



STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

CONSTRUCTION LIEN LAW

MARCH 2009

current as of 12/31/09

Marna L. Brown, Esq., Counsel
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: mlb@njlrc.org
Web site: <http://www.njlrc.org>

Introduction

Title 2A:44A-1 through 38, known as the Construction Lien Law, became effective in 1994, replacing the old Mechanic's Lien Law, which, up until that time, had applied to non-public construction projects. The purpose of the law is twofold: first, to enable private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a lien filing process, and second, to protect property owners from exposure to double payment for work or materials for which they have already paid. Thus, the law outlines the procedures for filing and perfecting the lien claim, establishing the amount of the lien claim, and then enforcing the lien. Considered remedial in nature by the legislature, the Construction Lien Law has been construed by the courts so as to achieve its remedial purpose.

Since its enactment, the law has been the subject of litigation concerning the meaning and application of key concepts -- such as the lien fund and the lien claim -- especially where the contractor has ceased working on the project, having gone out of business or filed for bankruptcy prior to contract completion. Although court holdings have further clarified and enhanced the statute, court dicta underscore the need for additional clarity. Attorneys are troubled by what they perceive as contradictory interpretations of the statute by federal and state courts, particularly in the area of residential construction contracts.

As the project progressed, the Commission learned that at the time of the statute's enactment, the initial drafters contemplated further revision would be necessary. The American Arbitration Association advised that construction industry claimants were confounded by the current law. The Commission further discovered that lower court judges, attempting to apply recent decisions of higher courts, wanted clarification. All seem to agree that revision is long overdue.

The proposed revision focuses on several areas. The concept of "residential construction" continues to be unclear. The term "residential construction"-- used interchangeably with the terms "residential housing construction" and "home construction" in current section 2A:44A-21 -- is not defined. Potential claimants providing work or services for multi-use and multi-dwelling properties are unsure whether to invoke the provisions that pertain to residential properties. If invoked, those provisions -- 2A:44A-18, 2A:44A-19, 2A:44A-20 and 2A:44A-21 -- do not guide claimants comfortably through the process of filing and perfecting residential construction contract lien claims for work on real property developments such as condominiums and cooperatives, especially work on common elements or commonly shared structures or areas. The role of community associations in the lien claim process is not specified. Lien claimants are uncertain against whom to file lien claims and how to serve them. The parameters of the arbitration proceeding and the obligations of the arbitrator are confusing. Thus, addressing concerns regarding the statute's residential construction provisions is a primary focus of the revision.

Other important definitions are absent from the law. Although the term “claimant” is defined, the term “lien claim” is not. The term “lien fund”, though essential to application of the law, also is not defined. The definition of “contract” is inconsistent with current case law. Even the definition of “filing” is problematic. The current definition appears to intend that a document, in order to be “filed”, must be *both* lodged for record and indexed. But this definition is unsatisfactory to many attorneys because the date a document lodged for record is actually indexed is not within the filer’s control. As a result, section 2A:44A-2 (Definitions) also is a necessary part of the revision.

Some provisions of the statute are awkward and imprecise. Other provisions that would improve application of the statute are nonexistent. For example, the formula for calculating the “lien fund” in section 2A:44A-10 is densely worded and difficult to understand. A lien claimant’s successful application of the statute, however, is dependent upon proper use of this formula. At the same time, the method by which the “lien fund” is to be distributed to multiple lien claimants, on a pro rata basis, is not explained in the current statute. No provisions even attempt to address this important issue.

Other provisions conflict with construction industry practice and are not workable or desirable. The time requirements for filing a residential construction lien claim illustrate this problem.

Every construction lien claim, whether residential or nonresidential in nature, must be filed within 90 days after the last work, services, material or equipment is provided for which the payment is claimed. For claimants seeking to place liens on residential real estate, however, a potential claimant must first file a Notice of Unpaid Balance and Right to File Lien (“NUB”), which is a condition precedent to filing any lien arising under a residential construction contract. Unless the parties have agreed in writing to an alternative dispute resolution mechanism, the claimant must then also serve, simultaneously with the service of the NUB, a demand for arbitration, satisfy American Arbitration Association procedures for instituting an expedited proceeding before an arbitrator, and then arbitrate the claim. The arbitrator must then determine within 30 days whether the lien claim is valid. Unless the potential claimant in a residential construction context prevails in the arbitration or alternative dispute resolution, a lien claim may not be filed.

Filing the NUB, serving the Demand for Arbitration and obtaining an arbitrator’s determination regarding the validity of the lien claim all must be accomplished within the same 90-day time period afforded the nonresidential construction lien claimant. This creates obvious time constraints for the residential construction lien claimant that cannot easily be met. A potential claimant also may wait too long to file the NUB or serve the arbitration demand only to discover that the lien claim is time-barred. Thus, the current act does not set out realistic time limitations for each step in the process of filing a lien claim for residential construction.

Provisions adapted or carried over from the old Mechanics Lien Law are ambiguous or confusing in the context of the Construction Lien Law. For example,

sections 2A:44A-10 and 2A:44A-22 both discuss mortgage priority but neither refers to the other nor is one easily distinguishable from the other in application.

Finally, commenters express frustration with the current form of lien claim, the process for amending a lien claim, the inconsistency of arbitration awards, and the lack of a comprehensive mechanism to address failure to discharge the lien once the claim is paid or satisfied.

The Commission addresses these and other concerns by (a) clarifying and adding defined terms, especially pertaining to the meaning of “residential”; (b) clarifying (and in some cases rearranging) provisions for the filing and amending of the lien claim and for the calculation, distribution and enforcement of the lien fund (new sections 2A:44A-9.1, 2A:44A-23, and 2A:44A-24 for example, are also added); (c) amplifying provisions for discharging a satisfied lien claim; (d) adopting court pronouncements regarding the concepts of contract price, lien fund and lien claim; (e) further defining the arbitrator’s role, and (f) modifying and adding time limits for filing and perfecting residential construction contract lien claims. The Commission also revises some language simply to make it easier for participants in the construction industry to use the law. The changes enhance application of the act and make clearer the procedures to be followed in order to process and perfect a construction lien claim.

The most significant changes from the current law are set forth below:

1. 2A:44A-2. - Definitions. The terms “lien claim”, “lien fund” and “community association” are now defined for the first time. Rather than refer to the meaning of person “as defined in R.S. 1:1-2” (which appears in the current definition of “claimant”), “person” is now its own defined term. The meaning of residential construction has been clarified by (i) revision of the existing definitions of “residential construction contract” and “residential purchase agreement”, and (ii) addition of the following new defined terms: “dwelling”, “real property development”, “residential construction”, and “residential unit”.

The definition of “filing” has been modified to address practical concerns, distinguishing “lodging for record”, and making a distinction, in section 2A:44A-6, for purposes of enforcement of the lien claim between parties within the construction chain with notice of the claim and third parties outside the construction chain without notice of the claim. In addition, the definition of “contract” now provides for a signature “by the party against whom the lien claim has been asserted” and also includes delivery slips that refer to a specific site or project where the materials are delivered or used.

2. 2A:44A-3. – Entitlement to lien for work, services, material or equipment provided pursuant to contract. A distinction is now made between a lien for work and services provided as part of the common elements or common areas of a residential or nonresidential property development and a lien for work and services provided for the unit itself. The former lien attaches to the interest of the owner in the property being developed but not to the unit owner’s interest in the real property. A lien attaches to the

unit owner's interest only for work and services provided within or as part of that unit. This section now also distinguishes liens filed against owners from those filed against community associations for work performed as part of the common elements of a real property development. The circumstances under which a landlord or other party with an interest in the property may be subject to a lien for improvements to the real property made by a tenant are now clarified. Finally, current 2A:44A-19 is now merged into this section.

3. **2A:44A-6. – Filing of lien claim; requirements.** This section is revised substantially to make the lien claim filing procedure easier to understand. The distinction between “filing” and “lodging for record” for purposes of enforceability of the lien is now part of this section. In order to provide sufficient time to comply with the procedures set forth in section 2A:44A-21, the time frame for the filing of residential construction contract lien claims also is extended to 120 days.

4. **2A:44A-7. – Mailing of lien claim; proof of services.** The procedure for serving the lien claim is now clearer and more consistent with industry practice.

5. **2A:44A-8. – Construction lien claim; form.** The proposed lien claim form is based on the form in current section 2A:44A-8, but designed to be easier to understand, more relevant to industry practice and more useful for its intended purpose.

6. **2A:44A-9.1. – Relationship to lien fund, maximum liability; impermissible reductions of lien fund.** This section is entirely new. In plain language, the section now incorporates the formula for calculating the lien fund (excised from current section 2A:44A-10) and adopts recent court determinations to explain what may be deducted from the lien fund. This section is intended to create a better understanding of the relationship between lien claims and the lien fund and how the lien fund is calculated.

7. **2A:44A-10. - Attachment of lien claim; priority of bona fide purchasers and other liens; maximum liability.** This section now deletes any reference to the lien fund calculation (that calculation has been excised, revised and incorporated into the new section 2A:44A-9.1), focusing instead on attachment of the lien and the priority of first recorded interests and liens affecting real property. Reference to section 2A:44A-22, which also pertains to mortgage priority, is also included. The modified language is consistent with actual construction lien practice.

8. **2A:44A-11. – Amendment of lien claim, form.** This section now illustrates those circumstances when a lien claim would be amended, clarifying that an amendment to cure a violation of section 2A:44A-15 is impermissible.

9. **2A:44A-13. – Construction lien book; construction lien index book; filing and notation fees.** Language is clarified and reference made to N.J.S. 22A:2-29 where fee amounts are already stated. Those fee amounts also have been updated.

10. **2A:44A-16 – Joinder of party defendants; defenses.** Most of this section is now incorporated into a new section 2A:44A-24. Hence, current section 2A:44A-16 has been deleted from the proposed revised statute.

11. **2A:44A-19. – Attachment of lien to interest of owner for work performed in a condominium or cooperative unit.** Subsection a., modified to comport with the new definition of “residential unit”, and subsection b. of this section are both now incorporated into the revised section 2A:44A-3. Hence, current section 2A:44A-19 has been deleted from the proposed revised statute.

12. **2A:44A-20. – Notice of unpaid balance; right to file lien; form.** This section now includes a form of NUB that comports with the changes made to section 2A:44A-8 and the form of lien claim. Other language is now consistent with proposed changes to section 2A:44A-10.

13. **2A:44A-21. – Legislative findings; additional requirements for filing of lien on residential construction.** Since the time frame for lodging for record residential lien claims now is extended to 120 days, the time frame for lodging for record the NUB has also changed; the NUB now must be lodged for record within 60 days from the last date of provision of work, services, material or equipment for which payment is claimed. This provision now describes the documents that are served along with service of the demand for arbitration and makes clear the time frame for completion of the arbitration. This section also modifies the types of determinations that the arbitrator must make and adds provisions that seek to avoid the problems associated with multiple, inconsistent arbitrations by (i) urging one arbitrator to determine all related claims and (ii) providing for the consolidation of multiple arbitrations into a single proceeding at the arbitrator’s discretion.

14. **2A:44A-22. – Priority of mortgages over liens.** This provision now distinguishes section 2A:44A-10, which applies to mortgages first recorded, from section 2A:44A-22, which applies to mortgages that are recorded after the lien claim is filed. The section also now applies to the advancement of funds required by mortgage loan closings, such as pre-paid taxes and interest.

15. **2A:44A-23. – Payment of lien claims; distribution of proceeds.** This proposed new section, a blend, in part, of the current sections 2A:44A-23 and 2A:44A-28, sets forth the process by which lien claims are paid out pro rata from the lien fund, not addressed in the current statute. As a result, section 2A:44A-28 is unnecessary and therefore deleted entirely from the statute.

16. **2A:44A-24 – Suit to enforce lien claim.** This proposed section is entirely new and replaces the current **Judgment; filing and content of statement** section. Sections 2A:44A-25, 2A:44A-26, 2A:44A-28 and 2A:44A-29 have been modified or eliminated accordingly. Section 2A:44A-16, pertaining to joinder, has also been incorporated into this section and consequently deleted entirely from the proposed revised statute.

17. **2A:44A-25. – Writs of execution; 2A:44A-26 – Special writs of execution; sale and conveyance of land; 2A:44A-28 – Proceeds of sale; distribution.** These existing sections are deleted in the revision because of the proposed changes to sections 2A:44A-23 and 2A:44A-24.

18. **2A:44A-30. – Filing of certificate to discharge lien claim of record.** This section now includes a summary proceeding for discharging a lien claim and imposes consequences for not canceling or discharging a lis pendens upon discharge of the claim. New proposed subsection d. also now enables an owner within thirteen months after the date of the lien claim, and upon the filing of an appropriate affidavit, to obtain a discharge of a lien claim that has been fully paid and satisfied.

19. **2A:44A-31.1. – Bond; form.** This section is entirely new and provides a form of bond to be used in order to discharge the construction lien.

20. **2A:44A-33. – Lien claim; discharge of record.** This section now enables the county clerk to discharge a fully paid and satisfied lien claim, under specific circumstances, upon receipt of the owner's submission of the appropriate affidavit.

Modifications to section descriptors are also recommended throughout the statute as needed.

2A:44A-1. Short title –

This act shall be known and may be cited as the “Construction Lien Law.”

COMMENT

No changes have been made to this section of the current law.

2A:44A-2. Definitions

“Claimant” means a person, ~~as defined in R.S. 1:1-2,~~ having the right to file a lien claim on real property pursuant to ~~the provisions of this act.~~

COMMENT

The current law does not define “person” but refers to it within the definition of “claimant.” Since the word “person” is used throughout the statute, it is now separately defined.

“Contract” means any agreement, or amendment thereto, in writing, signed by the party against whom the lien claim is asserted and evidencing the respective responsibilities of the contracting parties, including but not limited to price or other consideration to be paid, and a description of the benefit or improvement to the real property subject to lien. ~~which, [I]n the case of a supplier, “contract” shall include a delivery or order slip referring to the site or project to which materials have been delivered or where they were used and signed by the party against whom the lien claim is asserted or that party’s authorized agent, owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them. “The~~

party against whom the lien claim is asserted” is the party in direct privity of contract with the party asserting the lien claim. A writing that is “signed” bears a mark or symbol intended to authenticate it.

COMMENT

The new language adds formality to the definition of “contract” by requiring essential terms, such as price, or where appropriate, evidence of benefit or improvement to the property subject to lien. This is especially important since the statute affects property rights on a unilateral basis. The contract must be “signed” in accordance with the decision in *Gallo v. Sphere Construction Corp.*, 293 N.J. Super. 558 (Ch. Div. 1996.) The additional language regarding separate delivery slips incorporates comments by the court in *Legge Industries v. Joseph Kushner Hebrew Academy*, 333 N.J. Super. 537 (App. Div. 2000), consistent with construction industry practice, wherein deliveries are often “signed for” by authorized representatives of the parties in the construction chain and materials may be used at a construction site though delivered elsewhere.

“Contract price” means the amount specified in a contract for the provision of work, services, material or equipment.

