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# CONSTRUCTION LEGAL EDGE

FALL 2009

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## PENNSYLVANIA MECHANIC'S LIENS: FAILURE TO FILE AN AFFIDAVIT OF SERVICE OF INTENTION TO FILE A MECHANIC'S LIEN AND EXCESSIVE CURTILAGE

### Failure to file an Affidavit of Service of Intention to File a Mechanic's Lien

To obtain a mechanic's lien in Pennsylvania, two procedural steps must be fulfilled. First, a mechanic's lien must be filed and perfected pursuant to statute. 49 P.S. §1501-10. Second, the lien holder must institute an action to enforce the lien pursuant to the Pennsylvania Rules of Civil Procedure. 49 P.S. §1701(a).

As the courts regularly strictly construe the statues governing mechanic's liens, in lieu of applying the more forgiving Rules of Civil Procedure, parties intending to file a mechanic's lien must be aware that missing a single deadline may constitute a waiver of the protections afforded to them by statute. *See* Regency Investments, Inc. v. Inlander Ltd., 855 A.2d 75, 77 (Pa. Super. 2004); Tesauro v. Baird, 335 A.2d 792, 796 (Pa. Super. 1975).

The requirements include that an Affidavit of Service of Notice of Intention to File a

Mechanic's Lien, or the Acceptance of Service, be filed within twenty (20) days after service. This Affidavit must contain the date and manner of service. Failure to file the Affidavit or Acceptance of Service within the times specified shall be sufficient ground for striking off the claim. 49 P.S. §1502.

The language of the provision is clearly mandatory and, if the claimant fails to serve the Notice and file the required Affidavit within one (1) month after the filing of the claim, it is ground for striking off the claim. McCarthy v. Reed Terrace, Inc., 420 Pa. 534, 218 A.2d 229 (1966). Compliance with the provision is a prerequisite to the validity of the lien, and the failure to observe it invalidates the lien. Day & Zimmermann v. Blocked Iron Corp. of American, 394 Pa. 386, 386, 147 A.2d 332, 333-34 (1959). Filing a faulty or incomplete Affidavit of Service of Notice is no exception. Hoffman Lumber Co. Geesey, 1964 WL 6439 (Pa. Coml. Pl. 1964). The extraordinary remedy of a mechanic's lien requires strict compliance with the requirements of the act as to Affidavits of Service of Notice of filing the claim.

The right to file a mechanic's lien, as has been uniformly held by all the courts, is of statutory origin. No such right existed at common law. It is class legislation and, therefore, must be strictly construed. Day & Zimmermann, 394 Pa. at 386, 147 A.2d at 334.

**Excessive Curtilage**

Whereas the requirement to file an Affidavit of Service is strictly construed, the defense of excessive curtilage offers more flexibility.

A mechanic's lien, which covers the land immediately occupied by a building, cannot be restricted to the exact area of ground upon which the building rests, but must extend to so much of the land as may be necessary to the convenient use and occupation of the building, i.e., the curtilage appurtenant to the building. However, it cannot be extended so as to include land which is not necessary for the convenient and proper use and occupation of the building. 7 Summ. Pa. Jur. 2d Property §20:36.

To maintain a mechanic's lien against a large curtilage, for instance, to attach an entire shopping center to a mechanic's lien, all the buildings must come within the meaning of property under 49 P.S. §1201(2) – that is, must belong to the same legal or equitable owner reasonably needing them for the general purpose thereof and forming a part of a single business or residential plant. Westmoreland v. Century III Assocs., 1980 WL 624 (Pa. Com. Pl. 1980).

Where an owner objects that a lien has been claimed against more property than should justly be included therein, the court upon petition may, after hearing by deposition or otherwise, limit the boundaries of the property subject to the lien. Failure to raise this objection preliminarily will not be a waiver of the right to plead the same as a defense thereafter. Id.

