Bricker & Eckler ATTORNEYS AT LAW

# Bricker Construction Law

*A Discussion of Current Laws, Regulations and Practices for All Participants in the Construction Industry*

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Lien rights for private projects and public improvements are governed by two different statutory processes in the Ohio Revised Code. In this issue of Bricker Construction Law, we provide guidance on each of these mechanics' lien processes. The articles that follow are meant to provide a basic overview of these lien processes, but do not give a comprehensive description of all statutory requirements. Because the statutory lien processes for both private and public projects are complex, we recommend working with legal counsel when dealing with any lien claim issues.

## IN THIS ISSUE



# Mechanics' Liens & Private Projects: A Primer

### Getting Acquainted with Liens

Lien rights are governed by a statutory process that is littered with pitfalls and perils for owners, contractors, subcontractors and suppliers. Therefore, it is imperative that you are, or your legal counsel is, well-versed in the entire process. Because the intricacies of the lien law are complex, this article provides very basic information regarding liens on private construction projects and is intended to serve as an introduction to the topic, rather than a comprehensive representation of all the statutory requirements. It is wise to obtain the advice of legal counsel when dealing with any lien claim.

### Who Has Lien Rights?

A contractor or supplier (called "materialman" in the statute) who performs work or labor on or provides materials for an "improvement" may have lien rights, according to Ohio Revised Code § 1311.02. The lien secures payment for the work that was performed or for the materials that were supplied. The key to whether a person has lien rights or if these rights still exist is whether or not the person has carefully and diligently followed the statutory process.

More than 30 years ago, a trial court in Hamilton County gave an apt description of the purpose of the lien process in *Settle Builders Supply Co. v. Frankel Shore Partnership*, 42 Ohio Misc. 13 (Hamilton County C.P. Court 1974), where it provided the following:

> Taking up first the general spirit of R. C. Chapter 1311—its intent is to provide laborers and materialmen liens for work done pursuant to a contract with the owner and also provide protection to the owner by requiring affidavits and certificates from all subcontractors and materialmen, etc., on every payout and, by virtue of the sixty-day lien limit, prompt notice to the owner of any claim that has not for one reason or another been brought to his attention. If a materialman, who might be furnishing materials to a number of subcontractors working at different times on a job, could hold back until sixty days after the last material was furnished to the last contractor, an owner who had been taking every precaution the law provided him could suddenly find himself stuck with claims which should have been paid long before.

The Ohio Revised Code sections have been revised since the 1974 *Settle Builders* decision, but the basic purpose of the lien process is the same: to provide contractors and suppliers with a way to ensure that they are paid for their work and to protect owners from claims that could have been addressed early on. The process also provides protection to the owner by letting the owner know who worked on the project and when that work was completed. After all, nobody wants to receive a lien or claim for payment years after the project was completed.

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Private owners are required to file a Notice of Commencement in the office of the county recorder for the county in which the project is located. The Notice of Commencement must include all of the following information:

- Legal description of the property that will be improved;
- A brief description of the improvement;
- Name, address, and capacity of the property owner contracting for the improvement;
- Name and address of the fee owner (if different from the owner contracting for the improvement);
- Name and address of the owner's designee, if any;
- Name and address of all original contractors;
- Date the contract was first executed;
- Name of any lending institutions;
- Name of any sureties;
- Required statutory language;
- Name and address of the person preparing the Notice of Commencement; and
- Signed verification of the Notice of Commencement.

Only one Notice needs to be recorded. If there are any changes, then the Notice can be amended and will retain the original filing date.

It is, however, crucial that the information in the Notice of Commencement be accurate. When there is inaccurate information in the Notice, the owner can be held liable for any loss of lien rights of a lien holder and can be required to pay actual expenses and attorney's fees that were incurred to maintain the lien.

Courts strictly enforce this requirement. In fact, at least one court held that a Notice of Commencement was not proper where an owner's name was abbreviated on the Notice of Commencement because, "a lien claimant cannot be expected to search for all combinations and permutations of letters in order to cover every possible name under which a notice of commencement may be filed." See *Clinton Electrical & Plumbing Supply, Inc. v. Airline Professionals Ass'n, Teamsters Local 1224*, Clinton App. No. CA 2005-08-016, 2006-Ohio-1274.

