

# Construction Law:

Greensboro Builders Association

Remodelers Counsel

February 25, 2010

J. Patrick Haywood

Carruthers & Roth, P.A.

235 N. Edgeworth Street

Greensboro, NC 27401

Direct Line: (336) 478-1177

[jph@crlaw.com](mailto:jph@crlaw.com)



# Contracts

- Construction law contracts are like most contracts in establishing the rights and responsibilities of the parties. However there are some major issues to review:
  - 1) Contractual Chain of Command
    - Owner – General Contractor – 1<sup>st</sup> tier subcontractor – 2<sup>nd</sup> tier subcontractor
  - 2) Dispute Resolution
    - a) State Contracting Procedure
    - b) Mediation/Arbitration
    - c) Litigation
  - 3) Remedies Available
    - a) Bonds
    - b) Liens



# Remedies

Keep in mind that liens and bonds secure payment. They do not secure the right to payment. The underlying dispute will have to be resolved.



# Contract Considerations

- Advance Planning – contractual provisions.
  - What type of contract do you need (commercial / residential)
  - Fixed Price/ Cost Plus  
known price v. transparency and control
  - Cost Plus Guaranteed Max. (savings provision)
  - Construction Manager/ General Contractor



# Contract Terms to Minimize Damage

## 1) Waiver of Consequential Damages

- AIA A201 §4.3.10: The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract.
- Owner waives: rental expenses, loss of use, income, profit, financing, business and reputation
- Contractor waives: principal office expense, including compensation for employees, financing, business reputation and loss of profit (unless the work).
- \*Provisions favorable for contractor



- 2) Concealed/Unknown Conditions
- 3) Risk of Loss – Insurance
- 4) Warranties – Express/Implied
- 5) Materials to be used
- 6) Price Escalation



- 7) Environmental Concerns
- 8) Personal Guaranties (News from the front lines)
- 9) Attorney's Fees
- 10) Venue/Choices of Law



# CONTRACTOR'S LIEN ON REAL PROPERTY

- N.C.G.S. §44A-8 creates a right for any person or entity providing material or labor to the property pursuant to a contract with the owner of the real property to assert a lien on that property to secure future payment.
- This statutory provision has been interpreted to allow a large group of individuals including architects, engineers and containerized waste removal services to assert a lien on the property.





County of \_\_\_\_\_

\_\_\_ M \_\_\_

1. Name and address of the person claiming the lien on real property:
2. Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed:
3. Description of the real property upon which the claim of lien on real property is claimed:  
That parcel of real property located in \_\_\_\_\_ County, N.C. and more particularly described as set forth in exhibit A.
4. Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
5. Date upon which labor or materials were first furnished upon said property by the claimant:
- 5a. Date upon which labor or materials were last furnished upon said property by the claimant:
6. General description of the labor performed or materials furnished and the amount claimed therefore:

Unpaid principal balance of \$ \_\_\_\_\_ for services provided to the property, including but not limited to, \_\_\_\_\_.

This \_\_\_\_\_ day of \_\_\_\_\_, 2010.

[Claimant]

By: \_\_\_\_\_

Title: \_\_\_\_\_



# CRITICAL POINTS

- The Claim of Lien must be filed within 120 days of when the lien claimant last provided labor or material to the property in furtherance of its contractual obligations. (Warranty work does not count – good try.)
- The lien will relate back and have priority to the date when the lien claimant first provided labor or material to the property.
- For a claim of lien to be enforced, a lawsuit must be commenced within 180 days from when the lien claimant last performed work or provided materials to the property in furtherance of its contractual obligations.



# Priority Issues

## **§ 44A-10. Effective date of claim of lien on real property.**

A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property. (Key to challenging other liens and deeds of trust)

## **§ 44A-22. Priority of liens upon funds.**

Liens upon funds perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a lien upon funds shall take such payment subject to the lien upon funds.



# Subcontractor's Lien on Funds

- The lien on funds asserted by the subcontractor attaches to funds owed to the person with whom the subcontractor dealt. N.C.G.S. §44A-18(1).

