Commercial Projects: Contractor Dos and Don'ts Prior To, During, and Following the Last Day of Work

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The New Jersey Construction Lien Law codified at N.J.S.A. 2A:44A-1et seq. (CLL) provides a mechanism for contractors, subcontractors, architects, engineers, and suppliers (collectively, Contractors) to protect themselves if they have not been paid for their work, services, and/or materials. A construction lien is an essential tool that can be used by Contractors to increase the likelihood that they will be compensated for their work, services, and/or materials when a client fails to pay them. These construction liens serve as a legal claim against a client's leased or owned real property and incentivizes a client to pay its outstanding debts to a Contractor to avoid the creation of a lien against their leased or owned real property. However, filing a construction lien requires strict adherence to procedures, careful planning, and a thorough understanding of relevant legal requirements. Here are the critical dos and don'ts of filing commercial construction liens in New Jersey to safeguard a Contractor's rights. Filing construction liens on residential project sites comes with an additional set of rules and procedures which are not the subject of this article.

The Dos of Commercial Real Estate Liens

- One of the most crucial steps in the construction lien process is maintaining and collecting detailed records and information before, during, and after work, services, and/or materials are furnished. This process of due diligence is vital to reducing a Contractor's exposure to liability or unnecessary costs and expenses.
- Contractors should verify the identity of their client and the ownership of the real property where work or services are to be performed or materials delivered (Project Site). Prudence dictates that a lien search be run against the Project Site so that the Contractor is aware of any existing liens and encumbrances that affect the Project Site. Having this information provides important insight as to any existing impediments to the Contractor's ability to collect on outstanding amounts owed under a contract if a construction lien is filed and thereafter foreclosed on.
- A Contractor should also require deposit(s) before commencing performance under a contract and confirm that the client has sufficient funding sources to pay the balance of the total project by, among other things, requesting financials from the client.
- If the client does not own or lease the Project Site, the Contractor should ensure that the client has secured the Project Site owner's consent to engage the Contractor in the proposed project. If the Project Site is leased by the client, the Contractor should review the lease for any construction lien provisions that may limit the Contractor's ability to exercise its construction lien rights. Having adequate knowledge of the status of the Project Site can prevent future complications that could undermine a construction lien claim. For example, before entering into a contract with a client who leases the Project Site, a Contractor should confirm whether the client's landlord must provide written

authorization before work can commence. Taking these steps positions Contractors to know whether they can even assert a construction lien against the Project Site if a client fails to pay.

- Next, the Contractor should document in writing the proposed terms pursuant to which the Contractor will perform work or services or deliver materials to the Project Site. In New Jersey, a written contract signed by the party against whom the lien is asserted is required to establish lien rights. Without a written contract, a Contractor will be barred from filing a construction lien against the Project Site if the client defaults on its obligations to the Contractor. This extends to every amendment to the contract so the Contractor should ensure that any change order is fully documented in writing and signed by both the Contractor and the client.

- Because proper documentation is critical for resolving disputes promptly and enforcing your lien if payment issues arise, it continues to be critical for Contractors to maintain accurate records of all work performed, when it was performed, particularly noting the last day that the Contractor performs work at the Project Site. This is important because a Contractor must file a construction lien on a commercial project not later than 90 days following the last day when work was performed or services are rendered at the Project Site. If the deadline is missed, a Contractor will be completely barred from filing a construction lien against the Project Site and will have to avail itself of other legal or equitable remedies arising from a client's failure to comply with the terms of their contract.

The Don'ts of Commercial Real Estate Liens

- Don't delay. Time is of the essence when filing a construction lien. Failure to file a construction lien timely can result in a loss of priority allowing other creditors to take a superior lien position to yours.. A construction lien on commercial property must be filed within 90 days of the last date of furnishing labor or materials. Additionally, after filing a construction lien, a Contractor has one year to sue the client to enforce the construction lien. It is critical that Contractors do not miss these deadlines.

- Contractors should ensure that they release any construction liens correctly once a claim is settled or the lien dispute is resolved. Failure to release the lien properly can impact the property owner's ability to sell or refinance the Project Site, thus exposing the Contractor to liability. Under the CLL, lien claimants must file a certificate discharging the construction lien after the lien claim is satisfied, on the earlier of (i) 30 days after payment, satisfaction, or settlement of the lien, or (ii) 7 days after receiving a demand from any interested party. If the lien claimant fails to file the discharge certificate after the construction lien claim is resolved, it may be held liable for all court costs and reasonable attorneys' fees incurred by any party seeking to discharge the construction lien.

Seeking legal guidance is another crucial step. Consulting with a real estate attorney makes it easier for the Contractor to stay on top of what is required in order to file a legal construction lien claim and navigate the complex landscape of construction lien filings. Among other things, professional advice ensures compliance with state laws and protects a Contractor's interests, especially in complex or contested situations. Legal counsel can ensure adherence to all the administrative requirements relating to construction liens. For example, the construction lien must be notarized and signed by the claimant or an officer of the claimant. After the construction lien is filed, it must be served on the client, and if the client doesn't own the Project Site, it must also be served on the owner of the Project Site. The CLL specifies the information required for filing liens, including a signed contract with respect to the Project Site, name and address of the Contractor, identity of the client, Project Site details, including address and block & lot information, total contract price, change order information, amounts paid to date, amount claimed unpaid, description of work, and more.

In conclusion, construction liens are powerful tools that can minimize a Contractor's costs when trying to collect for unpaid work, services, or materials, but they require careful handling to ensure compliance with the law. By adhering to these dos and don'ts, Contractors can effectively navigate the challenges of filing construction liens and protect their rights.

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