

Claims of Lien Step-by-Step Guide

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INTRODUCTION

Claims of Lien on Real Property, or “Mechanic’s Liens,” are one of the oldest and most valuable tools for recovery of money owed to construction industry players and are encountered by lawyers in a variety of situations. However, the requirements to take advantage of this special statutory right are technical and specific and must occur within a very narrow window of time after the work is performed so strict compliance with the requirements of Chapter 44A is essential. This Guide addresses the processes and procedures for filing, enforcing, perfecting, and discharging a mechanic’s lien on real property and on contract funds in North Carolina.

What is a Mechanic’s Lien?

A mechanic’s or materialman’s lien is a powerful statutory right codified in Article 2 of Chapter 44A of the North Carolina General Statutes which allows parties providing labor, services, materials, or equipment used for **improvement to real property** to hold that real property and/or contract funds for that property as security for payment of their completed work.

Defining “**improvement**” to real property: To build, alter, repair, or demolish any improvement upon, connected with, or beneath the surface, or to excavate, grade, fill, or landscape any property, or to construct driveways and private roadways, or to furnish materials for such purposes (including plants and shrubs), or to perform labor, including providing design or other professional or skilled services furnished by architects, engineers, land surveyors etc., and the rental of equipment directly used on the property in making the improvement. (N.C.G.S. § 44A-7(3))

Important Terms

Obligor: An owner, contractor or subcontractor (in any tier) who owes money to another party for the work, labor, materials, or equipment they provided in performance of a contract to improve real property.

Contractor: General term for an individual or business who contracts to improve real property.

General Contractor: Individual or business who contracts directly with the Owner of the real property to perform construction services or provide labor/materials to the project.

Subcontractor: Individual or business who contracts directly with the general contractor or another subcontractor on the project to perform construction services or provide labor/materials to the project to complete the land improvement project for which the general contractor was hired by the property owner.

First Furnishing: date on which the contractor first performed services or provided labor, materials, or equipment to the property.

Last Furnishing: date on which the contractor last performed services or provided labor, materials, or equipment to the property.

Subrogation: “Stepping into the shoes” of another party to assert that party’s rights.

Lien Agent: authorized title insurance company that receives and tracks notices from contractors and subcontractors of potential claims of liens.

Applicable Statutes

N.C. Gen. Stat. § 44A-10 – A Claim of Lien on Property is effective from the date the contractor **first furnished** labor, materials or equipment to the property.

N.C. Gen. Stat. § 44A-11 – Perfecting a Claim of Lien on Property: filing and service.

N.C. Gen. Stat. § 44A-12(b) – **120-day** timeframe for filing Claim of Lien on Real Property from date of Last Furnishing.

N.C. Gen. Stat. § 44A-12(c) – Statutory form of Claim of Lien on Property.

N.C. Gen. Stat. § 44A-12(d) – A Claim of Lien on Property **may not be amended**; it must be cancelled, and a new lien substituted within 120-day filing timeframe.

N.C. Gen. Stat. § 44A-13 – Lawsuit to enforce Claim of Lien on Property; required to be brought within **180 days** of last furnishing.

N.C. Gen. Stat. § 44A-18 – Claims of Lien on **Funds** available to subcontractors.

N.C. Gen. Stat. § 44A-18(d) – Subrogation rights do not extend to subcontractors and suppliers more remote than third-tier.

N.C. Gen. Stat. § 44A-19 – Statutory form of Claim of Lien on Funds.

N.C. Gen. Stat. § 44A-35 – Attorneys’ fees available for prevailing party at discretion of court when there is an unreasonable refusal by losing party to resolve the matter.

I. PRELIMINARY QUESTIONS:

a. Was the construction project private or public?

A contractor on a private project is entitled to a Mechanic’s lien against the property under Chapter 44A. Conversely, as public property is owned by the people of the public, public construction projects cannot be liened or foreclosed. When construction related work is contracted to be performed on government-owned property (such as for the construction of a school, work on a stormwater management system, or building a new road) there will most often be a surety “payment” bond covering the project. A Contractor who has not been paid for its work on a public project can assert a claim against the payment bond for payment of amounts owed.

b. Who is your client?

In NC there are two types of mechanic’s liens, Liens on Real Property for parties contracting directly with the Owner (See N.C.G.S. § 44A-7 – 44A-16); and Liens on Funds for parties contracting with a party other than the Owner, such as a Subcontractor or Supplier (See N.C.G.S. § 44A-18 — 44A-23)

A subcontractor may also claim a Lien on Property in addition to the Lien on Funds in certain circumstances via subrogation, or also in instances when the Owner made improper payments to its Contractor in violation of a valid Lien on Funds after receiving notice. If your client is a subcontractor or supplier, its lien on property claim will be asserted via “subrogation” by “stepping into the shoes” of the higher-tier contractor to assert the rights that contractor has against the Owner for any amounts due. This means that **whenever an owner has**

already paid the general contractor, a subcontractor will not have lien rights.

c. When did your client perform the work?

