

Real Estate Title Insurance & Construction Law

New Construction Lien Law Revisions Clarify Residential Lien Procedures

BY JOSEPH J. HOCKING, CYNTHIA L. FLANAGAN AND RYDER T. ULON

The New Jersey Construction Lien Law has just had a major overhaul, the result of over three years of difficult work by the state Law Revision Commission. Among other significant changes, the revised CLL, N.J.S.A. 2A:44A-1 et seq., which took effect Jan. 5, clarifies the law and procedure concerning liens arising from residential construction contracts (RCCs).

RCC liens are subject to additional, time-sensitive and burdensome prelien procedures, including the filing and service of a Notice of Unpaid Balance and Right to File a Lien (NUB) and an expedited arbitration proceeding to establish a prima facie right to file a RCC lien. §§ 20-21. Noncompliance with these prelien procedures invalidates the lien, forfeits subsequent lien rights respecting the work for which the lien was claimed

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and imposes liability for reasonable legal expenses including attorneys' fees. §§ 15 and 21(13). The prelien procedures are not new for RCC liens, but significant changes and clarifications have been made.

Revised definitions of the terms "residential construction contract" and "residential purchase agreement" together with the addition of newly defined terms: "community association," "dwelling," "real property development," "residential construction" and "residential unit" have substantially clarified when the additional procedures for a RCC lien must be followed. Under the previous law, there was much uncertainty and inconsistency concerning the applicability of RCC lien procedures to the construction of large-scale residential developments, mixed-use developments and condominiums.

The definition of "residential construction" indicates that the additional RCC lien procedures are to be followed even when the work performed is limited to "offsite and onsite infrastructure and sitework improvements required by a residential construction contract; the common elements of a development; and areas or buildings commonly shared." § 2. The newly defined term "residential unit" means a unit "in a real property develop-

ment, a multi-use or a mixed use development" which is intended to be transferred or sold for use as a residence but excludes units designed for rental purposes. Section 3 of the revised CLL makes clear that the property owner's interest to which a RCC lien attaches will vary depending on when and where the work was performed and with whom the claimant contracted. When the RCC is with the owner of a real property development, the lien attaches only to the owner's interest in any residential or nonresidential units not yet sold or transferred and the proportionate undivided interests in the common elements attributable to those units. §§ 3a, 3b(1) and 3c(1).

When a large-scale real property development is being constructed and work is performed in a residential unit, a NUB filed before the sale of a unit in which work was performed places a prospective purchaser on notice of a potential lien claim. If a lien is perfected after the sale of the unit, it will relate back to the NUB and the purchaser will take title subject to the lien. § 20d. Liens attach to the interest of an individual unit owner, but only for work performed solely in that unit. § 3d.

A lien for work performed "as part of the common elements or facilities of a real property development" never attaches to the interest of an individual unit owner, even though such interest includes the proportionate undivided interests in the common elements. § 3c. A lien for work

performed pursuant to a RCC with a community association will never attach to property because “the lien shall be filed against the community association but shall not attach to any real property.” § 3c(2).

The significance of a lien attaching to the property is that a lien claimant may force a sale of the property to satisfy the lien. A court cannot force a sale of common elements owned by a community association or the common elements, areas or common buildings or structures of a real property development but can use other remedies to satisfy the lien. § 24h.

It remains unclear why liens which are prohibited from attaching to the improvement remain subject to the RCC lien procedures, particularly since one of the tasks of the arbitrator is to determine whether there is “an amount which, pursuant to a valid lien, shall attach to the improvement.” § 21b(8). Although the revisions make clear that the RCC lien procedures are to be followed whenever a lien involves residential construction, including work on common elements, the ultimate availability and utility of a lien which does not attach to the improvement remains unclear.

A RCC lien claimant now has 120 days from its last work for which payment is claimed (previously it was 90) to complete the process, including arbitration, and to present the lien to the county clerk for filing, i.e., “lodge for record.” § 6. The previous law did not take into account that documents are frequently not recorded by the county clerk on the same day they are presented for such purpose. A NUB must be lodged for record within 60 days of the RCC lien claimant’s last work for which payment is claimed. § 21b(1). The NUB must be served simultaneously with its

lodging for record. § 21b(2). A demand for arbitration must be served within 10 days of lodging the NUB for record, § 21b(3), however, no waiting period is mandated and prudent practice recommends serving the demand simultaneously with lodging of the NUB.

RCC arbitration procedures are now streamlined by mandating that all arbitrations “pertaining to the same residential construction shall be determined by the same arbitrator, whenever possible.” § 21b(3). Consolidation of arbitration proceedings brought by different lien claimants whose NUBs have been lodged for record but not yet arbitrated is now permitted (at the discretion of the arbitrator) and must be requested in the demand for arbitration or, if requested by the owner or any other party, within 5 days of service of the demand.

In addition to determining the validity and amount of any lien claim which may be filed pursuant to a NUB, an arbitrator is now required to determine the earned amount of contract between the owner and the contractor. The earned amount of the contract is required to determine the lien fund, described below, and also establishes the maximum amount of a bond to discharge RCC lien claims. § 31a.

A construction lien, whether residential or nonresidential, can never exceed the unpaid balance of the claimant’s contract. § 9a. All liens (residential and nonresidential) are limited by the “lien fund,” i.e. an owner’s maximum liability on all lien claims. § 2. Section 9 of the revised CLL describes in detail how the lien fund is calculated. The lien fund for a contractor (first-tier lien claimant) and its subcontractors or suppliers (second-tier lien claim-

ants) is the earned but unpaid amount of the contract between the owner and the contractor. § 9b1. For third-tier lien claimants (subcontractors to a subcontractor and suppliers to a subcontractor), the lien fund is the lesser of the lien fund for first- and second-tier lien claimants or the earned but unpaid balance of the contract between the contractor and the subcontractor for whom the third-tier lien claimant worked. § 9b2.

Limiting an owner’s liability to the lien fund protects an owner from paying lien claimants any more than the unpaid value of all work performed. The liability limitation imposed by the lien fund protects an owner from paying twice; thereby preserving the unearned balance of the contract for work which has not yet been performed. Only payments for work performed and undisputed charges against the contract balance reduce the lien fund. For example, payments not in accordance with the contract, liquidated damages and disputed setoffs or backcharges, do not reduce the lien fund. § 9c.

When multiple lien claims are filed, the lien fund is determined on the date the first participating lien claimant lodged its claim for record with the county clerk. Participating lien claimants are those with unresolved liens upon the filing of a lawsuit to enforce a lien claim. Liens resolved before the commencement of the lawsuit are not considered because they are non-participating. § 9f. If the amount of the contract is thereafter increased, the lien fund is calculated from the date of the increase. Section 23 of the revised CLL is almost completely new and provides a detailed procedure whereby the Superior Court distributes multiple lien funds to lien claimants of varying tiers. ■