2009 Mechanic's Lien Law Changes

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A mechanic's lien is a security interest in personal or real property for those who have supplied labor or materials without being fully paid. In Pennsylvania and most other states, these liens are statutory in nature. These protective devices exist to provide a type of insurance to contractors by allowing them to obtain a lien against another's property to ensure payment. Almost every state has enacted a statutory provision regarding mechanic's liens. Pennsylvania is no exception as our legislature recognizes this as an important item of public policy. For the most part, the laws controlling these types of liens have gone unaltered for decades. However, in the past several years, sweeping changes in legislation have drastically altered the way mechanic's liens are treated in Pennsylvania.
Pennsylvania's Mechanic's Lien Law of 1963, 49 P.S. 1101 et seq. went unchanged for many years until finally being amended in 2007. These amendments, known collectively as "Act 52", took effect on January 1, 2007 and were mostly an attempt to protect the rights of contractors and other service providers from being subjected to potentially unfair up-front "lien waivers". Before these amendments, the practice of lien waivers was largely unregulated. In general terms, a lien waiver is a document filed by a contractor at the request of a buyer/owner or lender which prevents the contractor from asserting a mechanic's lien on their property. This contractual agreement benefitted buyers and lenders by reducing risk and stimulated competition between contractors by giving them the bargaining tool of waiving their lien rights to attract new customers.
However, the 2007 amendments made a number of changes to the Mechanic's Lien Law including the mandated restriction of these waivers. These waivers were now declared void and unlawful in many cases and with exceptions, (the main exception being any "residential building" project valued below $1,000,000). Before the 2007 amendments, both contractors and subcontractors could acquire a mechanic's lien, but the definition of who could qualify as a "subcontractor" was very narrow. Before the amendments, the definition of "subcontractor" only applied to persons under direct contract with the contractor who furnished labor or supplies. In other words, all second-tier or sub-subcontractors were unable to acquire a lien. However after Act 52, the law now allows many more

subcontractors to enforce liens by changing the definition of which parties constitute as “subcontractors”. Act 52 added to the definition other similar parties who work for or under the contractor or even under other subcontractors. Act 52 also extended the period of time in which a contractor my file a lien against a property. Since January 1st 2007, potential claimants have up to 6 months to file a lien claim as opposed to the previous 4 month window. These 2007 amendments drastically limited the use of lien waivers and changed the relationships between owners and contractors as well as their ability to bargain with one another. Broadly speaking, these amendments were bad news for borrowers and lenders and not necessarily great news for contractors. While at first glance it may appear that this legislation would be a relief to contractors, granting them a legal remedy to use when their work has gone unpaid, it also took away one of the most powerful bargaining incentives that could be offered to a potential client. While these changes were intended to benefit contractors and many other parties in the industry, the legislation was not without its critics. Controversy and confusion over the phrase “residential building” and the $1million dollar limitation lingered until the issue was finally addressed in 2009.

The 2009 amendments, which went into effect in October of 2009 under Act 34, among other things, sought to clear up some of the confusion over what constitutes a “residential building”. Under the 2007 amendments, a residential building was defined as a “property on which there is a residential building, or which is zoned or otherwise approved for residential development, planned development or agricultural use, or for which a residential subdivision plan or planned residential plan has received preliminary, tentative or final approval”. The 2009 amendments further revise this definition. Now, the statute uses the phrase “residential property” rather than the previous “residential building” and clarifies this type of structure as “property on which there is or will be constructed a residential building not more than three stories in height, not including any basement level.” The 2009 legislation also did away with the prior $1,000,000 requirement. These two main revisions have important ramifications. Act 34 greatly expands what type of construction may be subjected to a lien waiver by removing the dollar limit and provides that any builder of a home under three stories tall can be subjected to a possible lien waiver regardless of contract price. To summarize, as of October of this year, up-front lien waivers will be permitted for contractors and

subcontractors on most residential properties regardless of cost but will continue to be void for any non-residential projects or residential properties exceeding three stories in height.

With the removal of the price limitation, the expansion of who is considered a subcontractor, and the clarification of the scope of what is considered a residential property, it would appear that most contractors and subcontractors undertaking residential projects of any dollar amount will face required lien waivers once again. This will reduce the risks for many buyers and lenders by making lien waivers more available but will continue to provide issues for contractors. While the 2009 amendments clear up two major points of confusion created by or unaddressed under the 2007 legislation, additional ambiguities may have been created. For example, a buyer or lender on a multi-million dollar property could insist on an up-front mechanic's lien waiver provided that the entire structure is under three stories tall, regardless of contract price. However, a single multi-tiered townhome would not be considered a residential property if it were to go over the three story limit. These inconsistencies may create confusion in the construction industry but in time court cases interpreting the statute will give us answers.

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