

Lien and Mean

How a Contractor's Failure to Pay Bills Can Become Your Liability

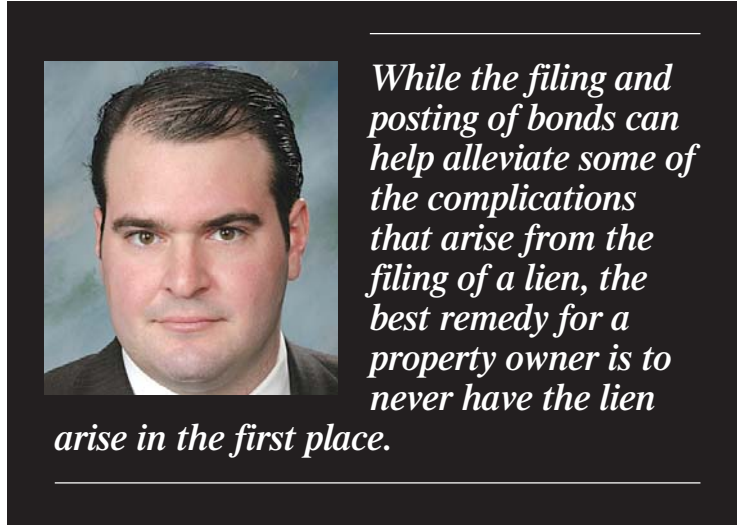
By ADAM BASCH

It should come as no surprise that, if you hire a contractor to make improvements to your property, and you fail to pay him or her, the contractor has a right of action against you and may seek to place a lien upon your property. What is surprising, however, is that, if this contractor fails to pay any of his or her subcontractors, one of them may be able to place a lien upon your property as well.

In short, although you have paid your contractor all sums that are due, your property may still be at risk. The contractor's failure becomes your liability.

As in most states, Massachusetts has a mechanic's lien statute. This statute is codified in Mass. General Laws Chapter 254. In essence, the mechanic's lien statute allows a contractor to place a lien upon property to secure his or her payment. This seems reasonable. What most people would view as unreasonable though, is to allow a subcontractor to place a lien upon your property, after you have paid the contractor in full. As with most areas of construction litigation, perils such as these can be avoided with a small amount of forethought and preventative action.

The statutory scheme for mechanic's liens provides protective alternatives to avoid or dissolve any lien placed upon one's



property to those who are potentially subject to a mechanic's lien. The first order of protection is to secure a no-lien or blanket bond. Once filed, these bonds stand in the place of the real property.

Another type of bond is the target bond. This is used when the property is already the subject of a lien, and the property owner wishes to substitute a bond in place of the lien. This type of bond is most commonly used when a property owner wishes to refinance his or her property and is unable to do so because of a pre-existing lien. When a particular lien is 'bonded off' by a target bond, the property owner must serve notice of the recording of the bond to the lien holder.

While the filing and posting of

bonds can help alleviate some of the complications that arise from the filing of a lien, the best remedy for a property owner is to never have the lien arise in the first place. Rest assured that, if the company issuing the bond eventually pays the subcontractor, it will seek reimbursement from you.

In Massachusetts it is illegal to require a contractor or subcontractor to execute a blanket lien waiver prior to performing his or her services. Although you cannot require a contractor or subcontractor to agree that they will not file a lien upon your property, you can require such a waiver at the time of payment. In most construction contracts, especially ones for new construction, pay-

ments are made to the general contractor at different intervals throughout the project. Prior to tendering any funds to the general contractor, the property owner should require that the general contractor, and all subcontractors who will perform services on the project, will agree to execute a lien waiver. This protects you from essentially having to pay twice.

In order to ensure that all the applicable subcontractors have executed a lien waiver, you must first know what subcontractors are being retained. As such, all construction contracts should contain a provision that the general contractor will provide you with a list of the subcontractors that he or she plans to use on your job. Although this provides you with a limited degree of awareness, however, it is no substitute for firsthand observation.

There is no such thing as being too proactive when it is your project. The old adage stands true here; an ounce of prevention is worth a pound of cure. ♦

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