

# Second Mechanic's Lien Timely Filed - 4 Years Later

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Mechanic's liens, whether filed on a public or private project, are often times an effective tool to secure payment for work performed and/or materials furnished. Because mechanic's lien rights are created by statute, contractors, subcontractors and sub-subcontractors must pay close attention to the information being placed in the notice of mechanic's lien and ensure compliance with operative laws regarding the content of the lien, the time to file liens and how to properly serve same. In certain instances, inserting the wrong information in a notice of mechanic's lien may make the lien facially defective and could result in the court striking the lien and, based upon timing, may result in the total loss of lien rights.

In a recent case, a sub-subcontractor faced a potential loss of lien rights when it improperly listed the project's subcontractor as the "general contractor" and, accordingly, the public owner docketed the lien against the wrong project.

In May 2011, the sub-subcontractor filed a public improvement lien and in December 2011, commenced an action to foreclose the lien. Thereafter, in January 2015, the public owner informed the sub-subcontractor that the lien was docketed against the wrong contract and it should have been docketed against the contract that was awarded to the "real" general contractor. As a result, in February 2015, the sub-subcontractor filed a new notice of public improvement mechanic's lien regarding the same work, but this time listed the correct general contractor.

Thereafter, the sub-subcontractor sought leave of court to amend its pleadings to foreclose the 2015 lien as opposed to the 2011 lien. The general contractor cross-moved to discharge the 2015 lien on the ground that it was untimely. The trial court granted the general contractor's cross-motion and discharged the sub-subcontractor's lien. The sub-subcontractor appealed.

On appeal, the Court overturned the lower Court decision as there was no surprise or prejudice to the general contractor resulting from the sub-subcontractor's delay in seeking leave to amend the complaint and, accordingly, permitted the sub-subcontractor to amend its complaint.

The Court also found that the lower court erred in granting the general contractor's cross-motion to discharge the 2015 lien. As the court noted, a public improvement mechanic's lien may be filed at any time before the construction or demolition of a public improvement is completed and accepted by the public owner and within 30 days after such completion and acceptance. Importantly, the Court noted that the significant date for filing a public improvement mechanic's lien is measured from the completion and acceptance by the public owner. This is a conjunctive requirement in that both branches (completion and

acceptance) must be met before the time starts running. Because the general contractor failed to submit any evidence as to when the public improvement was completed and accepted by the public owner, it failed to demonstrate that the 2015 lien was untimely filed.

### Commentary

In this recent case, the sub-subcontractor was extremely lucky that the facial defect on its 2011 lien was able to be corrected by a new mechanic's lien filed four years later. Had the project been a private improvement, the sub-subcontractor's lien rights would have long expired. What ultimately saved the sub-subcontractor was the fact that, for public improvements the Lien Law requires both completion and acceptance of the work by the public owner before the 30-day clock starts running.

This dual requirement of completion and acceptance is an important event. Often times, the physical work is completed, however, final acceptance by the public owner may not come until years later or never, if proper close-out procedures have not been followed. Each public owner's formal acceptance is different and must be closely monitored in order to avoid the loss of lien rights.

Providing the proper information to insert into the lien (and double checking that information) and filing the lien within a reasonable time after your work is completed are two easy steps to preserve lien rights. While in this case the sub-subcontractor was able to file a new mechanic's lien 4 years later, this case should be looked at as an extreme example and not viewed as the general rule. Lien rights are too important to not get it right the first time.

Feel free to contact me to discuss liens on public and private projects.