In that case the name on the deed to the property was "Airline Professional Association Teamsters Local 1224" while the name on the Notice of Commencement was "APA Teamsters Local 1224." It seems like a small change—until you try to search the files at a recorder's office to determine if a Notice of Commencement has actually been filed by an owner.

The owner's failure to file a Notice of Commencement does not relieve the lien claimant from its obligation to file an affidavit for mechanics' lien. If, however, the owner fails to file the Notice of Commencement, potential lien claimants are not required to serve a Notice of Furnishing on the owner and principal contractor as they would otherwise be required to do, as will be discussed later. A potential lien claimant's failure to serve a Notice of Furnishing where there is a proper filing of a Notice of Commencement may provide an owner with a good defense to all or a portion of the lien claim. So, if the owner does not file a Notice of Commencement, the owner may be unknowingly exposing itself to significant risk.

## The Notice of Furnishing

A Notice of Furnishing is the subcontractor's or supplier's way of telling the owner and primary contractor that it is performing work on the project. It must be served on the owner and the "original contractor" (the principle contractor who contracts with the owner), with a few exceptions. Contractors and suppliers who have a contract with the owner are not required to serve the owner with a Notice of Furnishing. Nor are subcontractors and suppliers who have a contract with the original contractor required to serve the Notice on that contractor.

The Notice of Furnishing must include specific information, but it is very easy to prepare, as the O.R.C. § 1311.05(B) provides the required language. Even so, that still doesn't prevent some subcontractors or suppliers from making costly mistakes. In *Structural Grouting Systems, Inc. v. Precision Wood Designs, Inc.* (Feb. 28, 2001), Medina App. No. 3086-M, the subcontractor filed an Affidavit for Mechanics' Lien three days after the Notice of Commencement was filed. The subcontractor argued that the Affidavit for Mechanics' Lien was an acceptable replacement for the Notice of Furnishing.

The court rejected this argument, as the Affidavit was indeed titled "Affidavit for Mechanics' Lien" instead of saying "Notice of Furnishing." The Affidavit did not include the required language for a Notice of Furnishing that is provided in O.R.C. § 1311.05. As a result, the appellate court agreed with the trial court when it determined that the Affidavit could not replace the required Notice of Furnishing, so the subcontractor's lien was not perfected.

Another potential pitfall is that the lien claimant must serve the Notice of Furnishing upon the owner

within 21 days after the lien claimant first performs work on the project or supplies materials for the project. Failure to serve the Notice within 21 days can truncate a party's lien rights, as the only work protected will be that performed in the 21 days immediately before the Notice was actually served. In other words, work done 22 or more days before service will have no security.

Failing to serve a Notice of Furnishing altogether effectively waives the potential claimant's lien rights on any work done or any materials delivered. This is why it is important for owners to properly file a Notice of Commencement, as discussed above, to protect their interests and their property.

## The Affidavit for Mechanics' Lien

In order to have a valid lien, a lien claimant, assuming all of the prerequisites are satisfied, must file an Affidavit for Mechanics' Lien in the office of the county recorder in which the project was located and must serve the Affidavit on the owner within 30 days after it is filed. Timing again comes into play, as the lien must be filed within a specific statutory time period, as shown below:

- **Property**: One- or two-family dwelling or a residential unit of condominium property.
- **Time to file**: Within **60** days from the date on which the last labor or work was performed or material was furnished by the person claiming the lien.
- **Property**: Oil or gas well facilities.
- **Time to file**: Within **120** days from the date on which the last labor or work was performed or material was furnished by the person claiming the lien.
- **Property**: Other property not described above.
- **Time to file**: Within **75** days from the date on which the last labor or work was performed or material was furnished by the person claiming the lien.

