

The New Notice of Mechanic's Lien: A New Way to Lose Your Lien Rights

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Effective January 1, 2011, California will add a new prerequisite to recording a mechanic's lien. The new legislation, contained in Assembly Bill 457, requires a mechanic's lien claimant to serve a statutory Notice of Mechanic's Lien, with a copy of the mechanic's lien, upon the property owner before recording the mechanic's lien. A proof of service affidavit, verifying that the Notice of Mechanic's Lien was properly served, must then be recorded concurrently with the mechanic's lien. Failure to serve the mechanic's lien and Notice of Mechanic's Lien as prescribed renders the mechanic's lien unenforceable as a matter of law. Therefore, claimants seeking to record a mechanic's lien must not only comply with the new requirements, but due to the deadlines to record mechanic's liens, must be extremely careful to plan ahead so that they can fulfill these additional requirements and record the lien within the statutory deadlines. Assembly Bill 457 also makes mandatory the previously permissive requirement that a notice of the pendency of a mechanic's lien foreclosure action be recorded within 20 days after filing the foreclosure action.

Existing Law

Existing law provides that if the claimant is a general contractor, it must record its mechanic's lien within 60 days after a valid notice of completion or cessation has been recorded. If the claimant is a subcontractor or supplier, then the mechanic's lien must be recorded within 30 days after a valid notice of completion or cessation has been recorded. If no notice of completion or cessation has been recorded, then all claimants must record their liens within 90 days after completion of the work of improvement.

Existing law also provides that the mechanic's lien must include a statement of the claimant's demand, the name of the owner or reputed owner, and a description of the site sufficient for identification. However, existing law does not require that the mechanic's lien claimant give any notice to the property owner or other parties that it has recorded or will record a mechanic's lien. Therefore, the new legislation seeks to address the so-called "double payment" problem. This problem theoretically arises when a subcontractor or supplier records a mechanic's lien for unpaid work against the owner's property after the owner has paid the general contractor for that work. This legislation attempts to partially remedy the perceived imbalance by providing the property owner with notice when a lien has been recorded. According to the legislation's sponsor, the Contractors State

License Board, many owners do not realize their legal options “and often pay the lien claimant even though they have already paid the prime contractor for the services covered by the lien.”

Changes to the Mechanic’s Lien Law - The New Notice Requirements

Pursuant to the new legislation, the Notice of Mechanic’s Lien must contain the following statement in at least 10-point boldface type:

NOTICE OF MECHANIC’S LIEN ATTENTION!

Upon the recording of the enclosed MECHANIC’S LIEN with the county recorder’s office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. The legal action must be filed with the court no later than 90 days after the date the mechanic’s lien is recorded.

The party identified in the mechanic’s lien may have provided labor or materials for improvements to your property and may not have been paid for those items. You are receiving this notice because it is a required step in filing a mechanic’s lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property. This may affect your ability to borrow against, refinance, or sell the property until the mechanic’s lien is released.

BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANIC’S LIENS GO TO THE CONTRACTORS’ STATE LICENSE BOARD WEBSITE AT www.cslb.ca.gov.

A. Service Of The Notice Of Mechanic’s Lien

The Notice of Mechanic’s Lien and a copy of the mechanic’s lien must be served on the owner or reputed owner of the property, before the lien is recorded, by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing.¹ However, the new legislation does not include any specific time that the Notice of Mechanic’s Lien must be served before the mechanic’s lien is recorded. The Notice of Mechanic’s Lien must be addressed to the owner or reputed owner at the owner’s or reputed owner’s residence, place of business or at the address shown on the building permit on file with the authority issuing a building permit for the work. If the owner or reputed owner cannot be served by these methods, then the Notice of Mechanic’s Lien and a copy of the mechanic’s lien must be served by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, to the construction lender or to the original contractor.

B. Proof Of Service Affidavit Must Be Recorded With The Mechanic’s Lien

A Proof of Service Affidavit, as well as the Notice of Mechanic’s Lien, must be included with the mechanic’s lien for recording with the county recorder. The Proof of Service Affidavit must be signed by the person serving the Notice of Mechanic’s Lien and must include the date, place, manner of service and facts establishing that the service was made in accordance with the service requirements. The Proof of Service Affidavit must also include the name and address of the

¹ A claimant need only have a reasonable belief of the identity of the property owner at the time the mechanic’s lien is recorded. A mechanic’s lien will not be invalidated if the “reputed owner” later turns out to be incorrect. Also, because certified mail provides a clear record of service, certified mail is usually the preferred method of service.

person that was served with a copy of the mechanic's lien and the Notice of Mechanic's Lien and if appropriate, the title or capacity in which the person was served.