COMMENT

No changes have been made to this section of the current law.

“Community association” means a condominium association, a homeowners’ association, a cooperative association, or any other entity created to administer or manage the common elements and facilities of a real property development that, directly or through an authorized agent, enters into a contract for improvement of the real property.

COMMENT

This definition is new. It has been added here because of modifications to section 2A:44A-3 which will now affect many other sections of the statute.

“Contractor” means any person in direct privity of contract with the owner of real property, or with a community association in accordance with section 2A:44A-3, for improvements ~~thereto~~ to the real property. A construction manager who enters into a single contract with an owner or community association for the performance of all construction work within the scope of a construction manager’s contract, a construction manager who enters into a subcontract, or a construction manager who is designated as an owner’s or community association’s agent without entering into a subcontract is also a “contractor” for purposes of this act. A licensed architect, engineer or land surveyor or certified landscape architect who is not a salaried employee of the contractor or the owner or community association, performing professional services related to the improvement of property in direct contract with the property owner shall be considered a “contractor” for the purposes of this act.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“County clerk” means the clerk of the county in which real property to be improved is situated.

COMMENT

No changes have been made to this section of the current law.

“Day” means a calendar day unless otherwise designated.

COMMENT

This definition is new. It is included for clarification only and to accommodate concerns of the American Arbitration Association and attorneys.

“Dwelling” means a one-, two- or three-family residence that is freestanding or shares a party wall without common ownership interest in that party wall. A dwelling may be part of a real property development.

COMMENT

This definition is new. The term “dwelling” is not defined in current section 2A:44A-2 although referred to in the current definitions of “residential construction contract” and “residential purchase agreement.” This definition, along with the new definition of “residential unit”, (see later in this section) attempts to clarify what is included within the meaning of “residential”.

“Equipment” means any machinery or other apparatus, including rental equipment delivered to the site to be improved or used on the site to be improved, whether for incorporation in the improved real property or for use in the construction of the improvement of the real property ~~but not incorporated therein~~. A lien for equipment shall arise only for equipment used on site for the improvement of real property, including equipment installed in the improved real property. In the case of rental equipment, the amount of any lien shall be limited to the rental rates as set forth in the rental contract.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

“Filing” means the (i) lodging for record and (ii) the indexing of the documents authorized to be filed or recorded pursuant to this act in the office of the county clerk in the county where the property subject to the lien is located, or, in the case of real property located in more than one county, in the office of the county clerk of each such county. A document is “lodged for record” if it is delivered to the county clerk and the clerk marks the document with a date and time stamp or other mark indicating the date and time received.

COMMENT

The additional language clarifies that the lien claim form or any other document authorized to be filed by the statute is to be filed where the property subject to lien is located. The revision also defines the terms “lodged for record” so as to make clearer both the definition of “filing” and new section 2A:44A-6 which makes a distinction between “filing” and “lodging for record” for purposes of enforcement of the lien claim.

“Improvement” means any actual or proposed physical changes to real property ~~by resulting from the provision of work, or services or material by a contractor, or subcontractor, or supplier pursuant to the terms of a contract~~, whether or not such physical change is undertaken, and includes the construction, reconstruction, alteration, repair, renovation, demolition or removal of any building or structure, any addition to a building or structure, or any construction or fixture necessary or appurtenant to a building or structure for use in conjunction therewith. “Improvement” includes excavation, digging, drilling, drainage, dredging, filling, irrigation, land clearance, grading or landscaping. “Improvement” shall not include the mining of minerals or removal of timber, gravel, soil, or sod which is not integral to or necessitated by the improvement to real property. “Improvement” shall not include public works or improvements to real

property contracted for and awarded by a public entity. Any work or services requiring a license for performance including, but not limited to, architectural, engineering, plumbing or electrical construction, shall not constitute an improvement unless performed by a licensed claimant.

COMMENT

The term “renovation” has been added to the definition of improvement. The current law was not consistent with the language in section 2A:44A-21, which speaks of “renovations” to residential property. Also the word “changes” was made singular and references to “material” and “suppliers” were added.

“Interest in real property” means any ownership, possessory security or other enforceable interest, including, but not limited to, fee title, easement rights, covenants or restrictions, leases and mortgages.

COMMENT

No changes have been made to this section of the current law.

“Lien” or “construction lien” means a lien on the owner’s interest in the real property arising pursuant to ~~the provisions of this act.~~

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

“Lien claim” means a claim, by a claimant, for money for the value of work, services, material or equipment furnished in accordance with a contract and based upon the contract price and any amendments thereto, that has been secured by a lien pursuant to this act.

COMMENT

This definition is new. The current law does not define “lien claim” even though the word “claimant” is defined as a ‘person . . . having the right to file a lien claim on real property pursuant to the provisions of this act” and the term “lien claim” is used in many sections of the act.

“Lien fund” means the pool of money from which one or more lien claims may be paid. The amount of the lien fund shall not exceed the maximum amount for which an owner can be liable. The amount of the lien that attaches to the owner’s interest in the real property cannot exceed the lien fund.

COMMENT

This definition is new. The current law does not define “lien fund” even though the term is expressed or implied throughout the act.

“Material” means any goods delivered to, or used on the site to be improved, for incorporation in the improved real property, or for consumption as normal waste in construction operations; or for use on site in the construction or operation of equipment used in the improvement of the real property but not incorporated therein. The term “material” does not include fuel provided for use in motor vehicles or equipment delivered to or used on the site to be improved.

COMMENT

No changes have been made to this section of the current law.

“Mortgage” means a loan which is secured by a lien on real property.

COMMENT

No changes have been made to this section of the current law.

“Owner” or “owner of real property” means any person, including a tenant, with an ~~estate or~~ interest in real property who personally or through an authorized agent enters into a contract for improvement of the real property. “Owner” or “owner of real property” shall not include a “community association” that holds record title to real property or has an interest in real property.

COMMENT

This section has been modified to exclude community associations holding record title to real property from the definition of “owner”. Community associations, in accordance with revised sections 2A:44A-3 and 2A:44A-24, cannot sell property commonly shared even if such property is titled to the community association itself and not to the property owners who share it.

“Person” means an individual, corporation, company, association, society, firm, limited liability company, limited liability partnership, partnership, joint stock company or any other legal entity, unless restricted by the context to one or some of the above.

COMMENT

This definition was extracted from the current definition of “claimant” and updated.

“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

COMMENT

No changes have been made to this section of the current law.

“Real property development” means all forms of residential and non-residential real property development now existing or yet to be developed including but not limited to a condominium subject to P.L. 1969, c.257 (C. 46:8B-1 et seq.), a housing cooperative subject to P.L.1987, c.381 (C. 46:8D-1 et seq.), a fee simple townhouse development, a horizontal property regime as defined in section 2 of P.L. 1963, c. 168 (C.46:8A-2), and a planned unit development as defined in section 3.3 of P.L. 1975, c.291 (C.40:55D-6).

COMMENT

This definition is new but adopts language from the current definitions of “residential construction contract” and “residential purchase agreement.” The current law does not define “real property development”, although references to different types of developments appear in multiple sections of the current law. The definition includes specific types of developments referenced in multiple sections of the current law while allowing for other forms of property development yet to be created.

“Residential construction” also referred to as “residential housing construction” or “home construction” means construction of or improvement to a dwelling, or dwellings, or any portion thereof, or any residential unit, or units or any portion thereof. In the case of a real property development, “residential construction” or “residential housing construction” or “home construction” also includes all offsite and onsite infrastructure and sitework improvements required by a residential construction contract , master deed, or other document, the common elements of the development (which may also include by definition the offsite and onsite infrastructure and sitework improvements), and those areas or buildings commonly shared.

COMMENT

This definition is new. Notably, section 2A:44A-21 a. references three different sets of terms, all intended to have the same meaning: “construction of residential housing”, “home construction” and “residential construction”. The addition of this new definition along with the new definitions of “dwelling” and “residential unit” (and the revised definitions of “residential construction contract” and “residential purchase agreement”) together enhance the meaning and application of the residential construction provisions of the statute. All offsite and onsite infrastructure and sitework improvements are now included within the definition of “residential construction.”

"Residential construction contract" means ~~any written~~ a contract for the construction of or improvement to a one-or-two-family dwelling, or dwellings, or any portion thereof, of the dwelling, which shall include any or a residential unit, or units or any portion thereof in a real property development, in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6).

COMMENT

This language now better reflects the legislative intent language in section 2A:44A-21, which is consistent with the holding in *In re Kara Homes*, 363 B.R. 399 (Bankr. D. N.J. 2007), especially with reference to the protections noted (*i.e.*, New Home Warranty and Builders' Registration Act). Also, the current law uses the words “written contract”. The word “written” has been eliminated since the word “contract” is already defined as “any agreement, or amendment thereto, in writing.” Finally, the language is less cluttered now that “dwelling” and “residential unit” have been separately defined.

"Residential purchase agreement" means a ~~written~~ contract between a buyer and a seller for the purchase of a one-or-two-family dwelling or dwellings, or any residential unit or units in a real property development, in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6).

COMMENT

The current statute uses the words “written contract”. The word “written” has been eliminated since the word “contract” is already defined as “any agreement, or amendment thereto, in writing . . .” The words “or dwellings” and “or units” are also added, consistent with the holding in *In re Kara Homes*.

“Residential unit” means a unit in a real property development designed to be transferred or sold for use as a residence, and the design evidenced by a document, such as a master deed or declaration, recorded with the county clerk in the county where the real property is located, or a public offering statement filed with the Department of Community Affairs. “Residential unit” includes a unit designed to be transferred or sold for use as a residence that is part of a multi-use or “mixed use” development project. “Residential unit” does not include a unit designed for rental purposes or a unit designed to be transferred or sold for non-residential use.

COMMENT

This definition is new. The current law does not define “residential unit” even though the term is used elsewhere in the definitions and text of the statute. The above definition makes the touchstone for ascertaining whether a development of units is designed for residential use either the recording of a master deed or declaration with the county clerk or the filing of a public offering statement with the Department of Community Affairs. As a consequence, a party may be held to have had constructive notice that certain real property developments are residential in nature. A “dwelling” may be part of a real property development, as its definition indicates.

The definition also expressly excludes a residential unit designed for rental use such as a rental unit in an apartment building. The intent of these modifications is to make the definitions of “residential construction contract” and “residential construction” (set forth above) more concise.

“Services” - means professional services performed by a licensed architect, engineer, ~~or~~ land surveyor, or certified landscape architect, who is not a salaried employee of the contractor, a subcontractor or the owner and who is in direct privity of contract with the owner for the preparation of plans, documents, studies, or the provision of other services by a licensed architect, engineer or land surveyor prepared in connection with a ~~proposed or an actual physical change~~ improvement to real property, whether or not such ~~physical change~~ improvement is undertaken.

COMMENT

The term “improvement” replaces “proposed or an actual physical change” because that term is already defined in the statute to include proposed or actual physical change.

“State” means the State of New Jersey and any office, department, division, bureau, board, commission or agency of the State.

COMMENT

No changes have been made to this section of the current law.

“Subcontractor” means any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor.

COMMENT

No changes have been made to this section of the current law.

“Supplier” means any supplier of material or equipment, including rental equipment, having a direct privity of contract with an owner, community association, contractor or subcontractor in direct privity of contract with a contractor. The term “supplier” shall not include a person who supplies fuel for use in motor vehicles or equipment delivered to or used on the site to be improved or a seller of personal property who has a security agreement providing a right to perfect either a security interest pursuant to Title 12A ~~of the New Jersey Statutes~~ or a lien against the motor vehicle pursuant to applicable law.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“Work” means any activity, including but not limited to labor, performed in connection with the improvement of real property. The term “work” includes

architectural, engineering, or surveying services provided by salaried employees of a contractor or subcontractor, as part of the work of the contractor or subcontractor, provided, however, that the right to file a lien claim for those services shall be limited to the contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law except the addition of the words “but not limited to” after the word “including”. The Commission, requested by a security guard services provider to specifically include security guard services within the definition of “work” and “services”, determined that such a request raised a policy issue best left to the Legislature. That issue is whether lien rights should exist under the statute for work that does not involve or impact, directly, the design, planning or construction stages of a project, but is collateral to the project, such as the services of security guards, insurers, accountants, attorneys and other similar work. If the definition of “work” were broadened to include those collateral work and service providers currently excluded from the protections of the statute, such lien rights would exist for such collateral services.

2A:44A-3. Entitlement to lien for work, services, material or equipment provided pursuant to contract

a. Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price, subject to ~~the provisions of sections 9 and 10 2A:44A-6; 2A:44A-9, 2A:44A-9.1 and 2A:44A-10 of this act.~~ The lien shall attach to the interest of the owner or unit owner in the real property, or filed against the community association, subject to in accordance with this section.

b. For purposes of this section, (i) “interest of the owner of the real property development” includes interest in any residential or nonresidential units not yet sold or transferred and the proportionate undivided interests in the common elements attributable to those units; (ii) “unit owner” means an owner of an interest in a residential or nonresidential unit who is not a developer of the property and acquires the unit after the master deed or master declaration is recorded, or after the public offering statement is filed with the Department of Community Affairs; and (iii) “interest of the unit owner” includes the proportionate undivided interests in the common elements of the real property development.

c. In the case of a condominium, notwithstanding the Condominium Act, or in the case of any other real property development with common elements or common areas or facilities, if the contract of improvement is (i) with the owner of the real property development, then the lien shall attach to the interest of such owner, but if the contract of improvement is (ii) with the community association, the lien claim shall be filed against the community association but shall not attach to any real property. In either case, if the work, services, material or equipment are performed or furnished as part of the common elements or facilities of a real property development, the lien shall not attach to the interest of the unit owner.

d. If the work, services, material or equipment are performed or furnished solely within or as part of a residential or nonresidential unit, the lien shall attach only to the interest of the unit owner.

e. If a tenant contracts for improvement of the real property, the lien shall attach to the leasehold estate of the tenant and to the interest in the property of any person who (i) has expressly authorized the contract for improvement ~~has not been authorized in writing signed by the person against whom the lien claim is asserted, which writing provides that the person's interest is subject to a lien for this improvement, by the owner of a fee simple interest in the improved real property,~~ or (ii) has paid, or agreed in writing to pay, the majority of the cost of the improvement; or (iii) is a party to the lease or sublease that created the leasehold interest of the tenant and the lease or sublease provides that the person's interest is subject to a lien for the improvement. ~~the lien shall attach only to the leasehold interest of the tenant.~~

f. If an interest in real property is lawfully conveyed after work, services, material or equipment are performed or furnished but before a lien attaches, the lien shall attach only to the interest retained by the owner or unit owner or community association, as the case may be, who contracted for the work, services, material or equipment and not to the interest previously conveyed.

g. Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.

COMMENT

New subsection b. defines relevant terms now included within this section. New subsections c. and d. explain that the right to lien for the value of work performed for the common elements of any real property development cannot in any case attach to the individual unit owners' interests once the development has been built and ownership of the residential or nonresidential units transferred to purchasers except to the extent that there is real property remaining in the hands of the original developer. In the case of work or services performed as part of the common elements of a real property development, the revised language provides that a lien may be filed against the owner of the real property development or against a community association depending upon who contracts for the work or services performed. A lien may attach to the interest of a residential or nonresidential unit owner, however, *only* for the value of work performed solely within or as part of that unit. Thus, subsection a. of current section 2A:44A-19 is incorporated into this new subsection d.