While Claims of Liens on Property are a powerful statutory tool for collecting payment, they accordingly have some substantial limitations and procedural requirements. Perhaps the most common invalidating factor is conformity with the 120-day filing period. N.C.G.S. § 44A-12(b) requires that all claims of lien must be filed “not later than 120 days after the last furnishing of labor or materials at the site...” This short time-filing deadline often sneaks up on many clients as 120 days is very brief considering the time between when the work is performed and when a potential lien claimant realizes there is a real problem getting paid.

Claims of Lien on Funds of subcontractors do not have the same 120-filing deadlines. Rather, a Lien on Funds is limited to the statute of limitations and statute of repose on the underlying breach of contract claim. A lien claimant may also extend the deadline for filing an action to enforce a Lien by tolling agreement (*Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 672 S.E.2d 691, 694 (N.C. Ct. App. 2009).)

d. What Pre-Lien Notices were posted for the project?

a. Lien Agent

For any contract for construction work over \$30,000 and which is not for the improvement of, or an addition of an accessory building or structure to, a single-family, Owner-occupied residence, a “Lien Agent” must be appointed by the Owner or its representative. The Lien Agent is an authorized title insurance company appointed to receive and track notices from contractors and subcontractors of potential claims of lien. Contractors and Subcontractors are required to serve a Notice to Lien Agent upon the Lien Agent designated on a project within 15 days of first furnishing labor, materials, services or equipment. The NC Online Lien Agent System website, www.liensnc.com, allows potential lien claimants to easily file and serve notice on the lien agent electronically. The Notice preserves the right of a potential lien claimant to pursue a Claim of Lien against the project property later. However, failure to file and serve a Notice to Lien Agent will only preclude a lien claim if the property is sold, refinanced, or otherwise transferred prior to Notice being given. The Notice to Lien Agent does not get filed with the Clerk of Superior Court.

b. Notice of Contract / Notice of Subcontract

An Owner or Contractor is also required to file with the Clerk of Court and post at the project property a Notice of Contract within 30 days of the later of: (i) the date a building permit is issued for the improvement; or (ii) the date the Contractor is

awarded the contract for the project. If a second- or third-tier subcontractor does not protect its right by also serving a signed Notice of Subcontract pursuant to N.C.G.S. § 44A-23(b), the potential lien claimant's lien rights may be extinguished.

II. THE CLAIM OF LIEN ON REAL PROPERTY

Because Claims of Liens on Property cannot be amended pursuant to N.C.G.S. § 44A-12(d), it is important to get the filed Claim of Lien right the first time. If a Claim of Lien is defective, the only option is to cancel the Claim of Lien and file a new corrected lien to substitute within the 120-day filing period.

- a. When:** A claim of lien on property must be filed within 120 days of a contractor's last date of Last Furnishing.

Claims of Liens on Property must also be served on the Owner and any other parties up the contractual chain within this 120-day timeframe. To evidence service of the Lien, a copy may be sent via a method with delivery receipt such as certified mail or UPS adult signature service, or sworn language may be included by the attorney in the body of the Claim of Lien generally certifying that the Lien Claimant or its agent have served the Owner (and contractor through which subrogation is asserted if the client is a subcontractor) in accordance with the requirements of G.S. 44A-11.

- b. Where:** A Claim of Lien on Real Property must be filed in the county where the property is located.

- c. What:** Mechanic's liens cover all claims arising from contracts to improve real property. The amount of the lien claim is limited to the unpaid amount remaining due on the project contract. The form of a Claim of Lien on Property is statutorily prescribed in N.C.G.S. § 44A-12(c) and requires the following:

- i. Lien Claimant's (your client) Name and Address;
- ii. Property Owner's Name and Address;
- iii. Property Description – Can be street address, tax lot & block number, reference to the recorded underlying deed or other recorded instrument, parcel identification number, or other description that reasonably identifies the property (N.C.G.S. § 44A-12(c)(3));
- iv. Date Lien Claimant FIRST provided labor or materials to the property;
- v. Date Lien Claimant LAST provided labor or materials to the property. This date establishes the lien priority date back to the date of first furnishing of labor or materials (rather than the date of filing);
- vi. General description of the work or materials furnished to the property;

- vii. Amounts owed for the work performed. N.C.G.S. § 44A-35 allows for attorneys' fees, but the amount should not be included in the Lien; and
- viii. Dated and signed by either the lien claimant or its agent, or the lien claimant's attorney. A Claim of Lien does not need to be notarized.

If your client is a subcontractor asserting a subrogation claim of lien on property, the following information is also required:

- ix. Name and address of each party through which subrogation rights are claimed;
- x. Name and address of the person with whom the lien claimant contracted if different than above;
- xi. Attach a copy of the notice of Claim of Lien on Funds as an exhibit; and
- xii. Although not required, a lien claimant should also consider including the following introductory language:

"PLEASE TAKE NOTICE that the undersigned lien claimant claims a lien on funds owed to the contractor and to each subcontractor against or through whom this claim is made. On receipt of this lien on funds you may not make any further payments to any of these parties unless you retain from such payments an amount sufficient to satisfy the lien on funds claimed herein. Failure to withhold sums as required may result in direct liability to the lien claimant."