Reason and common sense suggest that the issue, although properly the subject of initial preliminary objections, can nonetheless be raised at any stage of the proceedings so long as trial is not thereby delayed. Northeast Brick Co. v. Street Road Shopping Ctr., 1970 WL 8961 (Pa. Com. Pl. 1970). If either party is dissatisfied with the claim as filed, he can have the curtilage fixed at any time thereafter, pending an execution, or after a sale of the premises by virtue of an execution upon any mortgage or judgment. Harbach v. Kurth, 131 Pa. 177, 18 A. 1062 (1890). However, the overall claim will not be stricken because it appears to include a larger curtilage than is proper. Westmoreland, 1980 WL 624.

**Joseph J. Bosick** serves as Chair of the Construction Practice Consortium. For questions, you are welcome to contact Joe Bosick at (412) 263-1828 or e-mail him at JJB@PIETRAGALLO.com .

## NO ATTORNEYS' FEES FOR SUCCESSFUL MECHANIC'S LIEN CLAIMANT

Recently the Pennsylvania Superior Court was called upon to consider the interplay of the Pennsylvania Mechanic's Lien Law, 49 P.S. §§1101-1902 and the Contractor and Subcontractor Payment Act, 73 P.S. §§501, *et seq*. In the case of Wyatt, Inc. v. Citizens Bank of Pennsylvania and Mellon Bank, N. A., 2009 Pa. Super. 107, 2009 Pa. Super. LEXIS 1008 (Pa. Super. June 4, 2009), the court held that attorneys' fees were not available to a successful claimant under the Mechanic's Lien Law.

The case involved six appeals from a September 28, 2007 judgment in a mechanic's lien action in favor of certain subcontractors, who had been involved in the demolition and build-out of a portion of a 41-story office building in Pittsburgh, PA known as Three Mellon Bank Center. The build-out was for Citizens Bank, which was entering the Pittsburgh market. Citizens had hired a construction company to oversee the design and renovation of the building. After the work was complete, five subcontractors filed mechanic's liens when the contractor went into bankruptcy and was unable to pay them in full. The five subcontractors were each awarded mechanic's liens in various amounts between $41,000 and $111,000. Citizens Bank appealed, as did each of the subcontractors.

Citizens' argument on its appeal was that it had not been given proper notice by the subcontractors in accordance with 49 P.S. §1501. Under the Mechanic's Lien Law, subcontractors are required to provide notice prior to filing a claim for unpaid labor or materials. The type of notice that is required differs based upon the nature of the work. If the work is defined as "erection and construction", the only notice required from the subcontractor is a written notice of the intention to file a mechanic's lien, which must be made at least thirty (30) days prior to filing the claim. 49 P.S. §1501(b). On the other hand, if the work is defined as "alteration and repair", a preliminary notice must be given

by the subcontractor **prior** to completing its work on the project. 49 P.S. §1501(a).

The first issue before the court was whether the subcontractors were obligated to give the preliminary notice. Citizens argued that the work performed was "alteration and repair". Because the space that Citizens was leasing was essentially demolished and rebuilt, the court concluded that the work was new construction and that preliminary notice was not required.

In addition, the court was faced with the issue of whether the provisions of the Pennsylvania Mechanic's Lien Law, 49 P.S. §§1101, *et seq*., which provide that a claimant may obtain a lien for "all then debts due", also includes attorneys' fees, interest, and penalties recoverable under the Pennsylvania Contractor and Subcontractor Payment Act ("CSPA"), 73 P.S. §§501, *et seq*. The trial court had held that such additional relief was not proper in a mechanic's lien action.

The Superior Court agreed. It held that the Mechanic's Lien Law provides for payment of all debts due associated with labor and material costs furnished in the erection or construction of a building. The CSPA states that owners shall pay the contractors strictly in accordance with the terms of the contract. 73 P.S. §505(a). It also states that the subcontractor shall be paid by the party with whom it contracted. 73 P.S. §507(a). The subcontractors argued that provisions of the CSPA should be read together with the Mechanic's Lien Law. The court rejected that argument, stating that the Mechanic's Lien Law is a statutorily created action and is not a breach of contract action. Because a mechanic's lien action is distinct from a breach of contract action seeking remedies pursuant to the CSPA, the court held that a contractor and subcontractor are not entitled to attorneys' fees, penalties, and interest pursuant to the CSPA in a mechanic's lien action. The court did hold that statutory interest pursuant to §8101 of the Judicial Code was available to the subcontractors from the date of judgment.