The revision to subsection e. attempts to counter the effect of the court holding in *Cherry Hill Self Storage, LLC v. Racanelli Construction Company, Inc.* WL 1756914 (App. Div. 2007), which required the landlord to authorize in writing a contract for improvement by a tenant to leasehold property even though the lease provided that the tenant was permitted to contract to have the work done, the landlord was required to contribute to the work to be done in the form of a rent credit, and the landlord had the right to compel the tenant to make certain modifications to the building plans. In practice, the lease may not provide that the landlord approve each and every improvement proposed by the tenant. The tenant's ability to obtain written authorization for a proposed improvement in a timely fashion often may not be possible. The landlord, however, should not be obligated to bear the burden of the lien if the landlord has done nothing more than sign a lease that contemplates a tenant improvement. The proposed modification in subsection e. attempts to address those instances where the lien should attach to any other interest in addition to the leasehold interest.

New subsection f. incorporates language taken from current section 2A:44A-19 b., modified slightly, and incorporated here.

2A:44A-4. Attachment of liens for improvements

Liens for the following improvements shall attach to real property only in the manner herein prescribed. In the case of an improvement:

a. Involving a dock, wharf, pier, bulkhead, return, jetty, piling, groin, boardwalk or pipeline above, on or below lands under waters within the State's jurisdiction, the lien shall be on the improvements together with the contracting owner's interest in the lots of land in front of or upon which the improvements are constructed and any interest of the contracting owner of the land in the land or waters in front of the land;

b. Involving removal of a building or structure or part of a building or structure from its situs and its relocation on other land, the lien shall be on the contracting owner's interest in the improved real property on which the building or structure has been relocated;

c. Involving excavation, drainage, dredging, landfill, irrigation work, construction of banks, making of channels, grading, filling, landscaping or the planting of any shrubs, trees or other nursery products, the lien shall be on the land to which the improvements are made, and shall not be upon the adjoining lands directly or indirectly benefited from the improvements.

COMMENT

No changes have been made to this section of the current law.

2A:44A-5. Prohibited liens and claims

No liens shall attach nor shall a lien claim be filed:

a. For materials that have been furnished or delivered subject to a security agreement which has been entered into pursuant to Chapter 9 of Title 12A ~~of the New Jersey Statutes~~ (N.J.S. 12A:9-101 ~~et seq.~~ *et seq.*);

b. For public works or improvements to real property contracted for and awarded by a public entity; provided, however, that nothing herein shall affect any right or remedy established pursuant to the "municipal mechanic's lien law", N.J.S. 2A:44-125 ~~et seq.~~ *et seq.*;

c. For work, services, material or equipment furnished pursuant to a residential construction contract unless there is strict compliance with sections ~~20 and 21~~ 2A:44A-20 and 2A:44A-21 ~~of this act.~~

COMMENT

The revision replaces references to sections of the act with references to the title and section numbers. It also italicizes references to the abbreviation for the Latin *et sequens*.

2A:44A-6. Filing of lien claim; requirements

~~a. A lien claim shall be signed, acknowledged and verified by oath of the claimant or, in the case of a partnership or corporation, a partner or duly authorized officer thereof, and filed with the county clerk not later than 90 days following the date the last work,~~

~~services, material or equipment was provided for which payment is claimed. No lien shall attach, or be enforceable under the provisions of this act and, in the case of a residential construction contract, compliance with sections 20 and 21 of this act, unless the lien claim is filed in the form, manner and within the time provided by this section and section 8 of this act, and a copy thereof served on the owner and, if any, the contractor and the subcontractor, against whom the claim is asserted, pursuant to section 7 of this act.~~

a. A contractor, subcontractor or supplier entitled to file a lien pursuant to section 2A:44A-3 shall do so as set forth in subsections (1) and (2).

(1). The lien claim form as prescribed by section 2A:44A-8 shall be signed acknowledged and verified by oath of the claimant setting forth (i) the specific work or services performed, or material or equipment provided pursuant to contract; and (ii). the claimant's identity and contractual relationship with the owner or community association and other known parties in the construction chain.

(2). In all cases except those involving a residential construction contract, the lien claim form shall then be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed. In the case of a residential construction contract, the lien claim form shall be lodged for record, as required by section 2A:44A-21 b.(8), not later than 10 days after receipt by the claimant of the arbitrator's determination, and within 120 days following the date the last work, services, material or equipment was provided for which payment is claimed. If requested, at the time of lodging for record the clerk shall provide a copy of the lien claim form marked with a date and time received.

b. No lien shall attach, or be enforceable under this act unless the lien claim or other document permitted to be filed under this act is (i) filed in the manner and form provided by this section and section 2A:44A-8; and (ii) a copy thereof served in accordance with section 2A:44A-7, except that every document lodged for record that satisfies the requirements of this section, even if not yet filed, shall be enforceable against parties with notice of the document. A document must be first filed, however, in order to be enforceable against third parties without notice of the document, including but not limited to an owner, bona fide purchaser, mortgagee, or grantee of an easement, lessee or a grantee of any other interest in real estate.

c. In the case of a residential construction contract the lien claim must also comply with sections 2A:44A-20 and 2A:44A-21.

d. For purposes of this act, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant's contract shall not be used to determine the last day that work, services, material or equipment was provided.

COMMENT

The revisions attempt to clarify the current law, incorporate recent court pronouncements, and accommodate the needs of residential construction contract claimants. These claimants need more time to file claims because of the requirements prior to filing the lien, *i.e.*, the filing of a Notice of Unpaid Balance and Right to File Lien (NUB), the service of a demand for arbitration with the American Arbitration

Association, the arbitration procedure itself, and the determination by the arbitrator of whether the lien is valid.

The current law asks the reader to file a lien claim form with insufficient direction or explanation. New subsection a. attempts to provide such direction. New subsection b. also explains that the act of lodging a lien claim for record (or a NUB or amended lien claim) preserves the enforceability of the lien claim or other document as against parties with notice of the claim so long as the document satisfies the timeframe, form of lien claim and service requirements of the statute. However, a document must be filed (which includes indexing) in order for it to be effective as to third parties.

2A:44A-7. Mailing of lien claim; proof of service

a. Within 10 ~~business~~ days following the ~~filing~~ lodging for record of a lien claim, the claimant shall, ~~by personal service or registered or certified mail, return receipt requested, postage prepaid, serve on the owner, or community association in accordance with section 2A:44A-3, and, if any, the contractor and subcontractor against whom the claim is asserted, or mail a copy of the completed and signed lien claim substantially in the form as prescribed in by section 8 2A:44A-8 of the act and marked "received for filing" or a similar stamp with a date and time or other mark indicating the date and time received by the county clerk. Service shall be by personal service as prescribed by the Rules Governing the Courts of the State of New Jersey or by (i) simultaneous registered or certified mail or commercial courier whose regular business is delivery service and (ii) ordinary mail addressed to the last known business or residence address or place of residence of the owner or community association, and, if any, of the contractor and the or subcontractor, against whom the claim is asserted. Proof of timely mailing shall satisfy the requirement of service of the lien claim. A lien claim served upon a community association need not be served upon individual "unit owners" as defined in section 2A:44A-3.~~

b. The service of the lien claim provided for in this section shall be a condition precedent to enforcement of the lien; however, the service of the lien claim outside the prescribed time period shall not preclude enforceability unless the party not timely served proves by a preponderance of the evidence that the late service has materially prejudiced its position. Disbursement of funds by the owner, community association, a contractor or subcontractor who has not been properly served, or the creation or conveyance of an interest in real property by ~~the an~~ owner who has not been properly served, ~~without actual knowledge of the filing of the lien claim,~~ shall constitute prima facie evidence of material prejudice. ~~that the party has been materially prejudiced.~~

COMMENT

By the addition of lettered subsections, the revision clarifies current law and emphasizes that service of the lien claim upon the owner, community association and possible contractors and subcontractors, by personal service, or simultaneous certified or registered mail or commercial courier *and* ordinary mail, is a condition precedent to enforcement of the lien. The section now also provides that the claimant shall serve a lien claim form that has been marked "received for filing" or a similar stamp by the county clerk. The revision also makes clear that disbursement without proper service (not actual knowledge) is the key to evidence of prejudice; since the statute provides for the option of service by certified mail, actual knowledge of the lien claim filing may not occur.

2A:44A:8. Construction lien claim; form

The lien claim shall be filed in substantially the following form:

CONSTRUCTION LIEN CLAIM

TO THE CLERK, COUNTY OF _____:

~~In accordance with the terms and provisions of the "Construction Lien Law," P.L.1993, c.318 (C.2A:44A-1 et al.), notice is hereby given that:~~

~~1. (Name of claimant) of (address of claimant) has on (date) claimed a construction lien against the below stated real property of (owner against whose property the lien is claimed), in the amount of (\$ _____), for the value of the work, services, material or equipment provided in accordance with a contract with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:~~

~~a-~~

~~b-~~

~~c. (etc.)~~

~~2. The amount due for work, services, materials or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is as follows:~~

~~Total contract amount: _____ \$ _____~~

~~Amendments to contract: _____ \$ _____~~

~~Total contract amount and amendments to contract: _____ \$ _____~~

~~Less: Agreed upon credits: _____ \$ _____~~

~~Contract amount paid to date: _____ \$ _____~~

~~Amendments to contract amount paid to date: _____ \$ _____~~

~~TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND AMENDMENTS TO CONTRACT: _____ \$ _____~~

~~TOTAL LIEN CLAIM AMOUNT: _____ \$ _____~~

~~Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of County on _____ 19 _____ as No. in Book _____ Page _____.~~

~~3. This construction lien is claimed against the interest of _____ (name) as (check one):~~

~~Owner~~

~~_____ Lessee~~

~~_____ Other (describe): _____~~

~~in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the _____ of _____, County of _____, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided.~~

~~4. The work, services, materials or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated _____, between (claimant) and (name of other contracting party) of (address):~~

~~5. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date):~~

NOTICE TO OWNER OF REAL PROPERTY

~~Your real estate may be subject to sale to satisfy the amount asserted by this claim. However, your real estate cannot be sold until the facts and issues which form the basis of this claim are decided in a legal proceeding before a court of law. The lien claimant is required by law to commence suit to enforce this claim.~~

~~The claimant filing this lien claim shall forfeit all rights to enforce the lien and shall be required to discharge the lien of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim:~~

~~1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or~~

~~2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner requiring the claimant to commence an action to establish the lien claim.~~

~~You will be given proper notice of the proceeding and an opportunity to challenge this claim and set forth your position. If, after you (and/or your contractor or subcontractor) have had the opportunity to challenge this lien claim, the court of law enters a judgment against you and in favor of the claimant filing this lien claim, and thereafter you fail to pay that judgment, your real estate may then be sold to satisfy the judgment.~~

~~You may choose to avoid subjecting your real estate to sale by doing either of the following:~~

~~1. You (or your contractor or subcontractor) can pay the claimant and obtain a discharge of lien claim from the claimant; or~~

~~2. You (or your contractor or subcontractor) can cause the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 31 of P.L.1993, c.318 (C.2A:44A-31).~~

~~If you (or your contractor or subcontractor) choose to pay the claimant under 1. above, you will lose your right to challenge this lien claim in a legal proceeding before a court of law.~~

~~If you (or your contractor or subcontractor) choose to discharge the lien claim by filing a surety bond or making a deposit of funds as provided in section 31 of P.L.1993, c.318 (C.2A:44A-31), you will retain your right to challenge this lien claim in a legal proceeding before a court of law.~~

NOTICE TO SUBCONTRACTOR OR CONTRACTOR:

~~This lien has been filed with the county clerk and served upon the owner of the real estate. This lien places the owner on notice that the real estate may be sold to satisfy this claim unless the owner pays the claimed sum to this claimant.~~

Signed _____

For _____ Individual, Firm or Corporation

Date:

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

~~1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant's contract described in the construction lien claim.~~

~~2. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.~~

~~3. This claim has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.~~

~~4. The foregoing statements made by me are true, to the best of my knowledge. I am aware that if any of the foregoing statements made by me are false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.~~

Name of Claimant _____

Signed _____

Type or Print Name and Title

Date:

TO THE CLERK, COUNTY OF _____:

In accordance with the "Construction Lien Law," N.J.S.2A:44A-1 *et seq.*, notice is hereby given that (only complete those sections that apply):

1. On (date), I, (name of claimant), individually, or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (circle one and fill in name as applicable), located at (business address of claimant), claim a construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block _____,

Lot _____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey, (or if no Block and Lot is assigned, a metes and bounds or other description of the property) in the amount of \$(lien claim amount), as calculated below for the value of the work, services, material or equipment provided. (If the claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is claimed against the interest of the owner, unit owner, or against the community association in accordance with section 2A:44A-3, or other party (circle one; if "other", describe: _____.)

2. In accordance with a written contract for improvement of the above property, dated _____, with the property owner, community association, contractor, or subcontractor (circle one), named or known as (name of appropriate party), and located at (address of owner, unit owner, community association, contractor or subcontractor), this claimant performed the following work or provided the following services, material or equipment:

- a. _____
- b. _____
- c. _____ etc.

3. The date of the provision of the last work, services, material or equipment for which payment is claimed is _____, 20____.

4. The amount due for work, services, material or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is calculated as follows:

A. Initial Contract Price: \$ _____

B. Executed Amendments to Contract Price/Change Orders: \$ _____

C. Total Contract Price (A + B) = \$ _____

D. If Contract Not Completed, Value Determined in Accordance with the Contract of Work Completed or Services, Material, Equipment Provided : _____

E. Total from C or D (whichever is applicable): \$ _____

F. Agreed upon Credits: \$ _____

G. Amount Paid to Date: \$ _____

TOTAL LIEN CLAIM AMOUNT E - [F + G] = \$ _____

NOTICE OF UNPAID BALANCE AND ARBITRATION AWARD

This claim (check one) does ☐ does not ☐ arise from a Residential Construction Contract. If it does, complete 5 and 6 below; if it does not, complete 5 below only if applicable. If not residential and 5 is not applicable, skip to Claimant's Representation and Verification.

5. A Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of _____ County on _____, 20____ as No. _____, in Book _____ and Page _____.

6. An award of the arbitrator (if residential) was issued on _____ in the amount of \$ _____.

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies under oath that:

1. I have authority to file this claim.

2. The claimant is entitled to the amount claimed at the date of lodging for record of the claim, pursuant to claimant's contract described above.

3. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.

4. This claim form has been lodged for record with the County Clerk where the property is located within 90 or, if residential construction, 120 days from the last date upon which the work, services, material or equipment for which payment is claimed was provided.

5. This claim form has been completed in its entirety to the best of my ability and I understand that if I do not complete this form in its entirety, the form may be deemed invalid by a court of law.

