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TIMING IS EVERYTHING: DON'T WAIVE YOUR MECHANICS' LIEN RIGHTS

By Brad C. Friend

The Virginia General Assembly Delays Vote on Bill Revising Mechanics' Lien Notice Requirements.

As every construction lawyer knows, statutory notice and filing requirements must be complied with to enforce mechanics' liens. The timing requirements for serving notice and filing the actual lien in many jurisdictions are often tricky. As such, contractors must be familiar with the mechanics' lien notice and filing requirements of the jurisdiction they are working in so they do not waive any potential lien rights.

In Virginia, the present law requires that a contractor file its mechanics' lien within ninety (90) days of the last day of the month in which it last did work. In addition, the lien can only include work up to one-hundred fifty (150) days from its last day of work. Accordingly, even if the contractor is owed money for work performed six (6) months prior to its last day of work, in its lien, the contractor can only include monies owed for work performed one-hundred fifty (150) days from its last day of work. A general contractor and subcontractor are also required to notify the property owner by mailing a copy of the lien to the owner at the time of the lien filing.

Recently, HB 1265 was proposed in the Virginia General Assembly to revise the lien notice requirement. In its original form, the proposed bill would have required a contractor on all commercial and residential projects to serve the property owner with a copy of the proposed lien and a written notice of intent to file the lien at least sixty (60) days prior to the filing of the actual lien. Under the proposed bill, the contractor could not file a lien prior to the expiration of the sixty (60) day period. Interestingly, the proposed bill would not have changed the ninety (90) day filing requirement previously mentioned. Therefore, in light of the fact that contract payment terms typically allow 30 days for payment, contractors would have been placed in an awkward position of having to file notices with owners to preserve potential liens before a payment dispute ever arose.

Thankfully, this original bill was significantly amended. HB 1265 now only applies to residential dwellings and the sixty (60) day pre-lien notice requirement to the owner was amended to thirty (30) days. However, HB 1265 is still unnecessary. Existing law already requires a contractor working on a residential dwelling to notify the mechanics lien agent listed on the building permit of its name, address and intent to seek payment for its work. Moreover, HB 1265's thirty (30) day pre-lien notice requirement would essentially turn the ninety (90) day lien filing requirement into a sixty (60) day requirement. Thus, the pre-lien notice required by HB 1265 is an unnecessary hurdle for contractors to overcome and a significant restriction in their ability to enforce their lien rights.

...Continued from Page 1.

HB 1265 passed the Virginia House of Delegates by a vote of 90-7. However, as a result of lobbying efforts from contractor associations, the bill has been stalled in committee in the Virginia Senate and will not be considered until the General Assembly's 2013 session. Nevertheless, the General Assembly's consideration of HB 1265 is a good reminder of why contractors and their lawyers need to be familiar with statutory timing requirements for notice and filing of mechanics' liens.