The court also noted that a breach of contract action is not barred by the pendency of a mechanic's lien claim, nor is a mechanic's lien claim barred by the pendency of a contract action. However, the subcontractor or contractor may not recover twice. Once he has a recovery in one case, the other case will be dismissed.

This case answers several questions with regard to the nature of a mechanic's lien and the type of damages that may be recovered. It makes it clear that a claim under the Mechanic's Lien Law is limited to a claim for labor and materials and not attorneys' fees, penalties, or interest under the CSPA. The court, however, also took pains to point out that both contract and mechanic's lien actions may proceed until a recovery is achieved in one of the two cases.

If you have any questions regarding this article, you are welcome to call **Tony Basinski** at (412) 263-4346 or e-mail him at AJB@Pietragallo.com .

# A SUBCONTRACTOR'S MECHANIC'S LIEN NOTICE MUST INCLUDE SPECIFIC INFORMATION OR IT WILL FAIL

Omitting even a few of the elements required in the written Notice of Intention to File a Mechanic's Lien may be fatal. Before filing a mechanic's lien, a subcontractor must serve a written notice on the owner at least thirty (30) days before the subcontractor files the lien. 49 P.S. §1501(b.1).

This formal written notice shall state:

(1) the name of the party claimant;
(2) the name of the person with whom he contracted;
(3) the amount claimed to be due;
(4) the general nature and character of the labor or materials furnished;
(5) the date of completion of the work for which his claim is made; and
(6) a brief description sufficient to identify the property claimed to be subject to the lien. 49 P. S. §1501(c).

In Leeward Construction Inc. v. SC 2007-C27-093 LLC, 5 Pa. D. & C. 5th 377 (Pa. Com.Pl. 2008), Leeward filed a lien for $499,355.20, plus attorney's fees, costs, interest, and expenses for payment for labor and materials Leeward provided to SCP as a subcontractor in the construction of a CVS Pharmacy. The property owner, SCP, filed preliminary objections opposing the subcontractor's mechanic's lien. SCP said Leeward had not complied with sections of the Mechanic's Lien Law in both the notice and the lien claim itself since some required information was missing.

Leeward opposed the property owner's preliminary objections to the notice of intention saying that Leeward's notice of March 3, 2008 satisfied the timing requirements of 49 P.S. §1501(b.1) and that its amended notice of April 22, 2008 satisfied the content requirements of 49 P.S. §1501(c). The subcontractor's response to SCP's challenge, that the mechanic's lien claim itself lacked required information, was that it formed "… a conclusion of law that should not amount to a basis for dismissal."

Trying to determine if the subcontractor's notice was satisfactory, the Court looked at precedents from case law. After reviewing several cases, especially in the areas of two competing principles of mechanic's lien law: the doctrines of substantial compliance and strict construction, the Court said:

> Clearly, the case law establishes that while mechanic's liens and mechanic's lien notices must be strictly constructed, the demands should not be unreasonable

> and should be designed to ensure that the defendants have reasonably been provided with all the information that they are entitled to.

Reviewing Leeward's March 3rd notice, the Court concluded that the subcontractor did satisfy the requirement of 49 P.S. §1501(c)(2) to state "the name of the person with whom he contracted" by including the phrase, "under a contractual agreement with you" and by addressing the notice to SCP addresses.

The Court then looked at SCP's next objection that the March 3rd notice failed to satisfy the condition of 49 P.S. §1501(c)(4) to state "the general nature and character of the labor or materials furnished". The Court noted that "plaintiff's notice states that Leeward 'has furnished labor and/or repairs in connection with the erection, construction, alteration or repair of an improvement to your property'," and that the property owner has not cited any cases showing that such a description is deficient as a matter of law. For these reasons, the Court thought the requirement was satisfied enough for the subcontractor to survive the preliminary objections.