A subcontractor must:

- (1) have a contract,
- (2) to improve real property, and
- (3) furnish labor or materials at the site of the improvement.





## § 44A-23 – Subrogation Lien.

1<sup>st</sup> Tier Subcontractor who served Lien Upon Funds may also place a lien on the real property.

2<sup>nd</sup> or 3<sup>rd</sup> Tier Subcontractor may place a lien on the real property unless the contractor filed and posted a Notice of Contract. 2<sup>nd</sup> or 3<sup>rd</sup> Tier Subcontractor can respond with a Notice of Subcontract and maintain its lien rights.



# DISCHARGE OF CLAIM OF LIEN ON FUNDS

- 1) Notice of claim of lien on funds may be discharged by:
  - a) filing the Notice of Claim of Lien on Funds in the county where the property is located, and
  - b) deposit a sum equal to the claim with the clerk of court, **or**
  - c) deposit a corporate surety bond in a sum equal to one and one-fourth times the claim with the clerk of court.



2) A bond deposited under this section to discharge a filed notice of claim of lien on funds is effective to discharge the lien claimant and any lower tier subcontractors claiming through the lien claimant up to the amount of the bond.

Ex: First tier mechanical subcontractor files \$100,000 claim of lien on funds. Owner post bond (more likely makes the contractor do it) in the amount of \$125,000. If second tier supplier of HVAC materials files claim of lien on funds for \$50,000 the bond will satisfy the claim of lien.





# Defending and Removing Liens from Construction Projects

*In the wake of O&M Industries  
v. Smith Engineering Co.,  
where are we now?*



## The Lien on Funds Gets Teeth!

- Owner contracted with GC to construct oxidizer system.
- GC subcontracted with O&M for the construction and delivery of 3 thermal oxidizers.
- O&M served a Notice of Claim of Lien on June 8, 2001 in the amount of \$113,655.00
- After receiving the Notice, owner made 2 payments to the contractor; 1 for \$164,831.00 and 1 for \$150,000.00.
- Contractor ceased work on August 13, 2001 and filed bankruptcy.



- ❑ Retention of funds to satisfy an amount of a notice of claim of lien is not sufficient.
- ❑ Owner will not be allowed a set-off from withheld funds to complete the project.
- ❑ Once a notice on funds is served, risk shifts to the obligor (owner) to the extent the obligor is holding funds.
- ❑ Further payments to the contractor triggers personal liability up to the amount of the payments, not to exceed the amount of the claimant's lien.



# It's Not Business as Usual

- Discharge the Lien on Funds
  - ✓ Deposit funds with Clerk of Court
  
- Completion agreements
  - ✓ Separate contract with different general contractor to complete the project
  
- Contractor's payment bonds



# Lien Waiver

- Required at almost all real estate closings and releases the owner's future liability to the contractor and all those who claim through the contractor.
- Note: N.C.G.S. 44A-24 imposes criminal sanctions for the furnishing of a false lien waiver.



in consideration of and effective only upon receipt and negotiation of Contractor's final payment check marked "FINAL PAYMENT", the undersigned Subcontractor releases, acquits, forever discharges and covenants not to sue \_\_\_\_\_ ("Owner"), \_\_\_\_\_, ("Contractor"), and its respective representatives, agents, successors and assigns, in connection with any and all claims, demands of any nature whatsoever for payment under or in connection with performance of Subcontractor's obligations under the Subcontract Agreement for the construction of \_\_\_\_\_ "Project").

The undersigned Subcontractor hereby represents and warrants that all subcontractors, materialmen and suppliers to the Subcontractor have been paid or will from the "FINAL PAYMENT" be paid in full for all Work on the Project and that there are no outstanding claims arising out of the Work on which liens could be filed. The undersigned Subcontractor hereby specifically releases and waives any lien rights by or accruing through Subcontractor on this Project pursuant to Chapter 44A of the North Carolina General Statutes and agrees to indemnify, defend and hold harmless the Owner and Contractor in connection with any claims arising out of any amounts allegedly owed by Subcontractor to subcontractors, materialmen or suppliers on the Project.

