



## PUBLICATION

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### **Lien On Me – Mechanical Liens And Design Professionals Liens**

On July 1, 2012, SB 189, SB 190, AB 456, and SB 424 became effective, revamping California's Design Professionals Liens and Mechanics Liens statutes. Although it has been a few years since the statutes became effective, this article provides a general overview of the purpose and foundation of these remedies, the process of obtaining them, and the effect of the recent changes.

The California Constitution provides that "[m]echanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." (Cal. Const., art. XIV, § 3.)

#### **Overview of the Process**

Mechanics Liens provide contractors with an avenue to recover unpaid wages and only apply in situations where construction plans materialize. Design Professionals, however, typically perform their work *before* construction begins. Because of this technicality, the design professionals who worked on buildings that were never constructed were unable to obtain Mechanics Liens. To remedy this situation, the California Legislature created the Design Professionals Lien. (Civ. Code, § 8300 et seq.)

Under the statute, a design professional is any one of the following who furnishes services under written contract with a landowner for the design, engineering, or planning of a work of improvement: registered professional engineer, licensed architect, landscape architect, or land surveyor. (Civ. Code, §§ 8014 and 8300.) Design Professionals may record a Design Professionals Lien if the work *never* commences. If the work does commence,

they may record a Mechanics Lien. Moreover, if a design professional records a Design Professionals Lien because he has reason to believe that the work will not commence and the work does in fact commence, the design professional may be able to convert the Design Professionals Lien into a Mechanics Lien. (Civ. Code, § 8319.)

The following requirements must be met before a Design Professional Lien can be utilized: (1) the design professional's services must have been obtained through a written contract; (2) a building permit or other government approval must have been obtained in connection with the design professional's services; (3) the work of improvement for which the design professional provided services must not have commenced; and (4) the landowner must either default in a payment required under the contract or refuse to pay the demand of the design professional made under the contract. (Civ. Code, §§ 8300, 8304, subd. (a)-(c).) Also, Design Professionals Liens may not be recorded on single-family, owner-occupied residence with construction costs of less than \$100,000 in value. (Civ. Code, § 8318.)

Once those requirements have been met, the design professional with unpaid wages may begin the process of obtaining a lien. He must first give notice (subject to the requirements of Civ. Code, § 8100 et seq.) to the landowner and make a demand for payment, stating that there has been a default under the contract and the amount of the default. (Civ. Code, § 8304, subd. (c).) Ten days after the notice and demand are given, the design professional can record a lien. (*Id.*) Another time constraint that a design professional has during this process is to record the lien within 90 days of the date that he knows or has reason to know that the work of improvement will not be commenced. (Civ. Code, § 8312.) The claim of lien must include: the name of the design professional, the amount of the claim, the current owner of record of the site, a legal description of the site, and an identification of the building permit or other governmental approval. (Civ. Code, § 8304, subd. (d).)

Once a claim of lien has been recorded, the design professional must file an action to foreclose on the lien within 90 days to avoid the problem of an expired and unenforceable lien. (Civ. Code, § 8306, subd. (b), par. (2).) Also, because the Design Professionals Lien is a remedy for situations where work never commences, the claim of lien expires if the work does commence. (Civ. Code, § 8306, subd. (b), par. (1).) In situations where a lien expires due to work commencing, a design professional may convert his Design Professionals Lien into a Mechanics Lien. (Civ. Code, § 8319.) Moreover, even if a design professional fails in some respect to record a Design Professionals Lien, he may avail himself by obtaining a Mechanics Lien.

Similar to Design Professionals Liens, Mechanics Liens have strict time and notice requirements (subject to the requirements of Civ. Code, § 8100 et seq.) that must be complied with timely. The first requirement is the Preliminary Notice. The design professional must first determine whether he is a "direct contractor" or otherwise. A "direct contractor" is a contractor that has a direct contractual relationship with the owner of the building. If the design professional is a direct contractor, he only needs to give Preliminary Notice to the construction lender, if any. (Civ. Code, § 8200, subd. (e), par. (2).)

If the design professional does not have a direct contractual relationship with the owner of the building, he must give Preliminary Notice to the owner of the building, the direct contractor, and the construction lender, if any. (Civ. Code, § 8200, subd. (a).) The purpose of the Preliminary Notice is to alert the owner of the building that a contractor with whom he does not have a *direct* contractual relationship is claiming a right to a lien on his property.

The Preliminary Notice should be given within 20 days after first starting work. The Preliminary Notice could always be given after that time, but then the Mechanics Lien would only cover the services beginning with 20 days before the Preliminary Notice. (Civ. Code, § 8204, subd. (a).) Given the nature of design professionals' services, the statute provides that the Preliminary Notice "timing" requirements are deemed complied-with regarding a design professional who has already furnished services and gives Preliminary Notice not later than 20 days after the work on the building has commenced. (Civ. Code, § 8200, subd. (b).) The Preliminary Notice must contain the general description of the work to be provided, the estimated total price of the work, and the NOTICE TO THE PROPERTY OWNER excerpt found at Civ. Code, § 8202, subd. (a), par. (3). (Civ. Code, § 8203, subd. (a).)

