request an order to show cause under the New Jersey Rules of Court.
- A superior court judge may order the lien claim discharged on good cause shown on the ground that either the lien claimant has failed or has refused to file the discharge certificate or if it is without factual basis.
- If a construction lien is discharged by court order, the county clerk will attach the court order or a certificate to the original lien claim and will note on the record “discharged by court order” or “discharged by certificate.”

Discharge by Bond

- Pursuant to N.J.S.A. 2A:44A-33, in the event that a construction lien has not been paid off or satisfied, the lien can be discharged by the filing of a bond with the county clerk.
- Upon the execution and filing with the county clerk of a surety bond in favor of the claimant in an amount equal to 110% of the amount of the lien claim, the lien is effectively "bonded off" of the property.
- The surety company that issues the bond must be duly authorized to practice suretyship in the state and executed by a licensed agent or attorney in fact and acknowledged before a notary.

Death of Lien Claimant or Property Owner

- If the lien claimant dies, the construction lien right is not extinguished.
- A personal representative of a deceased contractor, subcontractor, or supplier may assert lien rights on behalf of the decedent.
- Also, construction lien rights can also be asserted against a property owner's estate, so if a property owner dies, the lien is still in effect.

Residential Construction

- N.J.S.A. 2A:44A-21 outlines the process to file a construction lien for residential property.
- A residential construction lien requires the existence of a written contract, and should be filed within 120 days of the last date that labor or materials were furnished on the property.
- However, as a condition precedent, the potential claimant must first file a Notice of Unpaid Balance (NUB) and Right to File Lien with the county clerk within 90 days of the last day they provided materials or services for the project, before a construction lien can be filed against the property.

Residential Construction (cont.)

- The NUB must then be served against the property owner within 10 days of filing, and a demand for arbitration must also be filed by the claimant to perfect the lien.
- The arbitration hearing must be conducted within 30 days of the filing of the demand for arbitration, and the arbitrator will decide if the claimant is granted the right to file the construction lien with the county clerk.
- Once the right is granted by the arbitrator, the construction lien claim must be filed with the county clerk's office within 10 days of the arbitrator's decision, and then served upon the property owner in order for the lien to be perfected.
- If the construction lien is not filed within the 10 day period, it is then deemed invalid.

Commercial Construction

- For commercial construction, a construction lien only has to be filed with the county clerk within 90 days of the last date the contractor or vendor provided the materials and services.
- A commercial construction lien does require the existence of a written contract, but the process to file the lien is much simpler compared to filing a construction lien against a residential property.
- If a contractor files a lien and is later owed more money because more work is performed under a written change order, the contractor can file an amended lien claim that includes the additional amount.

Leasehold Estates

- In regards to a leasehold interest, a construction lien will only attach to the leasehold estate if the tenant or lessee contracts for the improvements to be made to the property.
- Please keep in mind that there is an exception if the lessor or property owner consents in writing to the improvements; the lessor pays for the majority of the construction work; or the lease provides that the lessor's interest is subject to the lien.
- You should always review a copy of the lease for any provisions pertaining to mechanic's liens or construction work to confirm if the lien can attach to the fee simple interest.

Title Searches

- Please be aware of any recorded Notices of Unpaid Balance or construction liens for properties that were only recently developed.
- A NUB or CLC must always be included as an exception on an Owner's or Loan policy unless it will be satisfied or discharged prior to closing.
- A property owner should always disclose in their Affidavit of Title if there is any ongoing construction on the property within the statutory lien period (90 or 120 days), and if all parties who have a right to file a lien have been paid.
- If your title search is clear, then you can omit the general mechanic's lien exception from Schedule B of the policy.

Insuring a Construction Loan

- If you are insuring a construction loan, please be sure to add the pending disbursements exception in Schedule B of the loan policy.
- The pending disbursements exception provides that the policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith for the payment of construction costs, up to the face amount of the policy.
- However, this exception still accounts for a continued rundown search which will disclose any potential Notices of Unpaid Balance or Construction Liens that need to be discharged of record.

Construction Loan Endorsements

- In NJ, only two endorsements are available for construction loans.
- The first endorsement is the Special Construction Loan Policy endorsement, which converts the loan policy into a special construction loan policy.
- Please keep in mind that coverage on a construction loan policy will expire three years from its effective date, and the lender would need to obtain a permanent loan policy by paying the balance of the applicable underwriting rate on or before the expiration date.

Construction Loan Endorsements (cont.)

- The second endorsement available for a construction loan is the ALTA 33 (Disbursement) endorsement.
- This endorsement provides a vehicle by which the Date of Disbursement Coverage under the said policy can be amended to the date of the current disbursement.
- Both of these endorsements are not required, but can be issued for a loan policy at the request of the lender.
- Please consult your underwriter for further questions regarding construction loans or available endorsements in NJ.

Summary

- NJ is a filed lien state, so as long as your Notice of Settlement or mortgage is recorded first in time, then your deed or mortgage will have priority over a subsequently recorded Notice of Unpaid Balance or Construction Lien.
- Residential construction liens have more stringent requirements than commercial construction liens. Always check if a Notice of Unpaid Balance has been recorded for a residential property.
- Death does not extinguish construction liens! CLCs can only be released or satisfied by a certificate of discharge, court order, or by a bond.

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The screenshot shows the Stewart Title Virtual Underwriter website. At the top, there is a navigation bar with links for "Select Location", "Recently Viewed", "Terms of Use", and "State Laws and Customs Toolkit". The main header features the Stewart Title logo and the text "Virtual Underwriter". Below this is a search bar with a magnifying glass icon. A secondary navigation bar contains several menu items: "Forms", "Bulletins", "Real Estate Practices" (which is circled in blue), "Standard Exceptions", "Underwriting Manual", and "Special Alerts". The main content area begins with the heading "Everything you need." followed by a paragraph: "With VU, you have access to information needed to underwrite a real estate transaction, 24 hours a day, seven days a week. [Click here](#) for a tutorial." To the right of this text is an image of a stack of books. Below the text and image is a search and location selection section. On the left, under "Keyword Search", there is a text input field containing "Example : Absentee" and a red "Find it" button. Below the input field are three radio button options: "All of these words" (selected), "This exact phrase", and "Any of these words". On the right, under "Select a Location", there is a dropdown menu with the text "Select a state" and a downward arrow.

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N2K HOUR:

Judgments

Tuesday, December 10, 2019