Subcontractor: \_\_\_\_\_

SWORN TO BEFORE ME this  
 \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
 Notary Public

My Commission Expires: \_\_\_\_\_



# INSTRUMENT OF SATISFACTION

- Where a lien has been filed, an instrument of satisfaction should be filed to clear up any potential title issues.



\_\_\_\_ M \_\_\_\_

COUNTY OF GUILFORD

**INSTRUMENT OF SATISFACTION**

\_\_\_\_\_, for value received, pursuant to the provisions of §44A-16(2) of the North Carolina General Statutes, does hereby state that the lien indebtedness recorded in file \_\_\_\_\_ against that certain real property located at \_\_\_\_\_ and described in the Guilford County Registry of Deeds Book \_\_\_\_\_, Page \_\_\_\_\_ owned by \_\_\_\_\_ has been paid or satisfied. \_\_\_\_\_ does hereby request the Clerk of Superior Court to cancel the lien by entry of satisfaction on the record of such lien.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Lien Claimant:

\_\_\_\_\_  
By:  
Title: \_\_\_\_\_

SWORN TO AND SUBSCRIBED before me this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_





# Projects at Risk

- The new business as usual:
- 1. Bankruptcy
- 2. Reclamation
- 3. Joint Check Agreements
- 4. Payment /Performance Bonds
- 5. Lender/ Surety Commitment



# Bankruptcy – Automatic Stay

- §362 Bankruptcy Code provides an automatic stay protecting the debtor from actions of creditors including:
- “Any act to create, perfect or enforce a lien against property of the estate that could be avoided by a judgment creditor as of the date of the petition”



# Perfecting the Lien

- N.C. Gen Stat. §44A-13 requires that a lawsuit to enforce a lien be filed within 180 days of the last date worked.
- If Bankruptcy: Must file a proof of claim and lis pendens in the county where the work is performed within the same time period. In re Laurel Hill Paper Co.



# Executory Contracts

- A contract where the obligations of the bankrupt and the other party to the contract are unperformed and failure of performance of either party amounts to breach of contract (incomplete construction project)
- Motion to assume or reject §365(d)(2)
  - Chapter 7 – assumed rejected in 60 days from order for relief
  - Chapter 11 – no action necessary until confirmation of plan



# Reclamation/Administrative Claim

- §546(c) Bankruptcy Code:

- Seller of goods to bankrupt/ debtor  
(HVAC, Plumbing, Building Material Supplier)  
may make a claim within 45 days after debtor's receipt of goods or, if the 45 days expires after the filing of the petition, within 20 days after the petition.



- 1. Written notice to debtor
- 2. Must show that the goods were sold in the ordinary course of the business.
- 3. Demonstrate that the debtor was insolvent when the goods were delivered
- 4. The goods are identifiable and in the debtor's possession.



# Administrative Claim

- §506(b)(9) Bankruptcy Code
- Allows seller of goods sold in the ordinary course to debtor within 20 days prior to filing petition to claim a priority or administrative expense.
- This moves the priority of the claim much further up



# Joint Check Agreement

- Utilized where owner wishes to pay a subcontractor from whom he has received a Notice of Claim of Lien.
- The agreement allows the owner to make the payment to the contractor without incurring the liability imposed under N.C.G.S. 44A-20.





# Payment/Performance Bond

- Eliminate risk – make this provision part of the contract
- Cost can be a factor (1 to 3 percent of total job cost)
- Secures prompt payment
- Binds the bonding agent to promptly make payment to all persons supplying labor and material to the property
- Performance bond essentially guarantees that the project will be completed.
- Take Over Agreements with Surety



# Lender Commitment

- Lender to owner/developer actually contracts directly with subcontractors to complete the project.
- Subcontractors guaranteed payment
- Considerations:
  - Contract assignment
  - Impact on lien rights

