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RECENT DEVELOPMENTS IN NEW JERSEY LIEN AND BOND ACT LAW

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This Update covers significant developments in the first half of 2010 in both statutory and case law involving lien and bond claims. Liens on residential and commercial properties are filed under the "Construction Lien Law" (N.J.S.A. 2A:44A-1 et seq., the "CLL"). Liens on local public projects are filed under the Municipal Mechanics' Lien Law (N.J.S.A. 2A:44-125 et seq., "MMLL"). Bond claims may also be filed on local and State projects under the Public Works Bond Act (N.J.S.A. 2A:44-143 et seq., "Bond Act").

Statutory Law

The first major amendment to the CLL since it was enacted in 1994 is nearing the final stage for adoption into law. Assembly Bill A-410 was passed on June 21, 2010 and an identical version of the bill has been introduced in the Senate Commerce Committee, where it will be taken up some time this coming fall. The Amendment would clarify certain key concepts that were ambiguous, confusing, or even absent from the CLL, which have been the subject of significant litigation. Some of the

significant proposed changes are highlighted below:

- A definition for the term "lien fund" has been added to the CLL, with a formula provided to enable lien claimants and owners to determine the owner's maximum liability, what payments may reduce the fund available to pay lien claimants, and the method of determining the pro rata distribution to lien claimants.
- The term "lodging for record" has been added to the CLL and is distinguished from the term "filing" for purposes of enforceability of the lien, making those terms more consistent with general usage in real estate practice.
- The most significant changes are within the context of large-scale residential projects. The Amendment would clarify that the extensive pre-lien procedures that are required before a lien may be filed against a property in connection with a residential construction project apply to projects such as high-rise condominiums and large townhouse developments. The Amendment would also provide additional time to engage in these procedures, which include an arbitration hearing on the right to file the lien, but the timeline is still tight.

These and other changes will have a significant impact on construction in New Jersey. We will be closely monitoring this important piece of legislation. Please contact us, if you have any questions about how the changes may impact your projects.

Case Law

Corporate Acknowledgment of Lien Claim

The CLL provides that a "lien claim shall be signed, acknowledged and verified by oath of the claimant, or in the case of a partnership or corporation, a partner or duly authorized officer thereof" (N.J.S.A. 2A:44A-6). The statutory form of claim also requires that the claimant sign the verification of claim and indicate his or her "title." (N.J.S.A. 2A:44A-8). Soon after the CLL was first adopted, our Courts ruled that it is insufficient for an attorney to sign a lien claim on behalf of a client when acting simply as the client's attorney. *Gallo v. Sphere Constr. Corp.*, 293 N.J. Super. 558, 566 (Ch. Div. 1996).

The same conclusion was reached in the case *Aloia Construction Company, Inc.*

v. BFW/Howell Associates, LLC, No. A-0580-08T1 (N.J. Super. 1/29/2010), where the Appellate Panel held that a lien claim was defectively filed when it was signed by an attorney without indicating in what capacity he was signing the claim, despite the fact that the notary certified that the attorney had asserted he was authorized to sign the instrument as a "duly authorized officer of the corporation." That notarization was insufficient to overcome the failure of the lien claimant to produce any competent evidence that its bylaws permitted one officer to unilaterally appoint another individual as an officer of the corporation for the purposes of executing a lien, as the lien claimant alleged.

Takeaway

Be certain that lien claims filed on behalf of a corporation are executed by a duly authorized officer. If you choose to authorize an attorney or other non-owner to execute lien claims, the authorization must comply with the corporate bylaws.

Notice and Timing Requirements Under Bond Act

In order to preserve rights under a payment bond, the Bond Act requires that all "second tier" subcontractors (sub-subcontractors and suppliers to subcontractors) must give notice to the general contractor that they are furnishing work on the job. If a second tier sub fails to give such notice, the

surety has no obligation to make payment on a bond claim. (N.J.S.A. 2A:44-145).

Once work has been completed, if payment has not been received, notice of a payment bond claim must be given to the surety. The surety is then given 90 days to respond to the bond claim. Suit must be started no earlier than 90 days from the date of notice, but no later than one year from the last date of work performed by the bond claimant.

In *High Tech Steel Erectors, Inc. v. TLC Drywall Construction*, No. A-2531-07T1 (N.J. Super. 1/5/2010), the Court denied entitlement of a second tier sub (Hi-Tech) under the payment bond for failure to abide by both the notice and timing requirements. Hi-Tech had entered into two subcontracts on a municipal construction job, one with another subcontractor, and one directly with the general contractor. At no point did Hi-Tech provide notice to the general contractor that, for certain portions of the project, it was acting as a second-tier sub. After the subcontractor failed to pay Hi-Tech for work performed under that subcontract, Hi-Tech continued to perform work under the contract it had with the general contractor. It was not until it had completed that scope of work that it filed suit.

The Court ruled that the fact that Hi-Tech acted as a "first-tier" subcontractor for portions of the work had no bearing upon its obligation to provide notice to

the general contractor about its second-tier status for the work for which it filed a payment bond claim. In addition, the work for which it filed a payment bond claim was completed more than a year before it filed suit. The fact that Hi-Tech did not complete its work on the contract with the general contractor until months later, again, was irrelevant in considering the timing requirements of the Bond Act.

Takeaway

Second tier subcontractors should make it a routine business practice to provide notice to the general contractor immediately upon execution of the subcontract that it will be furnishing work on the job. Maximum protection will be obtained by furnishing such notice **before** any work begins.

Adrienne L. Isacoff, Senior Counsel in Lowenstein Sandler's Construction Practice Group, will co-lead two seminars: "Construction Lien Law," to be held on September 23, 2010 in Parsippany, NJ; and "Public Contracts and Procurement Regulations," to be held on October 12, 2010 in New Brunswick, NJ. For more information, please visit: <http://www.lowenstein.com/newsevents/events/>

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