

## **Mechanics' and Materialmen's Liens in Virginia**

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In Charlottesville and the surrounding areas, the filing of a memorandum of mechanic's lien has become more prevalent the last several years due the downturn in the economy. Contractors, both general contractors and subcontractors, seem to be finding that their bills are often going unpaid. Most contractors are aware that filing a memorandum of mechanic's lien may protect their rights, but do not know whether they should file a mechanic's lien and what advantages they may obtain from filing a memorandum of mechanic's lien. Knowing the answers to these questions allows contractors to make informed decisions that will help their business succeed.

### **I. What are the Advantages to Filing a Memorandum of Mechanic's Lien?**

Filing a Memorandum of Mechanic's Lien does two things: (1) the lien attaches to the real property upon which the contractor worked or supplied materials, giving the contractor the right to foreclose on the real property in an attempt to satisfy the lien and (2) it gives the contractor priority over other creditors seeking payment from the owner of the real property.

A memorandum of mechanic's lien is almost always filed only if the owner is unable to pay the contractor. If an owner of real property is in such a situation, that owner often owes money to many other creditors. Frequently the owner is insolvent and does not have enough assets to pay all his creditors. In such a situation, the law favors some creditors over others. Think of the creditors as standing in a line to get paid. Each spot in line may hold several creditors. For example, if both the plumber and the electrician are owed money, but neither has filed a memorandum of mechanic's lien, they will share a place in line. If, after paying those creditors ahead of the plumber and the electrician, the owner has insufficient funds to pay the plumber and the electrician, these two contractors may have to accept less than payment in full.

A memorandum of mechanic's lien may push the contractor closer to the front of the line of creditors waiting to get paid. In some cases, the contractor holding the memorandum of mechanic's lien may move to the front of the line.

A contractor must file suit to enforce the lien within six months of filing the memorandum of mechanic's lien. Failure to do so makes the lien invalid and unenforceable, and places the contractor in the same position he would have been had he never filed the lien. A suit to enforce a mechanic's lien is similar to most other litigation: if the suit is uncontested it will be relatively inexpensive, but if the suit is contested, the case may cost thousands of dollars to litigate. A contractor should always discuss the potential costs of the lawsuit with his attorney and determine whether there is any value in filing suit to enforce the mechanic's lien.

If the suit to enforce the mechanic's lien is successful, the contractor will now have a valid and enforceable lien on the owner's real property. The contractor, if he has still not been paid by this point, has the right to sell the real property at a foreclosure sale to satisfy his lien. Keep in mind that by now the contractor has moved very close to the front of the line of creditors seeking to get paid, and in most cases the contractor's debt will be satisfied in full by the foreclosure sale.

## **II. Should a Contractor Hire an Attorney to File a Mechanic's Lien?**

Contractors often file their own memorandum of mechanic's liens without consulting an attorney. Since the mechanic's lien statutes are highly technical, it is recommended that a Contractor allow an attorney to draft and file the memorandum of mechanic's lien. In fact, because there are certain notice requirements to filing a valid lien, and very short time periods in which a contractor must act to perfect a mechanic's lien, a contractor should contact an attorney at the first sign that payment in full may not be forthcoming.

The Virginia Supreme Court held that "a mechanic's lien is purely a creature of statute and is in derogation of the common law. As a result, where there are questions concerning the existence and perfection of such a lien, the mechanic's lien statutes will be strictly construed." *Woodington Electric, Inc v. Lincoln Savings and Loan Assoc.*, 238 Va. 623, 630, 385 S.E.2d 872, 875 (1989). For contractors, this means that if there are any slight flaws with the memorandum of mechanic's lien, the entire lien may be invalid.

For example, a contractor may only claim a lien for labor or materials furnished that are "permanently annexed to the freehold." Including costs that are not allowed to be included in a lien, for example the cost of purchasing a new ladder for use on a job, may very well invalidate the entire lien. Unfortunately, there is little about Virginia's mechanic's lien laws that is intuitive. Even the terms "general contractor" and "subcontractor" have a different meaning in the mechanic's lien laws than they do in the construction business, and misuse of the terms could mean that your lien is invalid.

As with all decisions in your business, deciding whether to file a memorandum of mechanic's lien is a business decision. If you are only owed \$500.00 on a job, hiring a lawyer

to file a memorandum of mechanic's lien may not make economic sense. However, when you are owed a substantial amount of money and want to file a memorandum of mechanic's lien, you should contact an attorney.

### **III. What are my rights if I do not file a Memorandum of Mechanic's Lien?**

A contractor may still file suit to collect the money he is owed if he does not file a memorandum of mechanic's lien. The downside is that the contractor will not obtain the advantages enumerated above, including priority of payment over certain other creditors.

**About the Author:** **Eric D. Smith** received his B.S. from the College of William and Mary and his J.D. from the University of Virginia. He has been licensed to practice law in Virginia since 2007. Mr. Smith focuses his practice on the areas of estate planning and administration, guardian and conservatorship, contracts, and real estate.