6. This claim form will be served as required by statute upon the owner or community association, and upon the contractor or subcontractor against whom this claim has been asserted, if any.

7. The foregoing statements made by me in this claim form are true, to the best of my knowledge. I am aware that if any of the foregoing statements made by me in this claim form are willfully false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.

Name of Claimant

Signed

(Type or Print Name and Title)

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [*person signing on behalf of claimant(s)*] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant's (s') act and deed, for the purposes therein expressed.

NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [*person signing on behalf of claimant(s)*] who, I am satisfied is the Secretary [*or other officer/manager/agent*] of the Corporation [*partnership or limited liability company*] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [*partnership or limited liability company*] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [*or partnership or operating agreement*] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

NOTICE TO OWNER OF REAL PROPERTY

NOTICE TO CONTRACTOR OR SUBCONTRACTOR, IF APPLICABLE

The owner's real estate may be subject to sale to satisfy the amount asserted by this claim. However, the owner's real estate cannot be sold until the facts and issues which form the basis of this claim are decided in a legal proceeding before a court of law. The lien claimant is required by law to commence suit to enforce this claim.

The claimant filing this lien claim shall forfeit all rights to enforce the lien claim and shall be required to discharge the lien claim of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim:

1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner or community association, as appropriate, requiring the claimant to commence an action to establish the lien claim.

You will be given proper notice of the proceeding and an opportunity to challenge this claim and set forth your position. If, after the owner (and/or contractor or subcontractor) has had the opportunity to challenge this lien claim, the court of law enters a judgment against any of you and in favor of the claimant filing this lien claim, and thereafter judgment is not paid, the owner's real estate may then be sold to satisfy the judgment. A judgment against a community association for a claim of work, services, material or equipment pursuant to a contract with that community association cannot be enforced by a sale of real estate.

The owner may choose to avoid subjecting the real estate to sale by the owner (or contractor) either:

1. paying the claimant and obtaining a discharge of lien claim from the claimant, by which the owner will lose the right to challenge this lien claim in a legal proceeding before a court of law; or

2. causing the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 2A:44A-31, by which the owner will retain the right to challenge this lien claim in a legal proceeding before a court of law.

COMMENT

This is a new form of lien claim relying upon the original. The new lien claim form is intended to be easier to use and incorporates suggestions by construction lien law practitioners regarding the appropriate method of calculation of the lien claim amount, etc. This new form also incorporates the change in time limitations for filing residential construction lien claims now in section 2A:44A-6, replaces the "19 " date year with a "20 " date year, and provides suggested notarial language.

2A:44A-9. Amount of lien claim; limited to contract price or any unpaid portion thereof

a. The amount of a lien claim shall ~~be limited to the~~ not exceed the unpaid portion of the contract price ,or any unpaid portion thereof, whichever is less, of the claimant's contract for the work, services, material or equipment provided.

COMMENT

By the deletions and insertions noted, the revision attempts to make clearer and less ambiguous the current law.

2A:44A-9.1. Relationship to lien fund; maximum liability; impermissible reductions of lien fund

a. For purposes of the act, the "first tier lien claimant" means a contractor claimant; the "second tier lien claimant" means a claimant who is a subcontractor to the contractor or a supplier to the contractor; and the "third tier lien claimant" means a claimant who is a subcontractor to the second tier lien claimant or a supplier to the second tier lien claimant. No lien rights exist for lower than third tier lien claimants.

b. Except as set forth in sections 2A:44A-15 and 2A:44A-21, and subject to section 2A:44A-7 and subsection c. below, the lien fund shall not exceed:

(1) in the case of a first tier lien claimant or second tier lien claimant, the earned amount of the contract between the owner and the contractor minus any payments made prior to service of a copy of the lien claim; or

(2) in the case of a third tier lien claimant, the lesser of (i) the amount in (1) above, or (ii) the earned amount of the contract between the contractor and the subcontractor to the contractor, minus any payments made prior to service of a copy of the lien claim.

c. A lien fund regardless of tier shall not be reduced by payments by the owner, or community association in accordance with section 2A:44A-3, that do not discharge the obligations for the work performed or services, material or equipment provided, including but not limited to:

(1) payments not in accordance with written contract provisions; or

(2) payments yet to be earned upon lodging for record of the lien claim; or

(3) liquidated damages; or

(4) collusive payments; or

(5) use of retainage to make payments to a successor contractor after the lien claim is lodged for record; or

(6) setoffs or backcharges, absent written agreement by the claimant, except for any setoffs upheld by judgment that are first determined by (i) arbitration or alternate dispute resolution in a proceeding conducted in accordance with section 2A:44A-21 or (ii) any other alternate dispute resolution agreed to by the parties.

d. Subject to subsection c. above, no lien fund exists, if, at the time of service of a copy of the lien claim, the owner or community association has fully paid the contractor for the work performed or for services, material or equipment provided.

e. For purposes of a lien fund calculation, the “earned amount of the contract”, is the contract price unless the party obligated to perform has not completed the performance in which case the “earned amount of the contract” is the value, as determined in accordance with the contract, of the work performed and services, materials or equipment provided.

f. If more than one lien claimant will participate in a lien fund, the lien fund shall be established as of the date of the first of the participating lien claims lodged for record unless the earned amount of the contract increases, in which case the lien fund shall be calculated from the date of the increase.

COMMENT

The current law is confusing to the reader. It does not explain the relationship between the lien claim and the lien fund. It also separates discussion of the amount of the lien claim (section 2A:44A-9) from discussion of the maximum liability of the owner (a part of section 2A:44A-10). At the same time, a large portion of current section 2A:44A-10 addresses attachment of the lien and priority of bona fide purchasers and other liens. Maximum liability of the owner is a subject worthy of its own section. Thus, for clarity and coherence, the portion of current section 2A:44A-10 of the act pertaining to the maximum

liability of the owner for lien claims was deleted from section 2A:44A-10 and incorporated into a new section 2A:44A-9.1.

New section 2A:44A-9.1 attempts to make clearer the formula to be applied when calculating the amount of the lien fund, replacing current section 2A:44A-10 a. and b. As the court explained in *Sil-Kemp Concrete, Inc. v. Conte & Ricci Const. Co.*, 2005 WL 3742261 (App. Div. 2005), depending upon the claimant's position in the chain of construction, there may be up to three tiers of lien fund in multiple lien scenarios which must be compared to each other in order to determine the full extent of the owner's liability. These are the prime contractor, subcontractor/supplier and sub to the subcontractor. The present confusion in applying section 2A:44A-10 a. and b. is also well illustrated in *Riggs Distler & Co., Inc. v. Valero Refining Company, et al.*, 2005 WL 2897483 (D.N.J. 2005) where the lien claimants argued that application of current section 2A:44A-10 mandated that the only relevant contracts were the prime contract and the contract between themselves and their subcontractor. The court in *Riggs Distler* disagreed, concluding that the underlying policy of protecting both the interests of the contractors in getting paid and the owners in paying just once for the same work can be fulfilled only if the entire construction chain is considered and credit given to all payments that were earned and due even if not subsequently forwarded down the chain.

New section 2A:44A-9.1 c. further adopts the conclusions of a series of recent court decisions both before and after the New Jersey Supreme Court's seminal opinion in *Craft v. Stevenson Lumber*, 179 N.J. 56 (2004). These decisions discuss those attempted reductions to the lien fund which are *not* permissible, specifically, *Labov Mechanical, Inc. v. East Coast Power, L.L.C.*, 377 N.J. Super. 240 (App. Div. 2005) (liquidated damages); *Craft v. Stevenson*, *supra* (advanced payments); *Legge Industries v. Joseph Kushner Hebrew Academy*, 333 N.J. Super. 537 (App. Div. 2000) (advanced payments and retainage used for post-filing payments to a successor contractor). By the inclusion of subsection d., the new section 2A:44A-9.1 also adopts the *Craft* court's determination that the lien fund will never include what the owner has already legitimately paid; in other words, once the contract or the value of the work or materials has been fully paid, there is no fund against which to measure an unpaid lien claimant's entitlement because nothing is owed. Subsection e. also adopts the *Craft* court's reasoning that the contract price may be "reformed" where the obligated party walks off the job before the work is completed, in which case the lien fund should be calculated based on the total amount due at that time.

Finally, subsection f. was added for further clarification of the timing of the lien fund determination, while acknowledging the distinction set forth by the court in *Triple "R" Enterprises, Inc. v. Pezotti*, 344 N.J. Super. 31 (N.J. Super. 2001) where the first lien claimant had settled its claim, prior to the time the plaintiff lien claimant had filed its lien claim, and the court held that the lien fund accrued from the date of the plaintiff's filing, not the date of the filing of the earlier settled lien claim. The terms "lodging for record" are used here, rather than "filing", because the date the document lodged for record is actually filed is not within the control of the claimant as earlier discussed. Application of subsection f. is illustrated as follows: Claimant A lodges for record a lien claim on April 1; Claimant B lodges for record a lien claim on April 14. If neither claimant A nor B settles prior to lien claim enforcement, both will participate in the lien fund and the lien fund will accrue as of April 1. If claimant A, however, settles its lien claim on April 13, the lien fund accrues on the date of the lodging for record of Claimant B's claim, *i.e.*, April 14. Claimant A, having resolved its claim, is no longer a participant in the lien fund.

2A:44A-10. Attachment of lien claim; priority of bona fide purchasers and other liens; ~~maximum liability~~

Subject to the limitations of sections ~~6~~ 2A:44A-3 and 2A:44A-6 of this act, the lien ~~claim~~ shall attach to the interest of the owner from and after the time of filing of the lien claim. Except as provided by section ~~20~~ 2A:44A-20 of this act, no lien ~~claim~~ shall attach to the ~~estate or~~ interest acquired by a bona fide purchaser as evidenced by a recordable document recorded or lodged for record before the date of filing of the lien claim. ~~first recorded or lodged for record; n~~ Nor shall a lien claim, except as provided by

sections 2A:44A-20 and 2A:44A-22, enjoy have a priority over any mortgage, judgment or other lien or interest in real estate first recorded, lodged for record, filed or docketed. A lien claim filed under the provisions of this act shall be subject to the effect of a notice of settlement filed pursuant to P.L. 1979, c. 406 (C. 46:16A-1 et seq et seq.)

~~Except as set forth in sections 15 and 21 of this act, the maximum amount for which an owner will be liable or an interest in real property subject to a lien under this act for one or more lien claims filed pursuant to this act shall not be greater than:~~

~~a. In the case of a lien claim filed by a contractor, the total amount of the contract price of the contract between the owner and the contractor less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, by the owner to the contractor or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant either to a contract with the contractor and any subcontractor or supplier, or a contract between a subcontractor of the contractor and any supplier or other subcontractor; or~~

~~b. In the case of lien claim filed by a subcontractor or supplier, the amount provided in subsection a. of this section, or the contract price of the contract between the contractor or subcontractor and the subcontractor or supplier, as applicable, pursuant to which the work, services, materials or equipment is provided by the subcontractor or supplier, less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, to the contractor or supplier or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant to a contract with such subcontractor or supplier, whichever is less.~~

COMMENT

The portion of current section 2A:44A-10 relating to the maximum liability of the owner was deleted and a new section 2A:44A-9.1 created in its place as noted in the Comment to section 2A:44A-9.1 above. The revision also clarifies language and replaces references to sections 6 and 20 of the act with references to the title and section numbers. Because the reference to the maximum liability of the owner is no longer a part of this section, the Commission also recommends modifying the descriptor as underlined.

2A: 44A-11. Amendment of lien claim, form

A lien claim may be amended for any appropriate reason, including but not limited to correcting inaccuracies or errors in the original lien claim form, or revising the amount claimed because of (i) additional work performed or services, material or equipment provided or (ii) the release of a proportionate share of an interest in real property from the lien in accordance with section 2A:44A-18 or (iii) the partial payment of the lien claim, by the filing of an amendment with the county clerk. A lien claim may not be amended to cure a violation of section 2A:44A-15. The amended lien claim, which shall be filed with the county clerk, shall comply with all the conditions and requirements for the filing of an original lien claim, including but not limited to the notice requirements of section 7 2A:44A-7 of this act, as well as the conditions and requirements of this section and shall be subject to the limitations of sections 10 2A:44A-9.1 and 2A:44A-10 of this act. That portion of the amended lien claim in excess of the amount previously claimed shall attach as of the date of filing of the amended original lien claim. That excess amount shall also be used to calculate the lien fund pursuant to section 2A:44-9.1 f.

The amended lien claim shall be filed in substantially the following form:

AMENDMENT TO CONSTRUCTION LIEN CLAIM

TO THE CLERK, COUNTY OF

1. On (date), the undersigned claimant, (name of claimant) of (address of claimant), filed a CONSTRUCTION LIEN CLAIM in the amount of (\$) DOLLARS for the value of the work, services, material or equipment provided in accordance with the contract between claimant and (name) as of (date).

2. This construction lien claim was claimed against the interest of (name) as (~~check~~—circle one): owner, unit owner, community association Lessee or other (~~describe~~) party; (if “other”, describe: _____) in that certain tract or parcel of land and premises described as Block ____ , Lot ____ , on the tax map of the (municipality) of _____, County of _____, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided. (If the claim was against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.)

3. This amends a lien claim which was previously lodged for record on _____, 20____ and filed with the County Clerk of _____ County on _____, ~~19-20~~ and recorded on _____, 20____ as No.____ in Book No.____, Page _____. A Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of _____ on _____, ~~19-20~~ and recorded on _____, 20____ as No.____ in Book No.____, Page _____.

4. Amendments to the original claim were recorded in the office of the County Clerk on _____, ~~19-20~~ as No.____ in Book No.____, Page _____. (Complete if applicable.)

5. Effective the date of the ~~filing~~ lodging for record of this AMENDMENT TO CONSTRUCTION LIEN CLAIM, the value of the lien is claimed to be in the total amount of (\$) DOLLARS, inclusive of all prior lien claims or amendments thereof.

6. The work, services, material or equipment provided upon which this Amendment is made are:

- a. _____
- b. _____
- c. _____ (etc.)

7. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).

8. The reason for this amendment is: _____

CLAIMANT'S REPRESENTATION AND VERIFICATION

(Same as for lien claim)

NOTICE TO OWNER OF REAL PROPERTY

(Same as for lien claim)

NOTICE TO SUBCONTRACTOR OR CONTRACTOR

(Same as for lien claim)

COMMENT

The revision replaces references to sections of the act with references to the title and section numbers and changes the year date from “19 ” to “20 ”. It also conforms this section to the revised section 2A:44A-8, pertaining to the form of the lien claim, making clear that an amendment to construction lien claim can be used for any appropriate purpose including but not limited to correcting inaccuracies and altering the amount of the lien claim. Line 8 is added to set forth the reason for the amendment. Reference to “community association” is added because of modifications to section 2A:44A-3. The language expressing what may be addressed by amendment also has been revised to clarify, but not limit, the

appropriate reasons for amending a lien claim. Language has also been added to clarify that a lien claim may not be amended to cure a violation of section 2A:44A-15.

