

# OSBORN

## What the Building Owner MUST Know About Mechanics' Liens

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Quite often the building owner takes a "crash course" on the Mechanics' Lien Law when it is least convenient-when the owner is about to sell the property or obtain refinancing and lien is filed. Purchasers and lenders do not appreciate the additional layer of red tape created when a lien is filed.

The Mechanics' Lien is nothing more than a security interest in the property. The Mechanics' Lien can be filed by a party who performed "an improvement" on real property in most cases "during the progress of the work and the furnishing of the materials" or "within eight months after the completion of the contract or the final performance of the work or the final furnishing of materials."

If the party files a Mechanics' Lien (a contractor, subcontractor or material supplier who "makes an improvement" in the owner's building may do so), the lien will be of absolutely no affect to the owner of the real property if the lienor is unable to establish that the lienor has a direct or indirect entitlement to be paid from the owners funds.

### How Can the Owner Step into a Trap?

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1. A Mechanics' Lien is filled against a subcontractor or general contractor retained by the owner-and the owner then pays the general contractor after the receipt of the lien has notified the owner that the subcontractor has not been paid. The owner may have to pay the subcontractor once again even though money intended for the subcontractor has already been paid to the general contractor.
2. The owner enters into a separate agreement directly with the subcontractor or supplier **after** the general contractor defaulted and under the new agreement the owner expressly or implicitly agrees to pay the subcontractor or supplier.

### How Can the Owner Prevent Lien Problems?

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1. By knowing of all renovation jobs being undertaken by tenants in the building. Very often the problem is that contractors work for tenants without the landlord's approval and quite often without permits.
2. By placing a clause in the lease for each tenant and requiring, in subleases, that the tenant or subtenant agree to have a Mechanics' Lien placed by its subcontractor, supplier or material supplier

discharge within fifteen (15) days of filing. This will often make the general contractor or subcontractor make payment.

All the owner cares is that if it is not the owner's responsibility to make payment, that the owner does not assume the payment obligation of others (such as its tenants) performing work on the property. Even if the owner has no responsibility, a lien will place a cloud on the title of the real property. On the owner's work, the owner needs a waiver of lien with each payment. Those steps may help the owner take care of liens on a fairly expedited basis.

### What Steps Can the Owner Take if the Lien is not Promptly Removed?

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Unfortunately, the further steps listed below are not "good" answers for the building owner as each of these steps involves hiring a lawyer and spending money.

1. **Demand Foreclosure.** The owner can "call the lienor's bluff" by filing a demand that the lienor foreclose on the real property and unless the lienor does so within 30 days, the lien will be removed upon an application to the court. Foreclosure is accomplished by suing all holders of an interest in the real property.
2. **Demand a Breakdown of the Mechanics' Lien Under Section 38 of the New York State Lien Law.** Upon receiving a Demand for a Breakdown of Lien from the owner, the lienor is required to prepare and serve a verified breakdown of lien within five (5) days. If the breakdown is not served, the owner may submit an application for a court order setting a deadline; if the deadline is not met, the owner can go back and seek an order vacating the Mechanics' Lien.
3. **Sue the Lienor for Exaggerated Lien.** The owner is entitled to sue the lienor for "exaggerated lien" if the amount exceeds what the lienor is owed. If this is claimed, and the lienor persists in the lien standing for an exaggerated amount, the owner may recover from the lienor at trial, the amount of exaggeration, attorneys' fees, bond costs, and other costs incurred by the owner. Although this should be a potent weapon in heading off a false lien, recovery of these amounts to compensate for an exaggerated lien may only be recovered upon a full presentation of the merits of the case—a costly and cumbersome process.
4. **The owner may also file a claim against the Mechanics' Lienor in the case of a false lien, for "slander of title".** Recovery of these damages can only be done after full presentation of the merits of the case. Mechanics' Liens are an important device to assure protection of rights of suppliers of labor and material to a property, but the mechanics of the process are a tremendous "thorn in the side of the owner".

## Conclusion

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There is no doubt that reform is needed to avoid a fairly routine lien discharge issue from getting "snagged" in the courts for months, holding up refinancing or sale of the property until the court reaches a decision. It is urged that all BOMA members who have a recent negative experience with the Lien Law share that experience with us in order that reform may be suggested to the State Legislature to better address the concerns of building owners while continuing to protect those who furnish labor, material and equipment to buildings.