



CURING SUBSTANTIAL MECHANIC'S LIEN DEFECTS: IT'S A MATTER OF TIMING

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It is commonly believed that when filing a mechanic's lien you have only one chance to get it right. This is not so.

LIEN LAW PROVISIONS THEMSELVES ARE LIMITED

The language of the Lien Law itself is mostly to blame for the commonly held belief that you cannot cure a defect in a mechanic's lien by amending the lien. The first paragraph of Lien Law § 12-a provides that a lienor can amend his lien (upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanic's lien has yet been commenced), but only to reduce the amount of the lien. However, reducing the amount of the lien is not the type of correction with which lienors are typically concerned.

Further, the second paragraph of Lien Law § 12-a does not provide much more help. This provision allows for amendments to a lien, but only upon an order from a court and only if no prejudice will result to an existing lienor, mortgagor, or purchaser acting in good faith. This provision leaves one exposed to the discretion or mercy of a court applied on a case-by-case basis. In addition, the case law applying this provision requires that the original lien be valid and that the amendment sought not be addressed to a substantial defect in the lien.

As a result of these provisions, the long-standing and widely-held belief is that you cannot breathe life into an invalid or understated lien by way of amendment.

THE FIX

The solution is remarkably simple: just keep filing until you get it right.

A lien on a private improvement can be filed anytime during the project or within eight months after the last work is performed or materials delivered to the project that are the subject of the lien. A lien on a public improvement can be filed anytime during the project or within thirty days of when the work is completed and accepted. As long as you are still within the applicable eight month (private lien) or thirty day (public lien) period, simply file a subsequent lien to "correct" the first filing. In other words, rather than spending time, energy and fees attempting to "resurrect" a flawed lien utilizing the Lien Law's limited provisions, simply start over.

Filing the subsequent lien based upon the same claim and facts as the prior lien does not discharge the earlier lien. However, you may file a subsequent timely lien to completely replace the previous one(s), while simultaneously withdrawing the original lien, without prejudice. You may file the subsequent lien for the purpose of creating

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lien rights for amounts owed that were not included in the prior lien(s). In such case, you may pursue your rights based on the total amount of the liens taken together. You may file the subsequent lien to correctly list the owner or the description of the property. You must withdraw the first lien and proceed only based upon the second. The only requirement you must meet is that you file all your liens timely, within the required statutory period (depending upon whether it is a public or private improvement). If you do so, your lien rights will be created by the totality of all the liens you have filed.

In doing so, however, be certain not to duplicate or "double up" on the amounts liened which might be considered a "willful exaggeration" of lien triggering problematic consequences affecting the validity of your lien and exposing you to damages.

Remember, the date when your lien is filed, as compared to the other mechanics' liens, does not determine any priority as to how you get paid. Upon foreclosure of a lien, all other mechanics' liens on the subject improvement must be foreclosed together, and all recoveries are paid in *pari passu*, that is, on a pro rata basis, in relation to the amount your claim relates to the rest of the valid liens that were filed at any time against the improvement. Therefore, multiple filings to "correct" or increase a lien have no impact on priority.

A note of warning should be taken when pursuing the filing of a subsequent corrective lien, where a lien foreclosure action has already been commenced. In a case of first impression, a New York State trial judge recently held that if the lienor on a private improvement has commenced an action to foreclose the original lien, it may not file a subsequent lien to correct any defects, even if the subsequent lien is filed within the eight month period under the Lien Law. There is no appellate authority to support this decision, which seems incorrect, and the decision is, not surprisingly, being appealed.

In this case, the last item of labor and/or material was furnished by the lienor on October 16, 2007. The original mechanic's lien was filed November 2, 2007 and the lienor commenced the lien foreclosure action on December 26, 2007. On February 1, 2008, well within the eight month period in which to file a lien on this private improvement project, the lienor filed a subsequent lien, which was entitled, "Amended Lien". Despite the fact that the subsequent lien was timely filed, the trial court held that there was no reported authority that allowed a lienor to file a subsequent lien after the commencement of a lien foreclosure action. Accordingly, the court dismissed the lien.

G&C COMMENTARY:

If you discover that your Mechanic's Lien is defective (e.g., you named the wrong party or did not properly describe the property) or inadequate (did not include all amounts owed to you), confirm when the appropriate eight month (private improvement lien), or thirty day (public improvement lien), period in which to file expires. If you are still within the applicable period, and a lien foreclosure action has not been commenced, withdraw the original lien (file a Release of Lien) and simultaneously file a subsequent corrective lien, and if you only seek to increase the amount claimed, simply file a new lien for the additional amount only.