Under the new legal requirements, a claimant should first serve the Notice of Mechanic's Lien with a copy of the mechanic's lien, and then record the Mechanic's Lien with the Proof of Service Affidavit that verifies that the Notice of Mechanic's Lien was properly served.²

C. After A Complaint To Foreclose A Mechanic's Lien Is Filed, A Notice Of Pendency Of Action Must Be Recorded Within 20 Days

Under existing law, a plaintiff that filed an action to foreclose a mechanic's lien could record a notice of pendency of the foreclosure action to give constructive notice to potential purchasers of the property that a foreclosure action has been filed. This step was not mandatory. Under the new legislation, a plaintiff must record a notice of pendency of the foreclosure action within 20 days of filing the complaint. It does not appear that failure to record the notice of pendency of the action would invalidate the mechanic's lien. However, a plaintiff that failed to record the notice of pendency of action within 20 days would be unable to foreclose its mechanic's lien against bona fide purchasers of the property that acquired an interest in the property after the foreclosure action was filed.

Analysis

Due to the strict deadlines to record a mechanic's lien, a claimant must be prepared to timely serve the new Notice of Mechanic's Lien with a copy of the mechanic's lien before recording the mechanic's lien. It is recommended that a mechanic's lien claimant serve the Notice of Mechanic's Lien well in advance of recording the mechanic's lien to give adequate notice. However, nothing prohibits a claimant from serving the Notice of Mechanic's Lien, via certified mail, immediately prior to recording the lien because service by certified mail is arguably complete at the time of the deposit of the certified mail.³

Although the new Notice of Mechanic's Lien will provide more information to property owners, it is unclear whether the new requirements will achieve the goals of the legislation's sponsor. For example, the legislation's sponsor has stated that "the goal of AB 457 is to provide all parties involved in construction related transactions with an opportunity to deal with the relevant obligations in advance of the legal and financial issues that result from a mechanic's lien." However, the legislation does not contain any requirements that the Notice of Mechanic's Lien must be served well before the mechanic's lien is recorded. As discussed above, many claimants will serve the Notice of Mechanic's Lien on the same day that the mechanic's lien is recorded. In that event, the relevant parties may not receive an opportunity to deal with the consequences of a mechanic's lien before that lien is recorded. The new legislation may, however, afford the relevant parties an opportunity to deal with the mechanic's lien before a foreclosure action is filed, although nothing prevents a lien claimant from filing a foreclosure action immediately after recording its mechanic's lien so this benefit may be more illusory than real.

Also, as discussed above, one of the goals of the new legislation is to avoid double-payment by the owner. Typically, an owner will pay the general contractor and then the general contractor will pay its subcontractors and suppliers from those funds. Therefore, by the time that a subcontractor or supplier has served a Notice of Mechanic's Lien and recorded a lien for unpaid funds, the owner most likely has already paid the general contractor. Notwithstanding that payment, an unpaid subcontractor or supplier may still record a lien against the property, and the fact that the owner has now received notice of the mechanic's lien does not invalidate that lien. Consequently, the owner may have to pay twice despite receiving notice of the mechanic's lien, unless the owner has withheld retention funds from the general contractor, in which case the owner may have funds to satisfy the lien and may avoid double-payment.

² Because a mechanic's lien is unenforceable if it is recorded late, it is usually a good idea to personally deliver a mechanic's lien to the county recorder's office to ensure the lien is timely recorded.

³ See Civil Code sections 3097(f)(3) and 3097.1(c).

Finally, it is not clear whether the change that makes mandatory the previously permissive requirement of recording a notice of pendency of action will have any impact. For example, the legislation's sponsor has stated that "for those situations where a foreclosure suit is filed in order to satisfy the debts underlying a mechanic's lien, clear notice should be available to all parties who are interested in the property in question." Even if the requirement was merely permissive, any sensible lien claimant would timely record a notice of pendency of action because a claimant would be unable to foreclose its mechanic's lien against any bona fide purchasers if it failed to do so. The new legislation does not change this.

However, one thing is clear: failure to properly serve the new Notice of Mechanic's Lien, with a copy of the mechanic's lien, shall cause the lien to be unenforceable as a matter of law. Navigating through the complexities of recording an enforceable mechanic's lien and properly foreclosing that lien has always been difficult. With the additional requirements pertaining to the Notice of Mechanic's Lien, claimants must be extra careful to properly record and foreclose their liens.

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