2A:44A-12. Notice of lien claim; authorized withholding of amount claimed from contract price

Upon receipt of notice of a lien claim, the owner, or community association in accordance with section 2A:44A-3, shall be authorized to withhold and deduct the amount claimed from the unpaid part of the contract price that is or thereafter may be due and payable to the contractor or subcontractor, or both. The owner or community association may pay the amount of the lien claim to the claimant unless the contractor or subcontractor against whose account the lien is filed notifies the owner or community association and the lien claimant in writing within 20 days of service of the lien claim upon both the owner or community association and the contractor or subcontractor, that the claimant is not owed the monies claimed and the reasons therefor. Any such payment made by the owner or community association shall constitute a payment made on account of the contract price of the contract with the contractor or subcontractor, or both, against whose account the lien is filed.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-13. Construction lien book; construction lien index book; filing and notation fees

a. ~~Each~~ The county clerk shall provide a book designated as the “Construction Lien Book” in which ~~each clerk~~ shall be entered each Notice of Unpaid Balance and Right to File Lien, and Amended Notice of Unpaid Balance and Right to File Lien, and each lien claim and amended lien claim, and each discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien presented for filing pursuant to the provisions of this act.

b. The county clerk shall cause marginal notations to be made upon each filed document ~~filed pursuant to this act,~~ as follows: (i) upon each Notice of Unpaid Balance and Right to File Lien ~~whenever an Amended Notice of Unpaid Balance and Right to File Lien or a discharge relative thereto~~ the date an amendment to that Notice or discharge thereof, and related lien claim or amendment thereto is filed; (ii) upon each lien claim, the date ~~whenever an amendedment thereto~~ whenever an amendedment thereto lien claim relative thereto is filed; and the date a discharge, subordination or release thereof is filed. upon each Notice of Unpaid Balance and Right to File Lien ~~whenever a lien claim or amended lien claim relative thereto is filed; upon each lien claim or amended lien claim whenever a discharge, subordination or release of a lien claim relative thereto is filed;~~; and (iii) ~~In addition, the clerk shall cause a notation of commencement of an action to enforce a lien claim to be made upon the affected lien claim or amended lien claim the date of the filing of the notice of lis pendens pertaining to the real property subject to the lien claim relative thereto.~~

c. The failure of the clerk to cause a marginal notation to be made in accordance with subsection b. shall not affect the validity, priority or enforceability of any document filed pursuant to this act.

d. The county clerk shall provide and maintain ~~on a daily basis~~ an index book designated as the "Construction Lien Index Book", setting forth ~~therein in~~ alphabetically order, and arranged by the owners' or community associations' names of the owners, and by the claimants' names of the claimants, each Notice of Unpaid Balance and Right to File Lien, Amended Notice of Unpaid Balance and Right to File Lien, lien claim, amended lien claim, discharge, subordination and release of a lien claim or Notice of Unpaid Balance and Right to File Lien.

e. Each county clerk shall charge ~~the following~~ fees for the filing and marginal notations of the documents authorized to be filed by this act as set forth in N.J.S. 22A:2-29.:

Each Notice of Unpaid Balance and Right to File Lien or Amended Notice of Unpaid Balance and Right to File Lien\$4.50
Each lien claim or amended lien claim\$4.50
Each discharge, subordination or release of lien claim or release of Notice of Unpaid Balance and Right to File Lien\$2.00
Each marginal notation\$1.00

COMMENT

The revision clarifies language and refers to N.J.S. 22A:2-29 for the fee amounts, which increased in 2004. Reference to "community associations" is added because of modifications to section 2A:44A-3.

2A:44A-14. Failure to bring action; forfeiture of lien; liability for costs and expenses

a. A claimant filing a lien claim shall forfeit all rights to enforce the lien, and shall immediately discharge the lien of record in accordance with section 2A:44A-30, if the claimant fails to bring commence an action in the Superior Court, ~~in the county in which the real property is situated,~~ to establish enforce the lien claim; venue shall be laid in the county in which the real property is located:

(1) Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

(2) Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner, community association, contractor, or subcontractor against whose account a lien claim is filed, requiring the claimant to commence an action to establish enforce the lien claim.

b. Any lien claimant who forfeits a lien pursuant to ~~subsection a. of this section~~ and fails to discharge that lien of record in accordance with section ~~30~~ 2A:44A-30 of this act, shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, ~~the~~ contractor, or subcontractor, or the total costs and legal expenses of all or any combination of them, in defending or causing the discharge of the lien claim. The court ~~may~~ shall, in addition, enter judgment against the claimant who fails to discharge the lien for damages to any of the parties adversely affected by the lien claim.

~~c. Whenever any claimant shall commence an action in the Superior Court of New Jersey to enforce a lien claim as provided by this act, the claimant shall cause a Notice of Lis Pendens to be filed in the office of the county clerk or register pursuant to the provisions of N.J.S. 2A:15-6 et seq.~~

~~d.~~ c. Any disputes arising out of the improvement which is the subject of a lien claim but which are unrelated to any action to enforce a lien claim may be brought in a separate action or in a separate count in the same action.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-30, as appropriate. Current subsection c. is here deleted but incorporated into a new section 2A:44A-24. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-15. Forfeiture of lien rights; improper filing

a. “Without basis” for purposes of this section means frivolous, false, unsupported by a contract, or made with malice or bad faith or for any improper purpose.

~~a.b.~~ b. If a lien claim is without basis, the amount of the lien claim is willfully overstated, or the lien claim is not ~~filed~~ lodged for record in substantially the form or in the manner or at a time not in accordance with ~~the provisions of this act,~~ the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in the lien claim. The claimant shall also be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys’ fees, incurred by the owner, community association in accordance with section 2A:44A-3, contractor or subcontractor, in defending or causing the discharge of the lien claim. The court shall, in addition, enter judgment against the claimant for damages to any of the parties adversely affected by the lien claim.

~~b.c.~~ c. If a defense to a lien claim is without basis, the party maintaining the defense shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys’ fees, incurred by any of the parties adversely affected by the defense to the lien claim. The court shall, in addition, enter judgment against the party maintaining ~~the frivolous this~~ defense for damages to any of the parties adversely affected thereby said defense.

~~e.d.~~ d. If a lien claim is forfeited pursuant to this section, or section 2A:44A-14 ~~of this act,~~ nothing herein shall be construed to bar the filing of a subsequent lien claim, provided, however, any subsequent lien claim shall not include a claim for the work, services, equipment or material claimed within the forfeited lien claim.

COMMENT

The revised language attempts to give further meaning to the words “without basis” as they apply to both the claim and the defense thereto. Language mirrored in the court rules (R.1:4-8 pertaining to frivolous litigation) is incorporated where appropriate. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-16. Party defendants joined by claimant, entitlement to defense [deleted and incorporated into section 2A:44A-24]

~~a. A claimant shall join as party defendants the contractor or subcontractor who is alleged to have failed to make the payments for which the lien claim has been filed and any other person having an interest in the real property that would be adversely affected by the judgment. A party required to be joined under this subsection shall be joined if feasible pursuant to R.4:28-1(a) of the Rules Governing the Courts of the State of New Jersey, unless prohibited by law.~~

~~b. Any party to an action to establish a lien shall be entitled to any defense available to any other party in contesting the amount for which a claimant seeks to have his lien reduced to judgment.~~

COMMENT

The revision to section 2A:44A-24 incorporates portions of this section. Thus, this section is deleted in its entirety.

2A:44A-17. Lien claims unabated by death of party in interest

No lien claim under this act or right thereto shall abate by reason of the death of any party in interest and the right to the lien claim may be asserted by the personal representative of a deceased contractor, subcontractor, or supplier against the personal representative of a deceased owner, contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law.

2A:44A-18. Residential construction contract; calculation of proportionate share

This section shall solely apply to work, services, material or equipment furnished under a residential construction contract. If a lien attaches to an interest in real property, the lien claimant shall release a proportionate share of the interest in real property from the lien upon receipt of payment for that proportionate share. This proportionate share shall be calculated in the following manner:

a. If there is a contract between the lien claimant and the owner or other writing signed by the parties which provides for an allocation by lot or tract, or otherwise, that allocation of the proportionate share shall be binding upon the lien claimant. Absent a contract between the lien claimant and the owner or other writing signed by the parties, any allocation made shall be proportionate to each lot if subdivision approval has been granted or to each tract if no subdivision approval is required or has been granted.

b. If the work performed by the lien claimant was for a condominium, in which a master deed is filed before the lien attaches, or for work performed for a cooperative in which a master declaration is filed before the lien attaches, then the proportionate share shall be allocated in an amount equal to the percentage of common elements attributable to each residential unit, subject to the limitations of section 2A:44A-3 b. and c.

c. If subsection a. or b. of this section does not apply, then the lien shall not be released as to any portion of the interest in real property ~~unless the lien claimant and the owner otherwise agree in a writing signed by both parties.~~

d. If a lien claimant receives payment of ~~it's~~ the proportionate share but refuses to discharge ~~it's~~ the lien claim, then upon application to a court having jurisdiction thereof, the court shall order the discharge of the lien claim to the extent of that proportionate share. The lien claimant shall be further subject to ~~the provisions of section 2A: 44A-30 of this act,~~ and any amounts to be paid shall be paid from the amount due the claimant.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-3, as appropriate.

2A:44A-19. Attachment of lien to interest of owner for work performed in a condominium or cooperative unit [deleted and incorporated into section 2A:44A-3]

~~a. For work performed solely within a unit in a condominium or cooperative, the lien shall only attach to the interest of the owner in the condominium or cooperative unit.~~

~~b. If an interest in real property is conveyed after work is performed but before a lien attaches to the property, then the lien shall attach to the real property retained by the owner, but shall not attach to the real property or interest previously conveyed.~~

COMMENT

The language of this section has been incorporated into section 2A:44A-3. Thus, this section is deleted in its entirety.

2A:44A-20. Notice of unpaid balance; right to file lien; form

a. All valid liens filed pursuant to this act shall attach to the interest of the owner from the time of filing of the lien claim in the office of the county clerk subject to this section and the provisions of sections 2A:44A-3, 2A: 44A-6 and 2A:44A-10 of this act.

ab. In the event of the creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made that are subject to the lien provisions of this act, a A lien claim validly filed under this act shall have priority over any prior creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made, only if the claimant has filed with the county clerk prior to that creation, conveyance, lease or mortgage, a Notice of Unpaid Balance and Right to File Lien is filed before the recording or lodging for record of a recordable document evidencing that conveyance, lease or mortgage. The Notice of Unpaid Balance and Right to File Lien shall be filed in substantially the following form:

~~TO THE CLERK, COUNTY OF~~

~~In accordance with the terms and provisions of the "Construction Lien Law," P.L.1993, c.318 (C.2A:44A-1 et al.), notice is hereby given that:~~

~~1.(Name of claimant) of (address of claimant) has on (date) a potential construction lien against the below described property of (owner against whose property the lien will be claimed), in the amount of (\$ ———), for the value of the work, services, material or equipment provided in accordance with a contract~~

~~with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:~~

~~a. b.~~

~~c. (etc.)~~

~~2. The amount due for work, services, materials or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is as follows:~~

~~Total contract amount: \$~~

~~Amendments to contract: \$~~

~~Total contract amount and amendments to contract: \$~~

~~Less: Agreed upon credits: \$~~

~~Contract amount paid to date: \$~~

~~Amendments to contract amount paid to date: \$~~

~~TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND AMENDMENTS TO CONTRACT: \$~~

~~TOTAL LIEN CLAIM AMOUNT: \$~~

~~3. This construction lien is to be claimed against the interest of (name) as (check one):~~

~~Owner~~

~~Lessee~~

~~Other (describe): in that certain tract or parcel of land and premises described as Block , Lot , on the tax map of the of , County of , State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided.~~

~~4. The work, services, materials or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated, between (claimant) and (name of other contracting party) of (address).~~

~~5. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).~~

~~6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2 of this act.~~

~~7. This notification has been filed prior or subsequent to completion of the work, services, materials or equipment as described above. The purpose of this notification is to advise the owner and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be filed within the 90 day period following the date of the provision of the last work, services, materials or equipment as set forth in paragraph 5.~~

~~CLAIMANT'S REPRESENTATION AND VERIFICATION~~

~~Claimant represents and verifies that:~~

~~1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant's contract described in the Notice of Unpaid Balance and Right to File Lien.~~

~~2. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.~~

~~3. The Notice of Unpaid Balance and Right to File Lien has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.~~

4. The foregoing statements made by me are true, to the best of my knowledge.

~~Name of Claimant~~

~~Signed~~

~~Type or Print Name and Title~~

~~Date:~~

~~b. In the event that the claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.~~

~~c. After the filing of a Notice of Unpaid Balance and Right to File Lien, any person claiming title to or an estate or interest in or a lien upon the real property described in the Notice of Unpaid Balance and Right to File Lien, shall be deemed to have acquired said title, estate, interest or lien with knowledge of the anticipated filing of a lien claim, and shall be subject to the terms, conditions and provisions of that lien claim within the period provided by section 6 of this act and as set forth in the Notice of Unpaid Balance and Right to File Lien. A Notice of Unpaid Balance and Right to File Lien filed under the provisions of this act shall be subject to the effect of a notice of settlement filed pursuant to P.L.1979, c.406 (C.46:16A-1 et seq.).~~

~~d. The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days from the date of the provision of the last work, services, materials or equipment delivery for which payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.~~

~~e. The filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the filing of a lien claim in accordance with the provisions of this act, nor does it extend the time for the filing of a lien claim in accordance with the provisions of this act.~~

~~f. Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under the provisions of this act, to the extent that no creation, conveyance, lease or mortgage of an interest in real property has taken place prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.~~

~~g. A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with the provisions of this section.~~

TO THE CLERK, COUNTY OF _____:

NOTICE OF UNPAID BALANCE AND RIGHT TO FILE LIEN

In accordance with the "Construction Lien Law," N.J.S. 2A:44A-1 et seq., notice is hereby given that:

1. (Name of claimant), individually or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (please circle one and fill in name as applicable) located at (business address of claimant) has on (date) a potential construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey, in the amount of (\$ _____), as calculated below for the value of the work, services, material or equipment provided. (If claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is to be claimed against the interest of the owner, unit owner, or other party, or against the community association (circle one; if "other", describe: _____.)

2. The work, services, material or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, community association,

contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated _____, between (claimant) and owner, unit owner, community association, contractor or subcontractor (circle one), named or known as (name of other contracting party) and located at (address of other contracting party), in the total contract amount of (\$ _____) together with (if applicable) amendments to the total contract amount aggregating (\$ _____).

3. In accordance with the above contract, this claimant performed the following work or provided the following services, material or equipment:

- a. _____
- b. _____
- c. _____ etc.

4. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date.)

5. The amount due for work, services, material or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is calculated as follows:

- A. Initial Contract Price: \$ _____
- B. Executed Amendments to Contract Price/Change Orders: \$ _____
- C. Total Contract Price (A + B) = \$ _____
- D. If Contract Not Completed, Value Determined in Accordance with Contract of Work Completed or Services, Material or Equipment Provided _____
- E. Total from C or D (whichever is applicable): \$ _____
- F. Agreed upon Credits: \$ _____
- G. Amount Paid to Date: \$ _____
- TOTAL LIEN CLAIM AMOUNT E - [F + G] = \$ _____

6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2A:44A-2 of this act.