These time periods must be met because tardiness results in the waiver of lien rights, even if the filing of the Affidavit is just one day late. In *State Street Bank & Trust Company v. Bare*, Franklin App. No. 02AP-1263, 2003-Ohio-3332, there was a dispute as to which lien, a mechanics' lien or a mortgage lien, had priority over the other. The lien had been filed 61 days—instead of 60—after the work finished. The court held that "a lien is invalid where it appears from the face of the affidavit that the last date of providing work or materials was not within the statutory period allowed for perfecting a mechanic's lien." The court also rejected an attempt to amend the lien because such an amendment is not permitted after the time period has run out.

Some lien claimants have been known to try to "stretch" the time for filing the affidavit. Some contractors may allege that a service call or that some other tinkering, performed months after their time to file an affidavit expired, was the actual "last date when work was performed." The goal is effectively to revive the contractor's time period to file its affidavit.

Courts have been on the alert for such tactics, dating all the way back to 1932 and the decision in *Walter v. Brothers* (Stark App. 1932), 52 Ohio App. 15. Although the date for substantial completion occurred in January of 1930, the plumber filed a lien affidavit nearly 180 days later, arguing that his placement of asbestos lining on a pipe in the garage in May revived his lien rights and re-started the 60-day countdown.

Looking at whether the repairs were a necessary part of the contract and were done at the request of the owner, the court decided that they were not and ruled against the plumber in *Walter*. The plumber had neither requested permission to do the work nor notified the owner when it was done. He had merely shown up unannounced to line the pipe six days after learning that the homeowner was bankrupt. The court decided that voluntarily performing unauthorized remedial measures, especially if the work is trivial, will not revive the period for lien rights.

In another case, a court determined that a contractor failed to protect its lien rights by belatedly filing its Affidavit. In *Swim Rite Pool Company v. Strausbaugh* (Sandusky App. July 14, 2006), 2006-Ohio-3612, the contractor completed the installation of a pool in October 2002 and returned in May of 2003 to install a solar cover and solar reel. The problem here was that the court, when asked to determine if the Affidavit was properly filed, determined that the solar cover and solar reel were not part of the pool installation contract but were part of a second and separate agreement. When the initial work was complete and the contractor failed to file within the 60-day period, it essentially waived its lien rights.

## Notice To Commence Suit

Once the lien affidavit is filed and properly served, the owner must decide what to do. An owner should consider whether the lien claimant followed all of the procedural requirements, if the claimant actually performed work or supplied materials used on the project and if the amount of the claim

is accurate. Under certain circumstances, it may be advisable to serve a Notice to Commence Suit on the lien claimant and properly record the Notice to Commence Suit.

If the lien holder fails to file a lawsuit within 60 days after being served with the Notice to Commence suit, the "lien is void and the property is wholly discharged from the lien."

### What's It All Mean?

Owners and potential lien claimants must know the lien statutes and know them well. An owner does not want to be hit with unforeseen lien claims, which can make financing difficult to come by and real estate transfers nearly impossible. By meeting deadlines and properly filing and serving the required lien documents, an owner of a private project can avoid many unwelcome problems, and claimants can protect their rights.

# Mechanics' Liens & Public Improvements: A Primer

**Highlights:** Mechanics' liens on public construction projects are a fact of life. Although they may seem familiar, it does not pay to regard them too casually. Mechanics' liens are statutory creatures, and anyone dealing with them needs to follow the statutory procedure precisely to avoid undesirable consequences. Liens differ depending on the type of project—private construction, public construction, home improvement work, railroad work, and several other categories. Do not assume that one size fits all. This article provides some of the basic information necessary to avoid disaster in dealing with mechanics' liens for public construction projects.

### What Is a Lien?

Liens are the statutory remedy that a subcontractor, material supplier, or materialman will use to protect payment due for work or materials provided to a project. (To simplify the discussion, when this article refers to "subcontractor," it will mean subcontractor, material supplier, or materialman.) By properly following the public lien process, a subcontractor may recover money that is "due and unpaid" to a principal contractor before that money reaches the hands of the principal contractor. Thus, in the public context, the lien is only against the funds owed to the principal contractor, not against the property itself. So, no lien claimant can insist that public property be sold in order to assure the subcontractor gets the money owed for its work on the project.

