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Ohio Mechanics' Liens: Perfecting a Mechanic's Lien (Part One of Two)

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Assume you are a subcontractor who has been hired by a contractor to install wiring in a building under construction. Then, assume that the contractor goes out of business without paying you for the work performed. What can you do to protect the value of your time and materials?

A "mechanics' lien" is your answer. Mechanics' liens are basically liens on real property (such as commercial real estate or a family home) held by contractors or laborers who improve the property. Mechanics' liens exist to protect the value of the labor and materials the contractors or laborers put into the property. In the event that a contractor or laborer is not paid for the value of its work, the property itself can be sold off to ensure payment.

Before a mechanics' lien can attach to property, however, it must be "perfected." This is the subject of this first installment of a two part series. "Perfection" is not as intimidating as it sounds. All a "lien perfection" means is that the lienholder has complied with all of the legal requirements to secure the value of its work by attaching a lien to the property itself. The perfection process serves two goals: it notifies property owners that those involved in the construction process hold mechanics' liens on their property and puts potential purchasers and lenders on notice that the property is no longer free and clear of liens.

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To facilitate these notice objectives, the perfection process revolves around two particular documents. One document is called a “notice of furnishing,” and the other is called an “affidavit of lien.” Subcontractors and materialmen must concern themselves with *both* notices of furnishing *and* affidavits of lien, while laborers and anyone directly in contract with the owner only have to worry about affidavits of lien.

In Ohio, the statutory provisions governing mechanics’ liens vary depending upon the nature of the property improved. Ohio Revised Code 1311.011 governs mechanics’ liens that attach to residential property, while the remainder of ORC 1311.01 – 1311.24 cover mechanics’ liens that attach to non-residential (*i.e.* commercial) property. The purpose of this article is to generally describe the process of “perfecting” mechanics’ liens, and thereby protect the value of labor and materials expended on real property.

Perfection, Step One:

First Determine Whether You Must Serve a Notice of Furnishing and Proceed Accordingly

A notice of furnishing is a document that subcontractors and materialmen must serve on non-residential property owners (and, sometimes, general contractors, if the general contractors and subcontractors are not directly in contract with the owner). The notice of furnishing gives notice that the subcontractors/materialmen are involved in the project. Always keep in mind that a notice of furnishing is *only* required for a *subcontractor or materialman* to perfect a lien on *non-residential* property (*i.e.*, commercial real estate). A notice of furnishing is generally not required to perfect a lien on *residential* property (*i.e.*, land that the owner intends to use as a personal residence), or where the person seeking to perfect the lien is something other than a subcontractor or materialman.

Ohio Revised Code 1311.05 sets out the required contents of a notice of furnishing. To protect the full value of work performed on non-residential property, a subcontractor or materialman must usually serve a notice of furnishing within 21 days of beginning work on the project. However, this requirement is subject to the property owner’s filing a “notice of commencement” with the county recorder at the outset of the construction which gives formal “notice” of the project’s official “commencement.” If the owner has not filed a notice of commencement upfront but later provides one, subcontractors and materialmen *then* have 21 days to serve notices of furnishing on the appropriate parties, to protect the full value of their work. If a subcontractor or materialman fails to serve a notice of furnishing within the applicable 21-day period, he or she can still prepare and serve a late notice of furnishing. Doing so will protect *part* of his or her work and is better than nothing. However, the disadvantage of waiting is obvious; some work value will go unprotected in the case of default. To protect the full value of the work, a notice of furnishing should always be timely served.

Perfection, Step Two:

Always Record and Serve an Affidavit of Mechanics’ Lien

After preparing and serving any necessary notices of furnishing, the perfection process next requires a subcontractor or materialman working on a non-residential construction project to prepare and execute an affidavit of mechanics’ lien. General contractors, construction managers, laborers and subcontractors and materialmen involved in residential construction projects also must prepare and execute affidavits of mechanics’ lien to perfect their mechanics’ liens (even if they did not need to serve notices of furnishing). Stated differently, in the mechanics’ lien perfection process, *everyone* must prepare and serve an affidavit of mechanics’ lien, regardless of whether or not they were required to serve notices of furnishing, and regardless of whether the property owner ever filed a notice of commencement. There are simply *no* exceptions to this rule.

Ohio law requires the affidavit of mechanics’ lien to be filed with the county recorder of the county in which the property is located. If the improved property is located in more than one county, the affidavit should be filed with the recorder of every county in which the improved property partially sits. The affidavit must be filed within a specified

number of days from the *last* day work is performed or material is furnished to the project, and the number of days one has to file the affidavit differs depending on the type of construction project at issue.

If the lien arises in connection with a single- or double-family dwelling, or in connection with a residential unit of a condominium, the affidavit must be filed within 60 days of the date on which the last labor or work was performed or material was furnished to the project. If the lien arises in connection with improvements to oil or gas well facilities, the affidavit must be filed within 120 days. Finally, if the lien arises in connection with any other real property improvements, including commercial property improvements, the affidavit must be filed within 75 days. Once the affidavit is recorded, a copy must be served on the property owner within 30 days of its filing. Once all these requirements are properly met, the mechanics' lien has properly been perfected, and it will remain in force for six years.

The next article in this two-part series will consider the issue of mechanics' liens from the opposite perspective: it will tell *property owners* what they can do to protect their property from mechanics' liens.

For more information on mechanics' liens, please contact either Mr. Harper or Mr. Abercrombie by calling our Toledo office (419-241-6000).



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