7. This notification has been lodged for record prior or subsequent to completion of the work, services, material or equipment as described above. The purpose of this notification is to advise the owner or community association and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be lodged for record within the 90-day period, or in the case of a residential construction contract within the 120-day period, following the date of the provision of the last work, services, material or equipment as set forth in paragraph 5.

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

- 1. I have authority to file this Notice of Unpaid Balance and Right to File Lien.
- 2. The claimant is entitled to the amount claimed herein at the date this Notice is lodged for record, pursuant to claimant's contract described in the Notice of Unpaid Balance and Right to File Lien.
- 3. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.
- 4. The Notice of Unpaid Balance and Right to File Lien has been lodged for record within 90 days, or in the case of a residential construction contract within 60 days, from the last date upon which the work, services, material or equipment for which payment is claimed was provided.

5. The foregoing statements made by me are true, to the best of my knowledge.

Name of Claimant _____

Signed _____

(Type or Print Name and Title) _____

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant's (s') act and deed, for the purposes therein expressed.

NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

~~b.c. In the event that the A claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to need not serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.~~

~~e. d.~~ After the filing of a Notice of Unpaid Balance and Right to File Lien, any person claiming title to or an ~~estate or~~ interest in or a lien upon the real property described in the Notice of Unpaid Balance and Right to File Lien, shall be deemed to have acquired said title, ~~estate~~, interest or lien with knowledge of the anticipated filing of a lien claim, and shall be subject to the terms, conditions and provisions of that lien claim within the period provided by section ~~6~~ 2A:44A-6 ~~of this act~~ and as set forth in the Notice of Unpaid Balance and Right to File Lien. A Notice of Unpaid Balance and Right to File Lien filed under ~~the provisions of~~ this act shall be subject to the effect of a notice of settlement filed pursuant to P.L.1979, c. 406 (C.46:16A-1 *et seq.*)

~~d. e.~~ The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days or in the case of a residential construction contract claim for 120 days from the date of the provision of the last work, services, materials or equipment delivery for which

payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.

~~e. f.~~ The lodging for record or filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the lodging for record or filing of a lien claim ~~in accordance with the provisions of this act~~, nor does it extend the time for the ~~filing~~ lodging for record of a lien claim, in accordance with ~~the provisions of this act~~.

~~f. g.~~ Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under ~~the provisions of this act~~, to the extent that no ~~creation~~, conveyance, lease or mortgage of an interest in real property ~~has taken place~~ occurs prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.

~~g. h.~~ A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with ~~the provisions of this section~~.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to make it easier to meet the time constraints for filing residential construction lien claims. It also incorporates changes required by the modification to the time limitations in section 2A:44A-6 and conforms to the changes made to sections 2A:44A-8 and 2A:44A-10. Reference to "community association" is added because of modifications to section 2A:44A-3. However, a lien against a community association does not attach to an interest in real property and real property cannot be sold in order to satisfy the lien.

2A:44A-21. Legislative findings; additional requirements for filing of lien on residential construction

a. The Legislature finds that the ability to sell and purchase residential housing is essential for the preservation and enhancement of the economy of the State of New Jersey and that while there exists a need to provide contractors, subcontractors and suppliers with statutory benefits to enhance the collection of money for goods, services and materials provided for the construction of residential housing in the State of New Jersey, the ability to have a stable marketplace in which families can acquire homes without undue delay and uncertainty and the corresponding need of lending institutions in the State of New Jersey to conduct their business in a stable environment and to lend money for the purchase or finance of home construction or renovations requires that certain statutory provisions as related to the lien benefits accorded to contractors, subcontractors and suppliers be modified. The Legislature further finds that the construction of residential housing generally involves numerous subcontractors and suppliers to complete one unit of housing and that the multiplicity of lien claims and potential for minor monetary disputes poses a serious impediment to the ability to transfer title to residential real estate expeditiously. The Legislature further finds that the purchase of a home is generally one of the largest expenditures that a family or person will make and that there are a multitude of other State and federal statutes and regulations, including but not limited to the "New Home Warranty and Builders' Registration Act", P.L.1977, c. 467 (C.46:3B-1 ~~et seq.~~ et seq.) and "The Planned Real Estate Development Full Disclosure Act", P.L.1977, c. 419 (C.45:22A-21 ~~et seq.~~ et seq.), which afford protection to

consumers in the purchase and finance of their homes, thereby necessitating a different treatment of residential real estate as it relates to the rights of contractors, suppliers and subcontractors to place liens on residential real estate. The Legislature declares that separate provisions concerning residential construction will provide a system for balancing the competing interests of protecting consumers in the purchase of homes and the contract rights of contractors, suppliers and subcontractors to obtain payment for goods and services provided.

b. The filing of a lien for work, services, material or equipment furnished pursuant to a residential construction contract shall be subject to the following additional requirements:

(1) As a condition precedent to the filing of any lien arising under a residential construction contract, a lien claimant shall first file a Notice of Unpaid Balance and Right to File Lien by lodging for record the Notice within 60 days following the last date that work, services, material or equipment were provided for which payment is claimed in accordance with the provisions of subsection a.b. of section 20 2A:44A-20 of this act, and comply with all other provisions the remainder of this section.

(2) Upon ~~the filing its lodging for record, of~~ a Notice of Unpaid Balance and Right to File Lien, ~~service of the Notice of Unpaid Balance and Right to File Lien shall be effected served~~ in accordance with the provisions ~~of~~ for the service of lien claims in section 7 2A:44A-7 of this act,

(3) Unless the parties have otherwise agreed in writing to an alternative dispute resolution mechanism, ~~simultaneously with the service under paragraph (2) of this subsection within 10 days from the date the Notice of Unpaid Balance and Right to File Lien is lodged for record,~~ the lien claimant shall also serve a demand for arbitration and fulfill all the requirements and procedures of the American Arbitration Association to institute an expedited proceeding before a single arbitrator designated by the American Arbitration Association. The demand for arbitration may be served in accordance with the provisions for the service of lien claims in section 2A:44A-7 along with (i) a copy of the completed and signed Notice of Unpaid Balance and Right to File Lien and (ii) proof by affidavit that the Notice of Unpaid Balance and Right to File Lien has been lodged for record. If not yet provided at the time of the service of the demand for arbitration, a copy of the Notice of Unpaid Balance and Right to File Lien marked "filed" by the clerk's office shall be provided by the claimant to the parties and the arbitrator, as a condition precedent to the issuance of an arbitrator's determination.

(3.1) All arbitrations of Notices of Unpaid Balance and Right to File Lien pertaining to the same residential construction shall be determined by the same arbitrator, whenever possible. The claimant, owner, or any other party may also request consolidation in a single arbitration proceeding of the claimant's Notice of Unpaid Balance and Right to File Lien with any other Notice of Unpaid Balance and Right to File Lien not yet arbitrated but lodged for record by a potential lien claimant whose name was provided in accordance with section 2A:44A-37. Such request shall be made in the demand for arbitration or, in the case of a request by a person other than the claimant, by letter to the arbitrator assigned to the arbitration or, if none has been assigned, to the appropriate arbitration administrator, within five days of when the demand for arbitration

is served. The arbitrator shall grant or deny a request for a consolidated arbitration proceeding at the arbitrator's discretion.

(4) Upon the closing of all hearings in the arbitration, the arbitrator shall make the following determinations: (a) whether the Notice of Unpaid Balance and Right to File Lien was in compliance with section ~~20~~ 2A:44A-20 ~~of this act~~ and whether service was proper under section ~~7~~ 2A:44A-7 ~~of this act~~; (b) the earned amount of the contract between the owner and the contractor in accordance with section 2A:44A-9.1; ~~(bc)~~ the validity and amount of any lien claim which may be filed pursuant to the Notice of Unpaid Balance and Right to File Lien; ~~(e d)~~ the validity and amount of any liquidated or unliquidated setoffs or counterclaims to any lien claim which may be filed; and ~~(d e)~~ the allocation of costs of the arbitration among the parties. When making the above determinations, the arbitrator shall also consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(5) ~~In the event~~ If the amount of any setoffs or counterclaims presented in the arbitration ~~are unliquidated and~~ cannot be determined by the arbitrator in a liquidated amount, the arbitrator, as a condition precedent to the filing of the lien claim, shall order the lien claimant to post a bond, letter of credit or funds with an attorney-at-law of New Jersey, or other such person or entity as may be ordered by the arbitrator in such amount as the arbitrator shall determine to be 110% of the approximate fair and reasonable value of such setoffs or counterclaims, but in no event ~~shall the bond, letter of credit or funds exceed greater than~~ the amount of the lien claim which may be filed. This 110% limitation ~~regarding~~ for any bond, letter of credit or funds shall also apply to any alternative dispute resolution mechanism to which the parties may agree. When making the above determinations, the arbitrator shall consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(6) The arbitrator shall make such determinations set forth in paragraphs (4) and (5) of this subsection and the arbitration proceeding shall be completed within 30 days of receipt of the lien claimant's demand for arbitration by the American Arbitration Association unless no response is filed, in which case the arbitrator shall make such determinations and the arbitration proceeding shall be deemed completed within 7 days after the time within which to respond has expired. These ~~That~~ time periods for completion of the arbitration shall not be extended unless otherwise agreed to by the parties and approved by the arbitrator. If an alternative dispute mechanism is ~~alternatively~~ agreed to between the parties, such determination shall be made as promptly as possible making due allowance for all time limits and procedures set forth in this act. The arbitrator shall resolve a dispute regarding the timeliness of the demand for arbitration.

(7) Any contractor, subcontractor or supplier whose interests are affected by the filing of a Notice of Unpaid Balance and Right to File Lien under ~~section 10~~ of this act shall be permitted to join in such arbitration; but the arbitrator shall not determine the rights or obligations of any such parties except to the extent those rights or obligations are affected by ~~the~~ a lien claimant's Notice of Unpaid Balance and Right to File Lien.

(8) Upon determination by the arbitrator that there is an amount which, pursuant to a valid lien shall attach to the improvement, the lien claimant shall, within 10 days of the lien claimant's receipt of the determination, ~~file~~ lodge for record such lien claim in accordance with ~~the provisions of section 8 2A:44A-8 of this act~~ and furnish any bond, letter of credit or funds required by the arbitrator's decision. The failure to ~~file~~ lodge for record such a lien claim, or furnish the bond, letter of credit or funds, within the 10-day period, shall cause any lien claim to be invalid.

(9) Except for the arbitrator's determination itself, any such determination shall not be considered final in any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable. Any finding of the arbitrator pursuant to ~~the provisions of this act~~ shall not be admissible for any purpose in any other action or proceeding.

(10) If ~~either~~ the lien claimant or the owner or community association in accordance with section 2A:44A-3 is aggrieved by the arbitrator's determination, then ~~either~~ the aggrieved party may institute a summary action in the Superior Court, Law Division, for the vacation, modification or correction of the arbitrator's determination. The arbitrator's determination shall be confirmed unless it is vacated, modified or corrected by the court. The court shall render its decision after giving due regard to the time limits and procedures set forth in this act and shall set time limits for lodging for record the lien claim if it finds, contrary to the arbitrator's determination, that the lien claim is valid or the 10-day requirement for lodging for record required by paragraph 8 of this subsection has expired.

(11) In the event a Notice of Unpaid Balance and Right to File Lien is filed and the owner conveys its interest in real property to another person before a lien claim is filed, then prior to or at the time of conveyance, the owner may make a deposit with the county clerk where the improvement is located, in an amount no less than the amount set forth in the Notice of Unpaid Balance and Right to File Lien. For any deposit made with the county clerk, the county clerk shall discharge the Notice of Unpaid Balance and Right to File Lien or any related lien claim against the real property for which the deposit has been made. After the issuance of the arbitrator's determination set forth in paragraphs (4) and (5) of this subsection, any amount in excess of that determined by the arbitrator to be the amount of a valid lien claim shall be returned forthwith to the owner who has made the deposit. The balance shall remain where deposited unless the lien claim has been otherwise paid, satisfied by the parties, forfeited by the claimant, invalidated pursuant to paragraph (8) of this subsection or discharged under section ~~33 2A:44A-33 of this act.~~ Notice shall be given by the owner in writing to the lien claimant within five days of making the deposit.

(12) Solely for those lien claims arising from a residential construction contract, if a Notice of Unpaid Balance and Right to File Lien is determined to be without basis, the amount of the Notice of Unpaid Balance and Right to File Lien is significantly overstated, or the Notice of Unpaid Balance and Right to File Lien is not ~~filed~~ lodged for record in (i) substantially the form, or (ii) in the manner, or (iii) at a time, ~~not~~ in accordance with ~~the provisions of this act~~, then the claimant shall be liable for all damages suffered by the owner or any other party adversely affected by the Notice of

Unpaid Balance and Right to File Lien, including but not limited to all court costs, reasonable attorneys' fees and legal expenses incurred.

(13) If the aggregate sum of all liens ~~claims~~ attaching to any real property that is the subject of a residential construction contract exceeds the amount due under a residential purchase agreement, less the amount due under any previously recorded mortgages or liens other than construction liens, then upon entry of judgment of all such lien claims, each lien claim shall be reduced pro rata. Each lien claimant's share then due shall be equal to the monetary amount of the lien claim multiplied by a fraction in which the denominator is the total monetary amount of all valid claims on the owner's interest in real property against which judgment has been entered, and the numerator is the amount of each particular lien claim for which judgment has been entered. The amount due under the residential purchase agreement shall be the net proceeds of the amount paid less previously recorded mortgages and liens other than construction liens and any required recording fees.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to set workable time limitations for each step of the residential construction claim process including conclusion of the arbitration itself. The new time frames for filing the NUB and serving the demand for arbitration are included to permit sufficient time for the demand for arbitration to be served and the arbitration to take place while still meeting the 120-day time frame for filing the lien claim. The revision also permits extension of the 120-day time frame if the court, upon review of the arbitrator's determination in accordance with subsection (10) of this section, finds the arbitrator was in error and the lien claim is valid.

Subsections b. (3) and (6) have been further modified in order to avoid disputes between the parties about timeliness and to provide further guidance to the arbitrators. Subsections b. (4) and (5) have been modified, and subsection b. (3.1) added, to accommodate the concerns of the New Jersey Builder's Association. The arbitrator has been given the authority to determine the earned amount of the contract between the owner and the contractor in order to effectuate a revised section 2A:44A-31, which allows for the capping of bonding requirements with regard to residential construction lien claims. New subsection b. (3.1) gives the arbitrator discretion, at the request of a party, to consolidate NUB arbitrations pertaining to the same residential construction and requires that, whenever possible, the same arbitrator determine all arbitrations of NUBs pertaining to the same residential construction. This revision hopefully will help eliminate inconsistent awards. Distinctions between "filing" and "lodging for record" also are noted.

