



Contractors: Beware These 5 Missteps That May Forfeit Your New Jersey Construction Lien

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As the fall construction season moves into its final stretch across the Garden State, contractors are pushing to complete projects before winter sets in. Global conflicts have created market and supply chain disruptions that have at times increased the cost of goods, equipment, and raw materials. These disruptions, among myriad others that can occur throughout a construction project, create issues for contractors, subcontractors, and suppliers alike, including payment disputes as between these parties or between these parties and property owners. When a contractor, subcontractor, or supplier is owed payment for work performed improving real property in New Jersey, the New Jersey Construction Lien Law, N.J.S.A. 2A:44A-1 *et seq.*, allows them to record a lien up to the amount of the claim, asserted against the interest of the owner in the real property.

However, the Construction Lien Law is a fickle beast. There are numerous, nuanced steps required to perfect a construction lien that can withstand challenge by the property owner or other interested parties. Moreover, courts apply the statutory requirements strictly, meaning that any deviation—however minor—from the statute's many requirements can potentially result in the forfeiture of the entire lien claim.

Contractors, subcontractors, and suppliers should avoid these five common missteps:

1. **Failing to have a written contract.** To be eligible to file a construction lien, a claimant must have a written contract evidencing the responsibilities of both parties. The contract must be signed by the party against whom the lien is asserted, most often the property owner (if a contractor is the claimant), or the contractor (if a subcontractor is filing). Signed affidavits alone have been found insufficient by courts to establish a "contract" for this purpose, but signed purchase orders or delivery slips have been held sufficient. While signed contracts are often lacking in the fast-paced world of construction (especially as between contractors and subcontractors), the best practice is to obtain a signature from the property owner or

contractor whenever possible, and particularly for large jobs or orders. Failure to do so may thwart any lien efforts down the road.

2. **Failing to file a Notice of Unpaid Balance (“NUB”) for residential construction.** The Construction Lien Law imposes more onerous requirements on contractors, subcontractors, and suppliers seeking to record a lien relating to residential construction (as opposed to commercial construction). Unlike commercial construction liens, for which the claimant can immediately proceed to file the lien so long as it is timely, the statute first requires the filing of a NUB for residential construction. NUBs simply identify the property by block and lot, the owner and contractor, and the amount owed. The statute provides a model form NUB that should be used in all cases. The NUB must be filed for recording with the county clerk in the county where the property is located within sixty (60) days of the last date of work.
3. **Failing to note the date of last work and to file within statutory time limits.** The most common basis for discharging a construction lien is a late filing. The critical step all contractors, subcontractors, and suppliers should take to avoid missing the filing window is to make a note of the date of last work on (or date of last delivery of materials or equipment for) a given project, as the filing deadlines for both commercial and residential liens run from that date. As noted above, the residential NUB must be filed within sixty (60) days of that date; construction liens for residential work must then be filed within 120 days of the date of last work, and commercial construction liens within 90 days. Missing any of these filing deadlines provides a challenger an easy way to get a filed lien discharged of record.
4. **Failing to complete mandatory arbitration for residential construction claims.** For residential construction, in addition to the NUB requirement, claims must first be submitted to mandatory, expedited arbitration proceedings before the American Arbitration Association (“AAA”). The claimant must file and serve on the property owner a demand for arbitration with AAA within ten (10) days of filing the NUB. The arbitrator then has thirty (30) days from the filing of the demand to render a decision, or seven (7) days after the time to respond to the demand expires in uncontested cases. The arbitrator must determine: if the NUB was filed and served in accord with the statute; the earned amount under the contract between the property owner and contractor; the validity and amount of the construction lien; whether any liquidated or unliquidated setoffs or counterclaims to the lien claim exist; and the allocation of arbitration costs among the parties. Failure to follow the arbitration requirements renders a residential lien claim invalid, though either party may challenge the arbitrator’s decision in court.
5. **Failing to properly serve filings.** Finally, in addition to the filing deadlines, the statutory service requirements must be observed. Both NUBs and lien claims (either residential or commercial) must either be personally served on the owner and contractor (if applicable), or served by both (1) regular mail and (2) registered mail, certified mail, or via a commercial courier regularly engaged in delivery service (e.g., Federal Express or United Parcel Service). When using the latter method, proof of delivery should be obtained whenever possible.

Avoiding these five common pitfalls is key for contractors, subcontractors, and suppliers to preserve their lien rights, which are a powerful tool in the contractor’s tool belt to help secure payment for hard work performed.



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