The timing requirement for recording a Mechanics Lien depends on whether the design professional is a “direct contractor” or otherwise. If he is a direct contractor, he must record the lien after completion of the direct contract and before the earlier of the following times: 90 days after completion of the work of improvement (i.e. the project) or 60 days after the owner records a notice of completion or cessation. (Civ. Code, § 8412.) If he is *not* a direct contractor, he must record the lien after the design professional ceases to provide work and before the same time limits as a direct contractor. (Civ. Code, § 8414.)

The Mechanics Lien must include all of the information set forth in Civ. Code, § 8416, subd. (a), which includes, *inter alia*, general information about the design professional, the work performed, and a generic “NOTICE OF MECHANICS LIEN” which must be served on the owner. The statute specifically sets forth that errors contained in a recorded Mechanics Lien relating to the amount owed will invalidate the claim of lien only if the claim of lien was made with intent to defraud or if an innocent third party became the owner of the property after the design professional recorded the claim of lien, and the claim of lien was so deficient that it did not put the party on sufficient notice of the claim of lien. (Civ. Code, § 8422, subd. (b).)

The claim of lien may only include work that was included in the direct contract or a modification thereof. (Civ. Code, § 8432, subd. (a).) Thus, even if the work was authorized by a direct contractor or subcontractor, if the work is not authorized by the *direct contract*, it is not allowed to be included in the claim of lien. Any person who shall willfully include in a claim of lien labor, services, equipment, or materials not furnished for the property described in the claim, shall thereby forfeit the person's lien. (Civ. Code, § 8422, subd. (c).) Therefore, it is important that the claim of lien reflects accurate information.

The design professional must commence an action to enforce a lien within 90 days after recording the claim of lien. If the design professional does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable. (Civ. Code, § 8460, subd. (a).)

As was briefly described above, if a design professional records a Design Professionals Lien which expires due to work commencing on the property, he may convert his lien into a Mechanics Lien. This opportunity is subject to a few requirements: the Design Professionals Lien must have remained fully or partially unpaid; the design professional must record a Mechanics Lien for the amount of the unpaid Design Professionals Lien within 30 days of its expiration; and the recorded Mechanics Lien must state that it is a converted Design Professionals Lien which will be enforced as a Mechanics Lien, except Preliminary Notice is not required. (Civ. Code, § 8319, subd. (a).)

The benefit of this conversion is that it allows the design professional to maintain a lien on the property without having to give Preliminary Notice to the owner; this eliminates the need to wait 20 days before recording the claim of lien.

### **Changes That Became Effective July 1, 2012**

SB 189, SB 190, AB 456, and SB 424 became effective on July 1, 2012. These bills made technical and substantive changes to California Design Professionals Lien and Mechanics Lien statutes. The following is an overview of the substantive changes.

Under the old statute, one way that a work of improvement was deemed “completed” was through the “acceptance by the owner, or his agent, of the work of improvement.” (Civ. Code, § 3086, subd. (b).) “Acceptance by the owner” no longer constitutes “completion” unless the work of improvement is subject to acceptance by a public entity. (Civ. Code, § 8180.)

The old statute required that the owner record a “notice of completion” within 10 days of actual completion of the project. (Civ. Code, § 3093, subd. (a).) Under the newer statute, that time has been extended to 15 days. (Civ. Code, § 8182, subd. (a).)

Under the old statute, when a lien expired and the owner filed a petition to release the property from the lien, the prevailing party was entitled to attorney's fees capped at \$2,000. (Civ. Code, § 3154, subd. (g).) Under the 2012 statute, the owner must give a 10-day notice demanding to the claimant that he execute and record a release of the claim of lien before filing such a petition. (Civ. Code, § 8482.) Moreover, the prevailing party is now entitled to "reasonable" attorney's fees. (Civ. Code, § 8488, subd. (c).)

As described earlier in this article, a design professional may now convert a Design Professionals Lien into a Mechanics Lien if certain requirements are met. (Civ. Code, § 8319.) Furthermore, under the new statute, "landscape architects" are included in the definition of "design professionals". (Civ. Code, § 8014.)

Civil Code section 8422 codifies existing case law that holds that errors in a claim of lien (i.e., errors in a claimant's demand, credits, and offsets deducted; the work provided; or the description of the site) do not invalidate the lien. However, such errors will render the lien invalid if a court determines that: (1) the claim of lien was made with the intent to defraud or slander title; or (2) an innocent third party, without notice, actual or constructive, became the bona fide owner of the property after recordation of the claim of lien, and the claim of lien was so deficient that it did not put the party on further inquiry in any manner.

## **Conclusion**

As set forth above, the law provides design professionals with the additional safeguards in the event of non-payment. Other remedies still remain in place, such as, suing for a breach of contract; however, such a remedy may ultimately fail if the owner of the building does not have the money to pay the judgment. Since the Mechanics Liens and Design Professionals Liens have strict procedural requirements, it is important to understand and adhere to all requirements in order to utilize the benefits of such liens.

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