2A:44A-22. Priority of mortgages over liens

~~Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8).~~

a. Every mortgage recorded before the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien established by virtue of this act, to the extent that

(1) the mortgage secures funds that have been advanced or the mortgagee is obligated to advance to or for the benefit of the mortgagor before the filing of the lien claim or Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20; or

(2) the mortgage secures funds advanced after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, and the funds are applied in accordance with subsection (b) (1) through (7) inclusive of this section.

b. Every mortgage recorded after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien ~~which may be~~ established by virtue of this act to the extent that the mortgage secures funds which have been applied to:

~~a.~~ (1) The payments of amounts due to any claimants who have filed a lien claim or a Notice of Unpaid Balance and Right to File Lien;

~~b.~~ (2) The payment to, or the securing of payment by, the party against whose interest the lien claim is filed of all or part of the purchase price of the land covered thereby and any subsequent payment made for the improvements to the land , including but not limited to any advance payment of interest to the holder of the mortgage as required by the mortgagee as a condition of the loan;

~~c.~~ (3) The payment of any valid lien or encumbrance ~~which~~ that is, or can be established as, prior to a lien provided for by this act;

~~d.~~ (4) The payment of any tax, assessment or other State or municipal lien or charge due or payable at the time of or within 60 days after such payment, as required by the mortgagee as a condition of the loan;

~~e.~~ (5) The payment of any premium, counsel fee, consultant fee, interest or financing charges, or other cost related to the financing, any of which are required by the lender to be paid by the owner, provided that the total of same shall not be in excess of 10 percent of the principal amount of the mortgage securing the loan upon which they are based;

~~f.~~ (6) The [p]ayment to the owner of that portion of the purchase price of the real property on which the improvements are made or to be made which have previously been paid by the owner, exclusive of any interest or any other carrying costs of such real property, provided, however, that at the time of the payment of such funds to the owner, the budget upon which the loan was made indicated that the amount of the loan is not less than the total of: (4a) the purchase price of the real property, (2b) the cost of constructing the improvements, and (3c) any cost listed in subsections e b.3., d4. and e5. of this section; or

~~g.~~ (7) An escrow in an amount not to exceed 150% of the amount necessary to secure payment of charges, described in subsections ~~a.~~ b. (1), ~~c.~~ (3), ~~d.~~ (4) and ~~e.~~ (5) of this section.

c. Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8-4 et seq.) or diminish the effect of a notice of settlement filed pursuant to P.L. 1979, c. 406 (C.46:16A-1 et seq.).

COMMENT

For the most part, the revised language incorporates modifications suggested by construction lien law practitioners. A mortgage for advance of funds used for improvements to the property takes priority over other liens, including but not limited to any advance of mortgage interest or taxes collected at time of loan closing. However, in an attempt to reconcile section 2A:44A-10 with this section, which together posed a claimed ambiguity in *Sovereign Bank v. Silverline Holdings Corp.*, 368 N.J. Super. 1 (App. Div. 2004), this section is now divided into three subsections. The first subsection explains the priority of a mortgage recorded before the filing of a lien claim (wherein priority is secured to the extent the funds have been advanced); the next subsection explains the priority of a mortgage recorded after the filing of a lien claim (wherein priority is secured to the extent the funds are applied as set out in the statute); and the last subsection retains the priority provisions of N.J.S. 46:9-8.1 *et. seq.* Since, as a general rule, a mortgage normally enjoys priority only to the extent it is funded, the proposed revision is more consistent with existing legal principles.

2A:44A-23. Payment of lien claims; distribution of proceeds

~~All lien claims established by judgment shall be concurrent and shall be paid pro rata out of the lien fund and the proceeds of the sale authorized by this act.~~

a. The amount due a lien claimant shall be paid only after the lien claim has been established by judgment, or, in the case of an execution sale, only to those lien claimants whose lien claims were filed before application was made to the court for distribution of the sale proceeds. All lien claims established by judgment are “valid claims” that shall be concurrent and shall be paid as provided in subsection (c) below.

b. The sheriff or other officer conducting an execution sale authorized by sections 2A:44A-24 shall pay the proceeds to the clerk of the Superior Court and the Superior Court shall provide proper disposition of sale proceeds to the persons entitled thereto under the act.

c. The Superior Court shall order the distribution of a lien fund, after its calculation in accordance with section 2A:44A-9.1, in the following manner:

(1) If there are first tier lien claimants, the lien fund shall be allocated in amounts equal to their valid claims. If the total of those claims would exceed the maximum liability of the owner (or community association) as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that maximum liability;

(2) From the allocation to each first tier lien claimant, amounts shall be allocated equal to the valid claims of second tier lien claimants whose claims derive from contracts with that first tier lien claimant. If the total of the claims is less than the allocation to that first tier lien claimant, the first tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that first tier lien claimant, the second tier claimants’ allocations shall be reduced pro rata so as not to exceed that first tier lien claimant allocation.

(3) From the allocation to each second tier lien claimant, amounts shall be allocated equal to the valid claims of third tier lien claimants whose claims derive from contracts with that second tier lien claimant. If the total of the claims is less than the allocation to that second tier claimant, the second tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that second tier lien claimant,

the allocation to the third tier lien claimants shall be reduced pro rata so as not to exceed that second tier lien claimant allocation.

(4) If there are no first tier lien claimants, the lien fund for second tier lien claimants shall be allocated in amounts equal to that second tier's valid claims. If the total of the claims of any group of second tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

(5) If there are no first or second tier lien claimants, the lien fund for third tier lien claimants shall be allocated in amounts equal to that third tier's valid claims. If the total of the claims of any group of third tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

COMMENT

The section is new. It merges some of the current section 2A:44A-23 with current section 2A:44A-28. This provision attempts to set out the process by which lien claims are disbursed from the lien fund. Because of the merger of two sections within this section, the Commission also recommends modification of the descriptor as underlined. Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-24. Judgment; filing and content of statement **Suit to enforce lien claim; entitlement to defense; joinder of party defendants; distribution of surplus funds**

~~When judgment is obtained under this act there shall be filed in the office of the county clerk a statement signed and sealed by the clerk of the court, containing:~~

- ~~a. The name of the court;~~
- ~~b. The names of the parties;~~
- ~~c. Whether judgment is against the owner, contractor or subcontractor, or against the building and land only, or both; and~~
- ~~d. The amount and date of judgment.~~

~~There shall be filed with, or as part of, the statement, an oath of the claimant, his attorney or agent, stating the amount currently due thereon based on an updated statement of the amount owing on the judgment.~~

a. Subject to the further requirements of section 2A:44A-14, and in the case of lien claims arising from residential construction contracts the additional requirements of sections 2A:44A-20 and 2A:44A-21, a lien claim arising under this act shall be enforced by a suit commenced in the Superior Court within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed. Venue shall be laid in the county in which the real property affected by the lien is located.

b. A lien claimant shall join as party defendants the owner (community association, if applicable in accordance with section 2A:44A-3), contractor or subcontractor alleged to have failed to make payments for which the lien claim has been

filed and any other person having an interest in the real property that would be adversely affected by the judgment. The court shall order joinder of necessary parties or determine if it is appropriate for the suit to proceed if party defendants are not joined.

c. The court shall stay the suit to the extent that the lien claimant's contract or the contract of another party against whose account the lien claim is asserted provides that any disputes pertaining to the validity or amount of a lien claim are subject to arbitration or other dispute resolution mechanism.

d. Upon commencement of the suit, the lien claimant shall cause a notice of lis pendens to be filed in the office of the county clerk or register pursuant to N.J.S. 2A:15-6 et seq.

e. A party to a suit to enforce a lien claim shall be entitled to assert any defense available to any other party in contesting the amount for which a claimant seeks to have the lien reduced to judgment.

f. The judgment to be entered in a suit to enforce a lien claim shall (i) establish the amount due to the lien claimant; and (ii) direct the public sale by the sheriff or other such officer as the court may direct of the real property affected by the lien. The proceeds of the sale shall be distributed in accordance with section 2A:44A-23. If funds are realized at the sale in an amount greater than the lien fund, the surplus funds shall be distributed in accordance with law.

g. Nothing in this act shall bar recovery of money damages pursuant to a lien claim arising under this act.

h. A judgment obtained against a community association that is unpaid may be enforced by assessment against unit owners as they would be assessed for any other common expense, after reasonable notice, and in a manner directed by the court. In ordering assessments, the court shall be guided by the master deed, bylaws or other document governing the association. A judgment shall not be enforced by the sale of any common elements, common areas or common buildings or structures of a real property development.

i. Upon resolution of the suit other than by the entry of final judgment in favor of the plaintiff in accordance with subsection f., a cancellation or discharge of lis pendens should be filed, by the party who filed the enforcement action, in the office of the county clerk or register where the notice of lis pendens was filed.

COMMENT

This section is new. It sets out the parameters for enforcing a lien claim by a suit in the Superior Court and attempts to conform this section with section 2A:44A-25, both of which were taken from the old Mechanics' Lien Law and inserted in the Construction Lien Law due to the hybrid nature of a proceeding to enforce a lien claim under the old statute. The requirement to file a notice of lis pendens has been inserted here. The current section 2A:44A-24 is eliminated and most of current section 2A:44A-16 is merged with this new section.

In merging current section 2A:44A-16 into this section, the new proposed language eliminates any distinction between an action to establish a lien and a suit to enforce a lien, and sets forth the procedure for joinder, notice, and enforcement of judgment. New subsection b. provides guidance with regard to a claimant's failure to join dispensable parties. As a practical matter, if all lien claimants are not joined, the lien fund cannot be calculated and accurate pro rata distribution to lien claimants cannot be made. New

subsection d. sets out the procedure for enforcing judgments against community associations and clarifies that enforcement by the sale of common elements or common buildings or structures is against public policy and therefore prohibited.

The modification to subsection f. eliminates the need for section 2A:44A-29, and that section accordingly has been deleted. The addition of subsection i. clarifies that the notice of lis pendens should be discharged except where resolution of a suit is by the entry of final judgment in favor of the plaintiff in accordance with subsection f., in which case the sheriff's sale will relate back to the notice of lis pendens just as in a mortgage foreclosure. The Commission also recommends modification of the descriptor as underlined.

2A:44A-25. Writs of execution

If judgment in an action to enforce a lien claim under this act is entered in favor of the lien claimant ~~against the owner, contractor or subcontractor~~, a writ of execution may issue thereon, ~~as in other cases; in accordance with the judgment. if against the improvements and land, a special writ of execution may issue to make the amount recovered therein by sale of the improvements and land.~~

~~If both general and special judgments are given, both writs of execution may issue, separately or combined in one writ, and one of such writs may issue after the return of the other for the whole amount recovered or the residue as the case may require.~~

COMMENT

The changes to section 2A:44A-24 make necessary the modifications to this section.

2A:44A-26. Special writs of execution; sale and conveyance of land [deleted]

~~When a special writ of execution has issued under this act, the sheriff or other officer shall advertise, sell and convey the improvement and land in the same manner as in the case of other execution sales.~~

COMMENT

The changes to sections 2A:44A-24 and 2A:44A-25 make this section unnecessary and it is therefore eliminated.

2A:44A-27. Interest in residential property, priority to all subsequent liens

The interests in real property set forth in section ~~21~~ 2A:44A-21 ~~of this act~~ shall have priority to all subsequent liens under this act upon the land and upon the improvements thereon, except such as may be removable as between landlord and tenant, which may be sold and removed by virtue of any lien for the erection, construction or completion of the same, free from the prior encumbrances.

COMMENT

The revision replaces reference to section 21 of the act with reference to the title and section numbers.

~~2A:44A-28. Proceeds of sale; distribution~~ [deleted and incorporated into section 2A:44A-23]

~~The sheriff or other officer conducting the sale authorized by this act shall pay the proceeds thereof to the clerk of the Superior Court, who shall distribute the proceeds among the lien claims filed under this act before an application for distribution thereof is made to the court. The Superior Court shall provide proper disposition of proceeds of any sale to the persons entitled thereto under this act. The amount due a lien claimant shall not be paid over to him until after his lien claim has been established by judgment.~~

COMMENT

The revision to section 2A:44A-23 incorporates portions of this section making this section unnecessary and it is therefore eliminated.

~~2A:44A-29. Surplus funds; distribution~~ [deleted and incorporated into section 2A:44A-24]

~~If the proceeds of the sale of the improvements or land under any judgment obtained under this act shall be more than sufficient to pay the judgments of the claimants entitled to payment out of the proceeds of the sale under this act, any surplus shall be distributed by the court out of which the special writ of execution issued, to the defendants holding liens, subject to that of claimants, according to priority of their respective liens as determined in the judgment.~~

COMMENT

The changes to sections 2A:44A-24 and 2A:44A-25 incorporate portions of this section making this section unnecessary and it is therefore eliminated.

2A:44A-30. Filing of certificate to discharge lien claim of record; order to show cause

a. When a lien claim has been filed and the claim has been paid, satisfied or settled by the parties or forfeited by the claimant, the claimant or his claimant's successor in interest or ~~his~~ attorney shall, within 30 days of payment, satisfaction or settlement, or within 7 days of demand by any interested party, file with the county clerk a certificate, duly acknowledged or proved, directing the county clerk to discharge the lien claim of record, which certificate shall contain:

(1) The date of filing the lien claim;

(2) The book and page number endorsed thereon;

(3) The name of the owner of the land (or the community association, if applicable) named in the notice;

(4) The location of the property; and

(5) The name of the person for whom the work, services, equipment or materials was provided.

b. If the claimant shall fail or refuse to file ~~this~~ the certificate, as set forth in subsection (a), then ~~upon application by~~ any party in interest may proceed in a summary

manner by filing an order to show cause in accordance with the Rules Governing the Courts of the State of New Jersey. ~~upon notice to the claimant, to be served upon him in the same manner as provided by section 7 of this act, or upon satisfactory proof that the claimant cannot be served, any~~ A judge of the Superior Court may, upon good cause being shown and absent receipt of written objections and grounds for same, order the lien claim discharged on the return date of the order to show cause. The county clerk shall thereupon attach the certificate or order to the original notice of lien claim on file and shall note on the record thereof "discharged by certificate" or "discharged by court order," as the case may be and any lien foreclosure action shall be dismissed with prejudice.

c. Any party in interest may proceed to discharge a lien claim on the ground that it is without factual basis by filing an order to show cause in the same manner as set forth in subsection b.

d. In those circumstances in which the lien claim has been paid in full, the lien claimant has failed to file a lien claim discharge pursuant to this section, and at least thirteen months have elapsed since the date of the lien claim, the owner or community association may, in accordance with section 2A:44A:33, submit for filing a duly acknowledged discharge certificate substantially in the form provided by subsection a. accompanied by an affidavit setting forth the circumstances of payment as set forth below:

OWNER (OR COMMUNITY ASSOCIATION) AFFIDAVIT OF PAYMENT TO DISCHARGE LIEN CLAIM

TO THE CLERK, COUNTY OF

The undersigned, being duly sworn upon the undersigned's oath, avers as follows:

1. I am an owner of real property located at *(address of property subject to lien)*, in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the *(municipality)* of _____, County of _____, State of New Jersey *(In the case of a community association, I am an [officer/manager/agent] of the community association, [name of community association] for property located at [location of property development].)*

2. On or about *(date)*, I caused to be sent to *(name of contractor or subcontractor to whom payment was made)*, located at *(address designated for payment by the filed lien claim form)*, the final payment in the amount of (\$ _____) in full satisfaction of a certain lien claim dated *(date)* which was filed by *(name of lien claimant)* against the real property designated in paragraph 1, on *(date)* in the office of the county clerk of the County of *(name of county)* in Construction Lien Book _____, Page _____.

