Navigating the Perils of Kentucky's Mechanic's Lien Statute

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Categories:

Publications

"Mechanic's liens," or more appropriately "construction liens," are an entirely American concept, tracing back to Thomas Jefferson and James Madison's plan for encouraging the financing of construction to support the newly-created District of Columbia. Because these liens are created only by statute, and have no basis in the "common law," many courts strictly construe their provisions. That is, courts generally will not forgive a contractor or supplier's failure to comply with the letter of the various states' lien laws. Couple such an unforgiving review process with the absence of uniform lien laws among the states, and protecting one's lien rights can become a harrowing experience. While consultation with a knowledgeable attorney is always the best option, potential lien claimants also should take special care to avoid these common mistakes in Kentucky:

1. Failure to File a Preliminary Statement of Lien

Priority amongst claimants and precedence as to conveyances are always a concern for lien claimants. As a general rule, a Kentucky lien claimant's rights will relate back to the date on which it first performed work, at least as to priority versus other lien claimants. KRS § 376.010(1); *Metal Sales Mfg. Corp. v. Newton*, 12 S.W.3d 691 (Ky.Ct.App. 1999). However, the lien will not take precedence over a mortgage or "bona fide conveyance for value without notice, duly recorded or lodge for record" that was filed after the start of work but before the claim of lien. KRS § 376.010(2). What does this mean? It means that if the property owner sells the property to a new entity that did not know of the lien claim, and who acquired the property legitimately "for value," then the interests of the new owner prevail as to the later-filed lien claim, even if the contractor began work before the sale or transfer. This is not altered simply because the new owner had "notice" that the claimant was performing work.

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Potential claimants can guard against this result by taking advantage of the provision found in KRS § 376.010(2), which provides for the filing of a "preliminary statement of lien" in the office of the county clerk in the county where a project is located. If properly filed, then later purchasers or grantees cannot be said to take "without notice" and the lien claimant's precedence is preserved.

2. Failure to Correctly Calculate the "Last Date" On Which Materials or Labor Were Provided.

Nearly all states will require that a lien statement be filed within a certain number of days or months since labor or materials were "last provided." In Kentucky, a lien statement must be filed within 6 months (note: *not* just 180 days) of the date on which the claimant "ceases to labor or furnish materials." Although at first blush identification of this date might seem straightforward, this date can often be subject to considerable debate. Does corrective or remedial work count? Older Kentucky decisions such as *Drummy v. Stern*, 269 S.W.2d 198 (Ky. 1954), suggest that if necessary to complete the claimant's contractual scope of work, it will extend the deadline. However, such issues are seldom simple, and consultation with an attorney as to the proper deadline for filing the statement or notice is frequently advisable.

3. Failure to Provide the Notice of Intent to File a Lien Within the Required Period.

In Kentucky, prior to filing the actual lien statement, certain classes of claimants also are required to send a preliminary notice to the property owner. For those claimants who are not performing under a direct contract with the owner, KRS § 376.010(3) requires that a preliminary notice of intent to file a lien be sent to the owner within 120 days of last providing labor or materials. (75 days if the amount claimed is under $1,000, or on a residential project). General contractors, i.e. those who directly contract with an owner, are not required file this statement for liens on private projects. However, it is often both advisable and common practice to do so. It is also

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advisable to send the notice via certified or registered mail to later prove compliance.

4. Failure to Provide Accurate Information in the Lien Statement.

Kentucky law requires lien claimants to provide the following information in their lien statements: 1) the amount due the lien claimant, "with all just credits and set-offs known to him;" 2) a description of the property intended to be covered by the lien sufficiently accurate to identify it; 3) the name of the owner, if known; and 4) whether the materials were furnished or the labor was performed under contract with the owner or with a contractor or subcontractor. The name and address of the lien claimant must also be given. If the claimant is a corporation, the lien statement must give the name and address of the corporations' process agent, or some other address at which service of process under the Kentucky Rules of Civil Procedure may be accomplished. Last, the statement must be "subscribed and sworn to" by the person claiming the lien "or by someone in his behalf."