III. THE CLAIM OF LIEN ON FUNDS

N.C.G.S. § 44A-18 provides subcontractors and suppliers down to the third tier the right to assert a Claim of Lien on Funds via subrogation. The Lien on Funds attaches to any funds that the Obligor owes to the contractor whom the lien claimant contracted with. For example, a first-tier subcontractor has a direct lien on the funds for amounts it is owed to the extent and amount that the project Owner owes to the General Contractor. Similarly, a second-tier subcontractor has a direct lien on the funds that a General Contractor owes to the first-tier subcontractor (who contracted with your client). Second and third tier subcontractors are subrogated to the rights of the lien claimant above them in the contract chain. For example, the amount of a second-tier subcontractor's lien on funds would be limited to the amount of the first-tier subcontractor's direct lien on the funds owed by the Owner to the general contractor. This means that if your client is a second-tier subcontractor owed \$50,000 by the first-tier subcontractor, but the first-tier subcontractor is only still owed \$30,000 by the general contractor, your client's Lien will be limited to \$30,000.

A Claim of Lien on Funds attaches and is effective immediately upon the first furnishing of labor, materials, or equipment to the project site. The Lien is perfected by serving a Notice of Claim

of Lien on Funds upon all potential obligors by certified mail or any other manner specified by Rule 4 of the NC Rules of Civil Procedure, including the property owner, the contractor, and each tier of subcontractors between the contractor and the lien claimant as set out in N.C.G.S. § 44A-19(d). Claims of Liens on Funds are not required to be filed. However, they are included as an exhibit to any corresponding subrogated Claim of Lien on Property which may be filed. Unlike a Claim of Lien on Property, there is no deadline for serving a Notice of Claim of Lien on Funds. However, the best practice is to serve the Notice as soon as possible to increase the likelihood of capturing any potential funds held by the Obligor or owed by the Obligor on the project contract.

Upon receiving a Notice of Claim of Lien on Funds, an Obligor is required to retain all funds subject to the Lien on Funds up to the full amount of the lien claim and stop making further payments of such amounts to contractors or subcontractors which are in tiers above the lien claimant unless it has retained an amount sufficient to satisfy the lien on funds claimed. An Obligor that “pays over” a Lien on Funds after receipt of notice is personally liable to the lien claimant for the amount of the lien pursuant to N.C.G.S. § 44A-20(d).

IV. THE LIEN FORECLOSURE LAWSUIT

Oftentimes, the cloud on title created by a Claim of Lien on Property will be enough to prompt payment from an Owner or potentially the general contractor for subcontractor claimants. If, however, payment of the claimed amount has not been secured within 180 days of last furnishing, a civil action to enforce and foreclose the Claim of Lien on Property must be filed in District or Superior Court depending on the amount of the claim pursuant to N.C.G.S. § 44A-13.

A lawsuit to enforce and foreclose a Claim of Lien on Property follows the same form and process as any other civil suit but includes as a prayer for relief that the property be sold, and the proceeds applied to the lien claim amount. The suit should also include any additional or alternative claims for the work performed or materials provided, including, but not limited to, enforcement of the Claim of Lien on Funds for subcontractors, breach of contract, unjust enrichment, and *quantum meruit*.

If the 180-day time period is missed for the lien lawsuit, the contractor still can file a breach of contract claim under the normal three (3) year statute of limitations.

V. PRIORITY OF LIENS

A perfected Claim of Lien on Property has the special privilege of a “relate-back” date of the date of first furnishing of work,

materials or equipment to the project, over all other interests (N.C.G.S. § 44A-10).

A perfected Claim of Lien on Funds has “super-priority” over all other interests or claims against the funds, including liens arising from garnishment, attachment, levy, judgment, security interests (N.C.G.S. § 44A-22).

In the event insufficient funds are available to satisfy all lien claimants, subcontractor lien claimants who have asserted Liens on Funds may recover amounts due under this section on a **pro-rata basis**.

VI. DISCHARGING A LIEN

A Lien can be discharged by several methods as set out in N.C.G.S. § 44A-20(e), including:

- Acknowledging payment of the debt in person at the Clerk’s office by signing an acknowledgement in front of the Clerk, which is then filed;
- Filing a Notice of Satisfaction of Lien (if satisfied);
- Filing a Cancellation of Lien (if unsatisfied);
- Depositing cash in the amount of the lien claim with the Clerk of Superior Court (a “Cash Bond”);
- Depositing a corporate surety bond with the Clerk of Superior Court in an amount equal to 125% of the lien claim (a “Surety” bond); or
- Filing a certified copy of a judgment or decree in the lien enforcement action showing the action was dismissed or otherwise determined adversely to the Lien Claimant.

Additional Resource:

NC Construction Law Deskbook 8th Edition (2021)

This newly released edition is now FREE as a member benefit for all members of the Construction Law section of the NCBA and is available in an entirely electronic, easily searchable format.

The Construction Law Deskbook has been a preeminent resource for practitioners serving the NC construction industry for over 25 years and includes:

- Discussion and practice pointers on frequently occurring issues
- Relevant case law and new developments
- Pertinent forms and examples