A public owner, lien claimant and principal contractor face many pitfalls throughout the statutory process of asserting and administering lien claims. From the beginning of the project to a certain point after the work ends for a subcontractor, there are many important events and time periods that must be watched closely by a potential lien claimant. Owners and contractors also have important events and time periods, and must follow the lien statutes to protect their own rights.

### The Notice of Commencement

Before any work is started or any materials are furnished for a construction project, the public owner must prepare a Notice of Commencement. Unlike on private construction projects, the Notice does not need to be filed with the County Recorder or posted on the job site for a public improvement project. The purpose of the Notice is to provide subcontractors and suppliers with information about the owner that they may need later if they have to submit an affidavit for unpaid funds to the owner.

Ohio Revised Code § 1311.252 lists the things that must be included in a Notice of Commencement.

- Name, location, and number used by the public authority to identify the improvement;
- Name and address of the public authority;
- Name, address, and trade of all principal contractors;
- Date the public authority first executed a contract with the principal contractor;
- Name and address of the surety for each principal contractors; and
- Name and address of the representative of the public authority upon whom service shall be made.

If the Notice is not prepared or is otherwise not available to contractors before work begins, the

public authority faces no statutory penalty. But it risks missing out on receiving some important information it may need later.

## The Notice of Furnishing

To protect their lien rights, subcontractors who do not have a contract with the principal contractor need to serve a Notice of Furnishing to the principal contractor. The term "serve" is defined by statute. R.C. § 1311.19 states that "any notice, affidavit, or other document" served under Chapter 1311 of the Ohio Revised Code must be provided in one of three specific ways:

1. Service by the sheriff of the county in which the person to be served resides. This is done in one of the methods provided in the Ohio Rules of Civil Procedure;
2. Service by any method that includes written evidence of receipt. Some of the methods that could be used include certified or registered mail, overnight delivery service, and hand delivery; or
3. If the "person" is a corporation, then there is a special means of service provided in R.C. § 1701.07(H) that must be used.

Let's assume that a subcontractor sends its Notice of Furnishing to the principal contractor by regular mail. Let's also assume it is received by the principal contractor, but there is no record of the date of receipt. The subcontractor has failed to preserve its lien rights unless it can prove that the principal contractor acknowledged receipt or the subcontractor can prove by a preponderance of evidence that the principal contractor actually received the notice. This can be a daunting task that is unnecessary if service is made using one of the above methods.

Timing is everything where the Notice of Furnishing is concerned. It must be served on the principal contractor within 21 days after the subcontractor first performs work on the project. If the notice is not served within this 21-day period, the subcontractor will lose any lien rights for the work or materials provided more than 21 days before the notice is served. If a subcontractor eventually serves its Notice of Furnishing, its rights will be preserved for only the 21 days prior to the proper service of the Notice of Furnishing. Many a procrastinating subcontractor has learned a lesson the hard way by losing a significant amount of money due to the improper or late service of a Notice of Furnishing.

The statute on Notices of Furnishing also requires principal contractors and subcontractors to provide to any subcontractors or suppliers with whom they contract both their own name and address and the name and address of the public authority. That way, the lower tier subcontractors will have the information they need for the Notice of Furnishing. If the principal contractor and subcontractors fail to provide this information, they may be sued by any affected subcontractors or suppliers, who may recover damages that resulted from any loss of their lien rights because they lacked this necessary information.

## The Heart of the Matter: An Affidavit of Claim for Unpaid Funds

If a subcontractor has submitted its applications for payment in a timely manner, it should be paid within 10 calendar days of the owner's payment to the contractor for their work or material. This rule comes from Ohio's Prompt Payment Act. But, suppose the owner paid the principal contractor more than 10 days ago, and the subcontractor is still waiting for its money? The unpaid subcontractor may establish a mechanics' lien on the remaining funds due to the contractor by serving the affidavit described in R.C. § 1311.26 on the public authority that owns the project. Again, timing is everything. The affidavit must be served within 120 days from the last date the subcontractor performed labor under the contract or the supplier furnished materials for the project.

There isn't any wiggle room in the 120-day period. When dealing with mechanics' liens, it is crucial that all statutory deadlines be met. In most cases, when the last work is completed, the time begins to run for filing a mechanics' lien. Miss the deadline, and the lien is not valid.