This list of instructions found in KRS § 376.080 at first glance may seem easy to fulfill. However, many questions and concerns frequently emerge. The claimant must first ensure that the amount due listed in the lien is accurate. A review of the account should be performed to identify any offsets or service charges that would be improper in the lien claim. Next, the property must be sufficiently identified. The best practice is to list both the street address, any common description of the property, as well as, if possible, the legal description of the property including a citation to a recorded deed. Performing a title search is advisable both to ensure that the property description is accurate as well as to confirm the owner's name.

As to the owner's name or identity, the lien claimant should take care to make sure that the "owner" entity is not leasing the property from another, or that the property has not been recently conveyed to a related entity, as property often is conveyed to a sole-purpose corporation or LLC during or soon after construction. The Kentucky Secretary of State's website can be a helpful resource in

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determining the owner's precise business name in the case of corporations and LLC's, as often an owner or contractor will do business under a name other than their true corporate identity.

Claimants also must take care to ensure that the lien statement is "subscribed and sworn to" and use these words in the statement before the notary public's signature. Lastly, although it is not required by statute for liens on private projects, lien claimants often add a statement providing the last date upon which labor or materials were furnished.

5. Failure to Fulfill the Post-Filing Requirements of the Lien Statute.

After the statement of lien is properly and timely filed, two additional deadlines remain. First, KRS § 376.080 requires that "the claimant shall send by regular mail a copy of the statement to the property owner at his last known address within seven (7) days of filing the statement with the county clerk." Notice that the statute does not require that the statement be sent via certified or registered mail. Although not required, it is advisable both to send a copy via regular mail to comply with the statute and *also* via registered or certified mail so that the claimant can secure proof of mailing the statement (and of receipt by the Owner).

Next, if the lien claim remains unpaid or is not otherwise satisfied, the claimant must file a lawsuit to enforce (foreclose on) the lien within twelve months of the date the statement was filed in the clerk's office. The lawsuit should be filed in the county in which the property is located (and, therefore, in the county in which the lien was filed). Many construction contracts require arbitration rather than litigation in court. Lien claimants should not consider the filing of an arbitration demand as fulfilling the twelve month filing deadline. Instead, it is recommended practice to file a lawsuit and reserve arbitration rights. It is critical at this stage that competent legal counsel be retained to assist the lien claimant.

6. Failure to Release the Lien Once the Claim is Satisfied.

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Recognizing that mechanic's liens are detested by Owners and frequently used as leverage against them, Kentucky provides remedies for Owners where a lien claimant fails to release its lien after its claim is satisfied. KRS § 382.365 requires that a lienholder release its lien in the county clerk's office where the lien is recorded within thirty days after the date of satisfaction. If the lienholder fails to timely release the lien, then an Owner may file a proceeding against the lienholder in either the District or Circuit Court in the county in which the property is located. If a lienholder is found to have received written notice of its failure to release its lien upon satisfaction, and lacked good cause for not releasing the lien, then while the lien remains unreleased, the claimant shall be liable to the Owner for 100 dollars per day, beginning on the fifteenth day after which the written notice was received. This amount continues to rise if the lien claimant refuses to release the lien, with the amount increasing up to as high as 500 dollars per day.

7. Failure to Investigate the Existence of a Payment Bond

Kentucky law does not mandate the posting of payment or performance bonds on private projects. However, larger construction project Owners often require their general contractors to obtain them. Unpaid subcontractors and suppliers on private projects, therefore, should inquire as to the existence of a payment bond, as such a bond would provide a second source of security for payment. Unlike some other states, Kentucky does not consider the existence of a payment bond as precluding a claimant's lien rights. The notice requirements for claims on a payment bond if not shortened in the language of the bond, and the statute of limitation for claims on the bond will not expire as quickly as with a mechanic's lien claim, meaning that claimants who have waited too long to file a mechanic's lien may still have bond rights.

Conclusion

The potential pitfalls discussed above are only a few of those awaiting contractors and suppliers attempting to preserve and

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enforce their lien rights in Kentucky. As should be evident, for lien claimants, consultation with a knowledgeable attorney frequently is the best practice, especially for larger claims. It is also advisable that the claimant not wait until the last few days before a deadline to consult an attorney, as information needed for filing a claim often takes several days to assemble.

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