



Builder's Liens: What Comes Next

By Jonathan J. Weisman

Builder's liens are the simplest way for a contractor to protect himself when dealing with non-paying clients. Liens are easy to file and can effectively put pressure on owners and general contractors. But knowing how to file a builder's lien is not always enough to force a property owner to pay. Filing a lien is only the first step in the process; what comes after that is just as important.

A builder's lien, like any lien, is an interest in property. The *Builders Lien Act* automatically creates a lien when a contractor works on a property. However, that lien is automatically lost after a short period of time, often only 45 days after the last day of work. Filing the lien against title to the property accomplishes two things: first, it extends the period of time before the lien is automatically lost to one year; second, it creates a public record of the lien, which warns others of the contractor's interest if they try to buy the property or lend to its owners.

But the lien on its own does not force the property owner to pay the lien-holder. Converting a lien into cash payment can be difficult unless the contractor is prepared to ask the court for an order to sell the property. And even if the property is sold before the lien is lost, the sale price may not be sufficient to recover the amount owed to the contractor. The costs of sale, outstanding mortgages, and amounts owing on other liens registered prior to the contractor's lien, will be deducted from the sale price before anything is paid to the contractor. If the property is foreclosed, the contractor may recover nothing.

In some cases, the property owner, other contractors, insurers, and mortgage-holders may ask the court to cancel the lien on the condition that they pay money into court. When these funds are paid, the lien on the property is cancelled and the contractor is granted an interest in the money in its place. This can also be arranged through negotiation without involving the court, if the contractor agrees. If the amount paid into court equals the amount claimed in the lien, the contractor is usually in a stronger position than with the builder's lien.

Even if funds are paid into court, the contractor is not automatically entitled to them. If the property owner and contractor do not agree, the contractor must obtain a court order for the money to be paid to him. The owner may also initiate an action to remove the lien by proving that he need not pay, or to challenge the lien itself if there were any mistakes made in filing it. Alternatively, the owner can

deliver a notice to the contractor requiring that he bring an action to enforce the lien. If the contractor does not do so within 21 days, the lien will be lost. The lien will be lost in any case if the contractor does not enforce it within the one-year period after it is filed. Bringing an action will protect the contractor's rights, and, once a certificate of pending litigation is filed, the one-year limit ceases to apply and the lien will be preserved until the court orders otherwise.

In some cases, the funds paid into court can be less than the amount claimed on the lien. The court can specify a lesser amount, especially if it is persuaded that the amount claimed in the lien is too high. In addition, the cost of enforcing the lien is not automatically included. At one time it was routine for the court to add 10% or 15% to the amount claimed as security for the contractor's cost of enforcing the lien. But the courts have recently ruled that these additional amounts should not be added automatically. If the contractor does not watch this process carefully and act where and when he needs to, he could end up with less security, rather than more.

Bringing an action within that one-year period can also preserve the other major tool which the *Builders Lien Act* provides to subcontractors: the Section 10 Trust. When a contractor receives payment for work done, the money becomes a trust fund for any subcontractors hired to do that work. The contractor receiving those funds is not allowed to use them for any purpose other than paying its subcontractors. This rule applies as soon as payment is received, even if a builder's lien is not filed, but it must be enforced within a year. If the contractor is a corporation, its directors can be personally liable for money which is improperly used. The Section 10 Trust protects subcontractors from contractors who try to use corporations or bankruptcy to avoid their obligations. While it is a powerful feature of the *Builders Lien Act*, trusts are a complex area of law. Good legal advice is crucial for subcontractors who hope to make use of the Section 10 Trust.

Because the time limit for filing a builder's lien is short, there is not always time to complete negotiations for payment. While negotiation is always the cheapest option, contractors should keep the time limit for filing in mind, and ensure they file a lien before it is too late. Negotiations can and should continue after a lien is filed, even if an action is brought, but lien rights cannot be restored once they are lost.

Builders' liens can help contractors manage their businesses better. Knowing when and how to file builders' liens, and using them where appropriate can make it easier to deal with non-paying clients. Understanding what comes after filing and being prepared for the next steps will ensure that when things get difficult, contractors can protect themselves, stay professional, and remain in control.