Properly filing a lien is especially important when determining any priority the lien may have with respect to other creditors. To see what happens when the statute is not followed precisely, we look to a case that dealt with a private project and an owner's failure to pay for construction work on that project. In *Swim Rite Pool Company v. Strausbaugh* (Sandusky App. July 14, 2006), 2006-Ohio-3612, a pool contractor working on a home construction and renovation project let his lien rights float away by failing to file the lien within the statutory time period. The pool contractor completed installation of the pool in October 2002, but apparently was not fully paid.

The homeowners filed for bankruptcy in April of 2003. Although the pool contractor was still waiting to be paid in full, he had not yet filed a lien. More than 60 days—the statutory period for filing

a lien on a residential project—had passed since he completed the installation.

The contract for the installation of the pool did not include a solar cover or solar reel, which were optional accessories. They had been discussed and rejected, but the homeowners decided later that they did want these additions. In May of 2003, the pool contractor returned to deliver and install the solar cover and solar reel in the pool.

On June 25, 2003, the pool contractor filed a lien for the unpaid amounts related to the work to install the pool. The court said this lien was invalid, citing the 60-day statutory period for filing a lien for work related to a residential project. The contractor argued that the lien was filed within 60 days of the installation of the solar cover and solar reel. But the court held that these were a separate contract from the pool installation. If the contractor wanted to protect his rights on the pool installation, he had to file a lien in December, 60 days after the installation was complete.

Serving a lien claim within 120-days of the last work performed or material provided on a public construction project is not the only consideration given by subcontractors. Subcontractors often quickly serve a lien claim when there is a sign that the principal contractor is in trouble and/or the project is nearing an end. This is because there is a small window of time a lien claimant has to submit a lien claim to trigger the owner's obligation to withhold contract funds. Since a public owner is only required to withhold contract funds that are due and owing to the principal contractor, the lien claim must be served upon the public owner before the principal contractor submits an application for payment or before the public owner makes payment to the principal contractor.

In *L.E. Myers v. Jordano Electric Company* (Franklin App. 1988), 47 Ohio App 3d 132, Jordano received periodic payments from ODOT. Jordano, however, failed to pay L.E. Myers for work that it performed. ODOT terminated Jordano and owed Jordano no more money when it was notified of Myers' first lien. The appellate court held that a subcontractor is not entitled to recover on its lien when the owner has paid the principal contractor everything owed to the principal contractor. If Myers had served the lien before all the funds were paid to Jordano, then funds due and owing to Jordano may have been withheld. Serving the lien claim within the 120-day period was not enough to protect Myers' because, by the time Myers served its lien, there were no funds due and owing to Jordano—the contract funds had essentially been reduced to zero. *Jordano* also stands for the proposition that a public owner has priority to funds due and owing to the principal contractor when the contract between the public owner and the principal contractor permit the public owner to decertify, nullify, or otherwise recover contract funds from the principal contractor.

What information must the affidavit of lien claim contain to be valid? The lien affidavit should contain, at a minimum, the following information:

1. amount due and unpaid for the labor and work performed and material furnished;
2. when the last labor was performed or material furnished, with all credits and set-offs; and
3. the post-office address of the lien claimant.

Also note that the affidavit must be "served" upon the representative of the public authority named in the Notice of Commencement. The same service requirements discussed above apply here.

The lien claimant must also file the lien with the County Recorder within 30 days of service of the affidavit of claim upon the public authority, according to R.C. § 1311.29. Failure to properly record the affidavit of claim doesn't waive any rights the subcontractor may have against the party owing it money, but it does put the lien claimant in a much worse position with respect to other lien claimants that have properly recorded their claims against the same party.

Recording the claim sets up a lien claimant's priority as to other claimants. If a lien claimant records its lien, it and other lien claimants who recorded lien claims with the county recorder will have priority over lien claimants who have not recorded their lien claims. Lien claimants that fail to record their lien claim with the county recorder will receive a pro-rata share of the money left over—if any—after all of the lien claimants who properly recorded their claims have been paid.