The Court, however, did agree with SCP that Leeward's notice did not address the requirement of §1501(c)(5), stating "the date of completion of the work for which his claim is made". Although Leeward believes this element was satisfied in his amended notice of April 22nd, which included a completion date, the court disagreed and observed that the subcontractor failed to include an entire required element in the earlier notice.

Looking at the timing issue of the amended notice of April 22nd, the Court also made clear that an amended later notice can not "borrow" the date for the required thirty (30) days timing notice from the earlier notice.

For these reasons, the Court held the written notice of intention to file a mechanic's lien was not sufficient.

SCP also claims that specific required information was missing from the mechanic's lien claim itself in violation of 49 P.S. §1503, Contents of Claim. The Court agreed with SCP since §1503(3), "the date of completion of the claimant's work;" §1503(4), "if filed by a subcontractor, the name of the person with whom he contracted…;" and §1503(8), "such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them" were not satisfied.

For these reasons, the Court sustained the preliminary objections to the subcontractor's mechanic's lien claim. The Court did note, however, that the subcontractor did have alternative remedies.

> 'A mechanic's lien is an extraordinary remedy, which should only be afforded to subcontractors who judiciously adhere to the requirements of the

> Mechanic's Lien Law, as an aggrieved subcontractor also has an action sounding in breach of contract.'

Philadelphia Construction Services LLC v. Domb, 903 A.2d 1262 (Pa. Super. 2006).

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## OHIO SUPREME COURT ADDRESSES PREVAILING-WAGE LAWS

On June 17, 2009, the Ohio Supreme Court issued its decision in *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.,* 2008-Ohio-1005. The case addressed two issues interpreting Ohio's prevailing-wage law.

The first issue pertained to whether a labor organization that obtains written authorization to represent one employee has standing as an "interested party" to pursue violations of prevailing-wage law on behalf of any other employee on the project.

The second issue involved whether shop employees who work off-site manufacturing materials to be used in or in connection with public improvement projects are entitled to prevailing wages.

In this case, Gene's Refrigeration was awarded a contract for the Granger Fire Station project. Gene's Refrigeration paid prevailing wages to its workers who performed work directly on-site, but did not pay prevailing wages to its employees who were fabricating duct-work off-site. The Sheet Metal Workers International Association, Local Number 33 filed suit claiming that prevailing wages should be paid to all workers. Local 33 was not the bargaining representative for Gene's employees; however, it alleged that it had standing as an "interested party" under R.C. 4115.03(F)(3) based upon the written authorization of an employee in Gene's off-site fabrication shop.

As to the first issue, the Court determined that a labor organization that is an "interested party" under R.C. 4115.03(F) may file a prevailing-wage complaint only on behalf of the employee who specifically authorized the action. The Court concluded that one employee's authorization does not extend to all remaining employees and that a labor organization that obtains written authorization to represent one employee does not have standing as an interceding party to pursue violations of the prevailing wage law on behalf of any other employee on the project.

It is interesting to note that the Court previously determined that the signatures of three employees was sufficient to convey the representative status of a Union to authorize the filing of a complaint on behalf of all employees alleging prevailing-wage violations. The key difference in this case, other than the number of employees granting authorization, may have been the language of the actual authorization signed by the Gene's Refrigeration employee.

As to the second issue, the Court ruled that R.C. 4115.05 applies only to persons whose work is performed directly on the site of the public improvement project. The prevailing wage statutes, R.C. 4115.03 through R.C. 4115.05, require contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed. The Court determined that there is no reference in R.C. 4115.05 to where the work must be performed, so the Court looked at the language of the statute, the circumstances under which the statute was enacted, and the legislative history. The Court also considered the language in other provisions of the prevailing-wage law that suggested that the Legislature intended the statute to apply only to those who are actually working directly on the projects. The Court further considered the 70-plus-year industry practice of paying prevailing wages only to those who actually worked on the job site. The Court concluded that the Legislature could have amended the statute, but the absence of such an amendment was compelling to the Court in this case.

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