3. At least thirteen months have elapsed since the date of the lien claim and 90 days before filing this affidavit, I mailed or caused to be mailed by certified mail to the last known address of the lien claimant as set forth in the filed lien claim form written notice of my intention to file a discharge certificate with respect to the lien claim. To the best of my knowledge and belief, no written communication denying or disputing payment in full of the lien claim has been received from the lien claimant *(name.)*

4. Wherefore, the undersigned directs the county clerk of the County of *(name of county)* to cause to be filed the discharge certificate accompanying this affidavit, and further directs the county clerk to cause a notation of the discharge of the lien to be endorsed upon the margin of the record of the original lien claim, stating that the discharge is filed, and setting forth the date, book and page number of the filed discharge.

Name of Owner/Community Association

Signed _____

(Type or Print Name and Title)

NOTARIAL FOR INDIVIDUAL OWNER

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this _____ day of _____, 20____, before me, the subscriber, personally appeared [*name of owner/community association*] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that the owner/community association signed, sealed and delivered the same as the owner's/community association's act and deed, for the purposes therein expressed.

NOTARY PUBLIC

NOTARIAL FOR CORPORATE OR LIMITED LIABILITY OWNER/COMMUNITY ASSOCIATION:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this _____ day of _____, 20____, before me, the subscriber, personally appeared [*person signing on behalf of owner/community association*] who, I am satisfied is the Secretary [*or other officer/manager/agent*] of the Corporation [*partnership or limited liability company*] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [*partnership or limited liability company*] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [*or partnership or operating agreement*] executed the within instrument on its behalf, and thereupon acknowledged that the owner/community association signed, sealed and delivered same as owner's/community association's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

e-e. Any lien claimant who fails to discharge a lien claim of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any combination of owner, community association, contractor and subcontractor, as applicable, to discharge or obtain the discharge of the lien, and in addition thereto, the court ~~may~~ shall enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to discharge the lien.

f. Upon discharge of record in all cases, the party who filed the enforcement action shall cause the notice of lis pendens to be cancelled or discharged of record pursuant to N.J.S. 2A:15-6 et seq. Any party who filed the enforcement action who fails to cancel or discharge the lis pendens of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any other interested party, or any combination thereof, as applicable, to obtain the cancellation or discharge of the lis pendens, and in addition thereto, the court shall enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to cancel or discharge the lis pendens.

COMMENT

The revision provides a summary disposition procedure for those lien claims that are paid, satisfied, settled or forfeited in the event the claimant fails or refuses to file a certificate discharging the lien and for those lien claims that are alleged to be without a factual basis, in accordance with *Kvaerner Process, Inc. v. Barham-McBride Joint Venture*, 368 N.J. Super 190, 198-200 (App. Div. 2004), where the court held a summary proceeding to discharge a construction lien, brought by the general contractor, was appropriate although not expressly provided by statute. Now the statute will provide the availability of such summary disposition by any interested party.

In addition, a new subsection d. is added to provide for the discharge of a lien by an owner's discharge certificate in the event that a fully paid and satisfied lien claim is not discharged within 13 months of the date of the claim. A mechanism for cancelling the *lis pendens* is also included, with consequences imposed for failure to do so. Reference to "community association" is added because of modifications to section 2A:44A-3. The Commission also recommends the adoption of the underlined descriptor.

2A:44A-31. Bond in favor of lien claimant; surety; conditions

a. When a lien claim is filed against any improvement and land under this act, the owner, community association in accordance with section 2A:44A-3, contractor or subcontractor may execute and file with the proper county clerk a bond in favor of the lien claimant, with a surety company, duly authorized to transact business in this State, as surety thereon; ~~in an amount equal to 110% of the amount claimed by the lien claimant and~~ The amount of the bond shall be equal to 110% of the amount claimed by the lien claimant but in the case of a lien claim arising from a residential construction contract, no greater than the earned amount of the contract between the owner and the contractor as determined by the arbitrator in accordance with section 2A:44A-21b.(4). The bond shall be filed, in accordance with the language set forth in section 2A:44A-31.1, along with a payment in the amount of \$25, conditioned upon the payment of any judgment and costs that may be recovered by the lien claimant under this claim. Any form of bond proffered in accordance with this statute containing language inconsistent with the language set forth in section 2A:44A-31.1, shall be the basis for a cause of action to strike such language from the form of bond.

b. As an alternative, the owner, community association, contractor or subcontractor may deposit with the clerk of the Superior Court of New Jersey, funds constituting an amount equal to 110% of the amount claimed by the lien claimant ~~and~~ along with a payment in the amount of \$25, conditioned upon the payment of any judgment and costs that may be recovered by the lien claimant under this claim. The deposit may be made without the necessity of commencing any legal action. The written receipt provided by the court clerk for the deposit made may be filed with the county clerk as evidence of that deposit.

c. Any surety bond filed with the county clerk under this section shall be discharged, and any deposit with the clerk of the Superior Court shall be returned to the depositor, without court order, upon presentment by the owner, community association, contractor or subcontractor of any of the following:

~~(a)~~ (1) a duly acknowledged certificate as provided in paragraphs (2) or (3) of subsection a. of section ~~33~~ 2A:44A-33 ~~of this act;~~

~~(b)~~ (2) an order of discharge as provided in paragraph (34) of subsection a. of section 33 2A:44A-33 ~~of this act;~~

~~(c)~~ (3) a judgment of dismissal or other final judgment against the lien claimant;
or

~~(d)~~ (4) a true copy of a stipulation of dismissal, with prejudice, executed by the lien claimant or its representative in any action to foreclose the lien claim which is subject to the surety bond or deposit.

COMMENT

The revised language references section 2A:44A-31.1, a new provision suggested by construction lien law practitioners. Subsection letter designations are added to each paragraph. Revisions to subsection (1) and (2) replace references to section 2A:44A-33 with references to the appropriate title and section numbers. Reference to the arbitrator's determination in accordance with section 2A:44A-21b.(4) has been added in order to cap the bonding requirements for residential construction lien claimants. Also reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-31.1. Bond; form

The bond shall be filed in substantially the following form:

BOND DISCHARGING CONSTRUCTION LIEN

Bond No. _____

Bound Amount \$ _____

WHEREAS, on the th day of (month) (year), (name of claimant) (hereinafter "Lienor") filed a construction lien claim for the sum of (\$ _____), in the Office of the Clerk of the County of (name of county where lien claim was filed), (hereinafter "Clerk"), against the real property of owner, (name of owner), or community association (name of community association) [and the tenancy interest of (if applicable, add name)], (address of property or name and location of the property development in the case of a community association), Lot (#), Block (#) on the Tax Map of the Township of (name of municipality), County of (name of county), State of New Jersey, as is more fully set forth in the notice of lien, a true copy of which is attached hereto, and which lien was filed on (date lien claim was filed) in book (#), at page (#).

WHEREAS, in accordance with the Construction Lien Law of New Jersey, N.J.S. Title 2A, Chapter 44A, Article 1 et seq., the Principal is permitted to file a bond for 110% of the lien amount, which would be a total bond penalty of (\$ _____) (hereinafter "Penal Sum").

NOW THEREFORE, in consideration of the discharge of said lien by the Clerk, we, (name) as Principal, and (name of bond company), as Surety, having an office at (address of bond company) and authorized to do business in New Jersey as a surety, do hereby pursuant to the statute in such case made and provided, jointly and severally undertake and become bound to the Clerk in the Penal Sum of (_____ Dollars and _____ Cents) (\$ _____), conditioned for the payment of any and all judgments that may be rendered against said property in favor of the Lienor, its legal representatives or assigns, in any action or proceeding to enforce the alleged lien as described.

Sealed with our seal and dated the th day of (month), (year)

Witness: _____

(Name of principal)

By: (Signature)

Title: (Printed name and title of signatory)

Witness: _____

(Name of bond company)

By: (Signature)

Title: (Printed name and title of signatory)

COMMENT

Construction lien law practitioners suggested that a form of the bond be made part of the act for easier reference. The Commission recommends the adoption of the underlined descriptor. Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-32. Release, discharge from claim

When the bond, deposit or any combination thereof, authorized by section ~~31~~ 2A:44A-31 ~~of this act~~, is properly filed or deposited, the improvements and land described in the lien claim shall thereupon be released and discharged from the claim and no execution shall issue against the improvements and land. The words "released by bond" or "released by deposit of funds," as applicable, and a reference to the time and place of filing of the bond or deposit shall be entered by the county clerk upon the record of the lien claim.

COMMENT

The revision replaces reference to section 31 of the act with reference to the title and section numbers.

2A:44A-33. Discharge of record of lien claim

a. A lien claim ~~may~~ shall be discharged of record by the county clerk:

(1) Upon the execution and filing with the county clerk of a surety bond, or the deposit of funds with the clerk of the Superior Court of New Jersey, in favor of the claimant in an amount equal to 110% of the amount of the lien claim; or

(2) Upon receipt of a duly acknowledged certificate, discharging the lien claim from the claimant having filed the lien claim, or ~~his~~ claimant's successor in interest, or ~~his~~ attorney; or

(3) Pursuant to the filing of an owner's or community association's discharge certificate in accordance with section 2A:44A-30, provided that 90 days prior to the filing of the affidavit, substantially in the form set forth below, the lien claimant is notified by certified mail at the lien claimant's last known address of the owner's or community association's intent to file a discharge certificate and no written communication from the lien claimant denying or disputing payment in full of the lien claim is filed with the county clerk and served on the owner or community association; or

(34) Pursuant to an order of discharge by the court.

b. When judgment of dismissal or final other judgment against the lien claimant is entered in an action to enforce the lien claim under this act and no appeal is taken within the time allowed for an appeal, or if an appeal is taken within the time allowed for an appeal, or if an appeal is taken and finally determined against the lien claimant, the court before which the judgment was rendered, upon application and written notice to the lien claimant as the court shall direct, shall order the county clerk to enter a discharge of the lien claim.

c. If an appeal is taken by the claimant, the claim shall be discharged unless the claimant posts a bond, in an amount to be determined by the court, to protect the owner or community association from the reasonable costs, expenses and damages which may be incurred by virtue of the continuance of the lien claim encumbrance.

d. Upon discharge of record of the lien claim, unless the action for enforcement also involves claims, by way of counterclaim, cross claim or interpleader, arising out of or related to the improvements that are the subject of the lien claim in which the owner or community association is an interested party, the court shall also order that the owner or community association shall no longer be a party to an action to enforce the lien claim, and the surety issuing the bond shall be added as a necessary party.

e. Discharge of record of a lien claim will automatically discharge of record the Notice of Unpaid Balance and Right to File Lien filed in connection therewith.

COMMENT

The revision accommodates the concern of construction lien law practitioners that even if a bond has been posted, in those cases where enforcement of the action also involves claims by way of counterclaim or cross claim arising out of or related to the improvements that are the subject of the lien claim, the owner should remain involved in the proceeding. The county clerk may also now discharge a lien upon receipt of the owner's submission of a discharge certificate under certain circumstances. References to gender have been eliminated. Finally, reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-34. Filing of book and page number of original record of lien claim

A discharge, subordination or release of a lien claim or Notice or Unpaid Balance and Right to File Lien, a receipt of payment of a lien claim, or any order of the court discharging or releasing a lien claim, shall recite the book and page number of the original record of the lien claim, and a full description of the property discharged or released. The county clerk may refuse to discharge a lien claim unless ~~the provisions of~~ this section ~~have been~~ is satisfied.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

2A:44A-35. Discharge, subordination or release of claim, notice of unpaid balance and right to file; recording; acknowledgment and endorsement

A discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be duly acknowledged or proved, and recorded in a properly indexed book for that purpose. A notation of the record of the discharge of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be endorsed upon the margin of

the record in the book where the original lien or Notice of Unpaid Balance and Right to File Lien is recorded stating that the discharge is filed ~~and recorded~~, giving the date of filing ~~and recording~~ and setting forth the book and the page number where the discharge, or receipt of payment of the lien or order or owner's or community association's discharge certificate discharging the lien, is recorded.

COMMENT

The revision accommodates the submission of an owner's or community association's discharge certificate. Reference to "community association" is added because of modifications to section 2A:44A-3. References to "and recording" and "and recorded" are deleted because they are unnecessary. The revised definition of "filing" clearly includes lodging for record and indexing.

2A:44A-36. Liability for fraudulently depriving person of benefits of this act

A person who fraudulently deprives a person entitled to the benefits of this act shall be liable to that person for any damages resulting therefrom.

COMMENT

No changes have been made to this section of the current law.

2A:44A-37. Furnishing list of subcontractors and suppliers pursuant to contract or upon written request; penalties for failure to furnish

a. If required in a contract or upon written request from an owner or community association to a contractor, a subcontractor, or both, the contractor or subcontractor shall, within 10 days, provide the owner or community association with an accurate and full list of the names and addresses of each subcontractor and supplier who may have a right to file a lien pursuant to ~~the provisions of~~ this act.

b. If required in a contract or upon written request from a contractor to a subcontractor, the subcontractor shall, within 10 days, provide the contractor with an accurate and full list of the names and addresses of each subcontractor or supplier who may have a right to file a lien pursuant to ~~the provisions of~~ this act.

c. ~~Any list provided pursuant to the provisions of subsection a. or b. of this section~~ shall be verified under oath by the person providing it ~~same~~.

d. Reliance upon the verified list ~~by the person requesting same or by the owner~~ shall be prima facie evidence establishing the bona fides of payment made in reliance thereon and shall constitute an absolute defense to any claim that the party making such payment should have made additional inquiry to determine the identity of potential claimants.

e. Any person to whom a written request has been made pursuant to ~~the provisions of subsections a. or b. of this section~~ who does not provide a list in compliance with this section shall be ~~directly~~ liable in damages to ~~(i) the party requesting the list or to~~ (i) the party requesting the list or to (ii) the owner or community association, including, but not limited to, court costs and the reasonable legal expenses, including attorneys' fees, incurred by ~~said party or the owner~~.

~~or both,~~ any or all of them, in defending or causing the discharge of a lien claim asserted by a party whose name ~~has been~~ is omitted from the list.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3. Other stylistic changes have been made.

2A:44A-38. Waiver of construction lien rights unlawful and deemed void; exceptions

Waivers of construction lien rights are against public policy, unlawful, and void, unless given in consideration for payment for the work, services, materials or equipment provided or to be provided, and such waivers shall be effective only upon and to the extent that such payment is actually received.

COMMENT

No changes have been made to this section of the current law other than to make “material” singular as it is throughout the statute.