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Five Frequent Fatal Mistakes of Ohio Mechanic's Lien Claimants

In these challenging economic times, getting paid has become an increasing struggle central to the continued viability of many construction businesses. For Ohio contractors and materialmen, protecting the ability to secure payment through mechanic's liens is more important than ever. A mechanic's lien serves as security upon the owner's property for the value of work performed or materials furnished to improve real property. Mechanic's liens are governed by Ohio statutes, and the process to perfect your lien rights can be confusing and daunting. The following are five major mistakes lien claimants should avoid to protect their lien rights.

No. 1 – Failure to Preserve Lien Rights. Lien claimants must take the proper steps to preserve their lien rights. In Ohio, construction projects formally start when the owner records a Notice of Commencement,[\[1\]](#) which is a document that compiles all necessary information in one convenient document for subcontractors and materialmen to rely upon to assert their lien rights. The Notice of Commencement must contain the following information:

- Legal description of the property
- Brief description of the improvement
- Name and address of the party contracting for the improvement
- Name and address of the owner of the property
- Name and address of original contractor
- Date of the first contract with the original contractor
- Name and address of lending institutions and sureties
- Name and address of the person preparing the notice and verifying affidavit[\[2\]](#)

The Notice of Commencement must be recorded in the county where the construction project is located,[\[3\]](#) posted in a conspicuous place at the project,[\[4\]](#) and served upon the original contractor.[\[5\]](#) If such steps are not taken or incorrect information is

provided in the Notice of Commencement, the property owner is liable for expenses associated with others having to obtain that information and is liable for any loss of lien rights as a result of incorrect information.

Subcontractors and materialmen should always request a copy of the Notice of Commencement from the project owner. The Owner has ten days to provide the Notice of Commencement.^[6] If a Notice of Commencement is filed, then the subcontractor or materialman should file a Notice of Furnishing on the entity designated in the Notice of Commencement.^[7] If an Owner fails to timely respond to a request for a Notice of Commencement, the time for serving a Notice of Furnishing is extended until twenty-one days after the Notice of Commencement is ultimately provided.^[8]

As a general rule, a Notice of Furnishing must be served within 21 days of the first day labor or materials are furnished to the project.^[9] Since the Notice of Furnishing relates back only 21 days from the date of service of the Notice of Furnishing, the Notice of Furnishing will only protect labor or supplies provided 21 days before the service of the Notice of Furnishing. So, the Notice of Furnishing, if filed untimely, will not protect labor or supplies provided more than 21 days before the service of the Notice of Furnishing. As a result, failure to timely serve the Notice of Furnishing may result in forfeiture of lien rights.

However, if a Notice of Commencement is not filed, subcontractors and materialmen have no obligation to file a Notice of Furnishing to preserve their lien rights. Owners and General Contractors should develop a habit of always filing a Notice of Commencement. On the other hand, subcontractors and materialmen are well-advised to always promptly file a Notice of Furnishing, regardless of whether a Notice of Commencement has been filed.

No. 2 – Failure to Timely File an Affidavit for Mechanic's Lien.

Timing is crucial for protecting lien rights. A lien claimant must be aware of two crucial factors to perfect a mechanic's lien claim: (1) the deadline for filing an Affidavit for Mechanic's Lien; and (2) calculating when the clock begins to run for the filing of an Affidavit for Mechanic's Lien. These deadlines vary depending upon the type of project involved.

On commercial projects, a claimant has 75 days from the last day materials or labor was provided to file the Affidavit for mechanic's lien.^[10] For a residential project, a claimant has 60 days from the last day materials or labor was provided.^[11] As to gas and/or oil wells, a 120 day period applies.^[12]

Determining the "last day of work", for the purposes of determining when lien rights expire, is a fact-specific determination that can vary from project to project. As a general rule, the "last day of work" occurs when the lien claimant completes the work that was required of the claimant under its contract. Thus, a contractor's last day of work occurs when its job is complete and the contractor is no longer providing labor or material. Completion of punch list work may qualify as the "last day of work", but warranty work will not. A materialman's last day of work is when the materials were delivered to the project.

Lien rights are invalidated if a claimant does not timely file an Affidavit for Mechanic's Lien.

No. 3 – Failure to Provide All Necessary Information. The Affidavit for Mechanic's Lien must include the following information: (a) the amount owed; (b) a description of the property subject to the lien; (c) the name and address of the person for whom the work was performed or the material provided; (d) the name and address of the owner; (e) the name and address of the lien claimant; and (f) the first and last dates that work was performed or supplies were furnished.^[13] The Affidavit must be filed with the local county recorder's office. An Affidavit for Mechanic's Lien will not be effective unless all the required information is included.

No. 4 – Failure to Provide Proper Notice. Lien claimants have the duty to serve the recorded lien. The Affidavit must also be served on the owner of the property within 30 days after filing with the local county recorder's office.^[14] If the owner cannot be found, a copy of the lien must be posted conspicuously on the project site within 10 days of failure of service. Failure to properly serve the lien can invalidate it.

No. 5 – Allowing the Lien to Expire. Mechanic's liens are valid for 6 years, unless a Notice to Commence Suite is served on the lien

claimant.^[15] A Notice to Commence Suit can be issued by the Owner or by the General Contractor, on behalf of the Owner. It must be served upon the person who executed the Affidavit for Mechanic's Lien either personally by the Sheriff or by certified mail. Once served, the Notice to Commence Suit must be filed with the local county recorder's office. After service, the lien claimant has 60 days to commence a lien foreclosure suit.^[16] Lien claimants must be mindful that a Notice to Commence Suit shortens the time otherwise available to file a lawsuit to foreclose a lien. Mechanic's lien rights will expire 60 days after service of a Notice to Commence Suit if a lawsuit has not been filed.

While not an exhaustive list of mistakes that can occur when trying to protect lien rights, contractors and materialmen should be vigilant in working to avoid these all too common, and potentially fatal, mistakes. Doing so will certainly go a long way to preserving contractors' mechanic's lien rights.

^[1] Ohio Revised Code (O.R.C.) § 1311.04

^[2] O.R.C. § 1311.04(B)

^[3] O.R.C. §1311.04(A)

^[4] O.R.C. § 1311.04(G)(1)

^[5] O.R.C. §1311.04(H)

^[6] O.R.C. §1311.04(D)

^[7] O.R.C. §1311.05

^[8] O.R.C. §1311.05(H)

^[9] O.R.C. §1311.05(A)

^[10] O.R.C. §1311.06(B)(3)

^[11] O.R.C. §1311.06(B)(1)

^[12] O.R.C. §1311.06(B)(2)

^[13] O.R.C. §1311.06

^[14] O.R.C. §1311.07

^[15] O.R.C. §1311.13(C)

[16]O.R.C. §1311.11(A)&(B)

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