

What owners, tenants and developers can do before paying a sub. or supplier mechanic's lien

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Landowners, commercial tenants and developers should know that subcontractors and suppliers on their construction projects can look directly to them for payment if the general contractors they hire do not pay the subcontractors and suppliers. This is despite the fact that landowners, commercial tenants and developers generally do not hire and have no contracts with the subcontractors or suppliers. But, subcontractors and suppliers can look to landowners, commercial tenants and developers generally only if they first assert valid mechanic's liens against the property.

Construction Projects-Who Is Who?

It is important to know who is who on a construction project since landowners, commercial tenants and developers often play different roles on a project. For example, the landowner may also be the developer. Or, the developer or tenant may act as the general contractor by hiring subcontractors and suppliers directly.

Under the mechanic's lien statute, codified at Chapter 254 of the Massachusetts General Laws, the "owner" owns the property interest that is being developed or improved, whether that interest is a tenancy under a lease or outright ownership under a deed. The "contractor" agrees to oversee the project for the owner and to procure the labor, material, tools and equipment used in the project. The "contractor" is usually the general contractor or construction manager. The "subcontractor" supplies the labor, material, tools and equipment. "Subcontractors" therefore include sub-subcontractors, material suppliers and rental companies, among other entities.

The Mechanics of a Mechanic's Lien

There are three types of mechanic's liens: the contractor mechanic's lien, the subcontractor or supplier mechanic's lien, and the rarely seen laborer mechanic's lien. In this article, we focus on the more frequently seen and problematic subcontractor or supplier mechanic's lien. Most of the rules that apply to subcontractor and supplier mechanic's liens also apply to contractor mechanic's liens.

To assert a mechanic's lien, a subcontractor or supplier must first record a notice of contract with the local registry of deeds, usually within 90 days of when the subcontractor or supplier last performed work or supplied material on the project. The notice of contract states the amount the subcontractor or supplier claims it is owed as of the date it is recorded. A subcontractor or supplier must then notify the owner that the notice of contract was recorded with the registry of deeds. The mechanic's lien is not established until the owner receives that notice.

A subcontractor or supplier must then take a number of additional steps to preserve its mechanic's lien until a court resolves its claim. These additional steps include recording a statement of account with the registry of deeds that states the amount that is then owed to the subcontractor or supplier, filing a lawsuit in a local court against the owner to enforce the mechanic's lien, and then recording an attested copy of the complaint from the lawsuit with the registry of deeds. Each of these

additional steps has a different deadline. If any deadline is missed, the mechanic's lien is automatically dissolved.

Now What?

To secure payments under its subcontract or supply agreement, sometimes a subcontractor or supplier will assert a mechanic's lien before any payment problems arise. In fact, they can claim as the lien amount the total amount of their subcontract or supply agreement even before they begin supplying labor or material on the project or earning any payment under their subcontract or supply agreement. This can leave the landowner, tenant or developer in a bind if the subcontractor or supplier is not willing to dissolve its mechanic's lien and give up its security for payment. An imminent sale or refinancing may fall through or be put on hold indefinitely until the mechanic's lien is paid. In addition, a lender financing the construction project may withhold further loan disbursements until the mechanic's lien is paid.

The landowner, tenant or developer can look to the contractor to pay the subcontractor or supplier, but the contractor may itself be a source of the problem. The landowner, tenant or developer can purchase a lien bond from a surety company to "bond off" the mechanic's lien, but a surety company will typically require a deposit of cash or other collateral such as a letter of credit that is at least equal to the lien amount. The surety company can then look to that deposit if it decides to litigate or pay the subcontractor's or supplier's claim itself.

Things to do Before Paying a Mechanic's Lien

If a landowner, tenant or developer needs to keep a construction project moving, their best choice may be to pay or settle the mechanic's lien directly and then later look to the party that was responsible for paying the subcontractor or supplier in the first place. There are a few things that a landowner, tenant or developer can do to determine the enforceability of the mechanic's lien before offering to pay or settle it directly.

First, check the notice of contract to make sure it was recorded with the registry of deeds within 90 days of when the subcontractor or supplier last performed work or supplied material on the project. Almost all records at all registries of deeds are available for review online and for free. If beyond 90 days, generally the mechanic's lien is not valid.

Second, check the notice of contract to determine which property interest is described and which "owner" is identified. For example, a landowner's ownership of the property under a deed should not be affected by a mechanic's lien if the notice of contract describes the improved property as a leasehold interest under a lease and the tenant as the owner.

Third, check, if possible, whether the subcontract, supply agreement, purchase order, invoice or other agreement between the subcontractor or supplier and the contractor (or whoever hired the subcontractor or supplier) adequately identifies the type and the cost of the labor, material, equipment and so forth that the subcontractor or supplier agreed to furnish on the project. Also, check whether these documents are signed or initialed by both parties. Subcontractors and suppliers must have enforceable written contracts in order to have enforceable mechanic's liens.

Fourth, verify, if possible, how much was owed by the contractor to the subcontractor or supplier as of the date the owner received notice that a notice of contract was recorded with the registry of deeds. Regardless of how much a subcontractor or supplier claims in a mechanic's lien, an owner is obligated to pay the subcontractor or supplier no more than the owner was obligated to pay the contractor as of the date the owner receives notice of the recording. Sometimes a subcontractor or supplier will initially notify the wrong "owner," e.g. the developer who is neither the owner nor the

tenant, and will not notify the correct owner until much later on the project. By that time, the owner may owe relatively little money to the contractor, thereby limiting how much the owner might have to pay the subcontractor or supplier.

Finally, check whether the statement of account was recorded with the registry of deeds within 120 days of when the subcontractor or supplier last performed work or supplied material on the project. A failure to do so generally results in automatic dissolution of the mechanic's lien.

There are additional things that a landowner, tenant or developer can do to determine the validity of a mechanic's lien such as determining if a lawsuit was filed in a court on time and if a copy of the complaint from the lawsuit was then recorded with a registry of deeds on time. However, such steps may not be very effective if time is a consideration. Not all courts make their records available online, and a subcontractor or supplier can have up to 8 months from when it left a project to record a copy of a complaint with a registry of deeds.

These are just some of the things that a landowner, commercial tenant or developer can do before deciding whether to pay or settle a mechanic's lien.

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