### The Public Authority's Obligations

Once the public authority receives the lien affidavit, R.C. § 1311.28 requires that the public owner detain funds from the balance of the funds remaining under the contract with the principal contractor that are owed to the principal contractor. The amount of funds detained for the lien claimant cannot exceed the amount of the claim that was made, nor can it exceed the amount of money remaining under the contract with the principal contractor. The public

authority must keep the funds in an escrow account in accordance with Ohio law.

If the lien claimant was required to submit a Notice of Furnishing—in other words, if the claimant is a subcontractor that did not contract directly with the principal contractor—then it must provide a copy of the Notice to the public authority and a sworn statement as to the date the Notice was served upon the principal contractor. If such a lien claimant fails to do this, then the owner cannot retain any funds.

If a public owner fails to detain the funds and goes ahead and pays the principal contractor, it may ultimately have to pay the lien claimant as well. In this situation, the public owner would pay twice for its mistake. As the court in *Richards v. Bennett* (Hamilton App. 1914), 3 Ohio App. 240, said 92 years ago, "[a]n owner who fails to retain in his hands a sufficient amount to satisfy the claim of a material man, who has given proper notice, becomes liable on such claim notwithstanding the payments which he made after notice [was] made in good faith."

Once the owner receives the lien affidavit, it must also serve the principal contractor with a copy of the affidavit, even if the lien claimant has already done so. Service must occur within five days of the owner's receipt of the lien affidavit.

The notice provided to the principal contractor must state that it has 20 days to dispute the lien. If the contractor fails to dispute the lien within 20 days, then it has assented to the correctness of the lien.

The public authority, a principal contractor, or a subcontractor that receives a lien affidavit may serve a Notice To Commence Suit upon the lien claimant, under R.C. § 1311.311. This notice means the lien claimant must file a lawsuit to enforce its lien within 60 days or its lien will be void, and the funds can be released to the principal contractor. Such a notice speeds up the process and allows the parties to use the courts to determine the validity of the lien or the amount due to the respective lien claimants, or to resolve any other issues. Failing to file a lawsuit within 60 days after receiving such a notice does not mean the subcontractor must stop trying to collect the money it is owed, but it will no longer have the security of a lien as protection.

If the contractor does dispute the lien, it may want to have the funds released from escrow while the dispute is being worked out. Posting a bond pursuant to R.C. § 1311.311 and issuing a Notice to Commence Suit, will void the lien claim and permit the release of contract funds to the principal contractor. The bond must equal 150% of the amount of the lien, be in favor of the lien claimant, and be provided to the public owner, who must approve the form of the bond. Subcontractors or other interested parties may also post such bonds.

## When Should the Funds Be Released?

According to R.C. § 1311.28, funds placed in escrow may not be released unless one of three things has happened:

1. The public authority is ordered to release them by the court;
2. The public authority is requested to release them by the principal contractor and the lien claimant because those two parties have come to an agreement; or
3. The lien claimant fails to commence suit (if a Notice To Commence Suit was given under R.C. § 1311.311).

Of course, the public authority would also release the funds in escrow if a bond had been posted, as discussed above.

As the Ohio Supreme Court explained in *State ex rel. Dinneen Excavating Co. v. Sykes* (1988), 40 Ohio St. 3d 84 (1988),

> When funds due subcontractors have been placed in escrow pursuant to R.C. 1311.28, a court of competent jurisdiction must order the release of the escrow funds to specific parties, in specific pro-rata amounts, and at specific times, as properly determined by that court unless the parties agree to the amount owed. Where the parties agree to the amounts owed, the owner must distribute the funds on a pro-rata basis according to R.C. 1311.31.

## The Bottom Line

Working with liens can be a tricky endeavor. The statutes impose deadlines, require language that must be included in certain notices and other documents, dictate escrow accounts, and mandate service and other requirements. The process discussed above is just the tip of the iceberg, as there are many intricacies to each part of the lien process for public construction projects. Whether you are dealing with a lien on a public improvement project or a lien on some other type of work, it is a good idea to consult with an attorney who is experienced.

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