

# Subcontractor's Lien Only Attaches to Lien Fund Due to Construction Manager

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A mechanic's lien is a great tool for a subcontractor to utilize in order to obtain payment due for work and materials provided to a project absent payment from the contractor. Once a mechanic's lien is filed on a private project, the owner must address the lien before it, among other things, it seeks financing/refinancing, attempts to sell units (or the entire property) or obtain its monthly funding from its construction lender.

The timing of a mechanic's lien filing is critical. While the New York Lien Law permits a subcontractor on a private improvement to wait eight months after providing its last work or furnishing the last of its materials on a commercial improvement (liens on residential improvements must be filed within four months of the last date of furnishing work or materials), waiting the eight months may result in a subcontractor's mechanic's lien not attaching to a lien fund.

A subcontractor's lien on a private improvement project is derivative of the upper tier contractor's claim for payment. This means that the potential lien fund to satisfy a subcontractor's lien is only the amount left due and owing to the upper tier contractor by the owner. By waiting eight months to file a mechanic's lien, the owner may have paid significant contract payments to the contractor with little to no monies remaining on the contract between the owner and contractor and thus, little to monies left to satisfy the lien.

In a recent case, after a construction manager failed to pay a subcontractor for work and materials furnished on a private project, the subcontractor filed a mechanic's lien. After litigation commenced, the owner moved for summary judgment to dismiss the subcontractor's complaint on the basis that it paid the contractor manager in full under its contract. The owner argued that the subcontractor's recovery on the basis of foreclosure of the mechanic's lien was precluded because the owner fulfilled its obligations under the construction management services agreement in full.

In opposition, the subcontractor argued that the owner's motion was defective on two grounds: (i) the representative that provided an affidavit in support of the motion lacked personal knowledge of the facts and circumstances surrounding the action and (ii) the owner failed to submit adequate proof of payment to the prime contractor.

The Court disagreed with the subcontractor's arguments and held that the affidavit was furnished by an individual with personal knowledge of the facts and circumstances of the project, and the accounting evidence submitted established full payment to the construction manager. As a result, the Court held that there was no lien fund for the subcontractor's lien to attach. Therefore, the court dismissed the subcontractor's mechanic's lien foreclosure cause of action.

The court, in also dismissing the breach of contract cause of action, further held that the

owner is not responsible for the construction manager's failure to pay the subcontractor because the subcontractor did not have a contract with the owner. Finally, the court held that because there was a valid and enforceable written agreement between the subcontractor and the construction manager, there could be no quasi-contract *quantum meruit* recovery. Accordingly, the *quantum meruit* cause of action was also dismissed.

### Commentary

This case is a tough loss for the subcontractor. Here, it is rightfully owed monies for work and materials incorporated into a project and it is essentially left without any recourse.

While the court noted that the construction manager never appeared and the subcontractor did not seek a default judgment against the construction manager, the construction manager may no longer be in business and any such action against the construction manager may have been fruitless.

Here, the subcontractor should have taken steps to protect itself, including filing its mechanic's lien as soon as it practically could. The sooner the mechanic's lien is filed the better chance there is a lien fund for the lien to attach.

Prior to the filing of a mechanic's lien, there are other mechanisms available to the subcontractor under the New York Lien Law, including, but not limited to a Lien Law § 8 Demand, which requests that the owner provide a statement of the terms of a contract made between the owner and the contractor and the amount due or to become due. The Lien Law has other pre-mechanic's lien mechanisms that can provide the subcontractor with insight into the finances of the project and amounts being received by the contractor.

Feel free to call me to discuss mechanic's liens.