

STATEMENT FROM STUART S. ZISHOLTZ

When you are involved in a lawsuit there is no guarantee that you will be able to establish your position. This fact applies whether you are suing somebody or somebody is suing you. There is never a guarantee about the outcome of a piece of litigation. How a court or jury views the witnesses, evidence, testimony, etc. cannot be predicted.

For example, if you are suing someone for \$100,000, your records may only establish \$85,000 or less. You may even lose the case.

If you are being sued, you may have many defenses. You may claim that you do not owe \$100,000 for multiple different reasons. You may win all of it, you may lose all of it or you may be charged with anything between \$0 and \$100,000.

Similarly, if you file a mechanic's lien for \$100,000, the same principles apply. You may get all of it, you may get none of it, or you may get something in between.

Simply getting something in between or none of it does not result in the mechanic's lien being declared exaggerated. An exaggeration means that you willfully and deliberately decided to hurt the owner or the general contractor.

Recently, there was a situation where an architect was not paid a balance of approximately \$23,000. The architect knew that the owner was trying to refinance and, in an effort to kill the refinancing, filed a mechanic's lien for \$123,000. He added \$100,000 to his claim for no reason but to injure the owner.

This scenario is not the same situation where a contractor files a lien for \$123,000 based upon previously billings, etc., but cannot establish the claim at trial.

Again, exaggeration and failure of proof are not the same. You have every right to assert a claim for every penny you believe you are entitled to receive.

Many contracts provide that there are to be no change orders unless they are in writing. However, many field conditions prevent the contractor from first obtaining written change orders before the work is performed. A lien which encompasses those change orders would not constitute an exaggerated lien. However, adding to your lien legal fees, interest, finance charges, etc. can result in the lien being declared exaggerated. You are only entitled to lien for work performed or materials furnished. The additional costs, including legal fees, interest, finance charges, etc. can be sought in a foreclosure lawsuit.

Under the Lien Law, if you file an exaggerated lien and get caught doing it, you become responsible not only for the difference between the amount of your lien and the exaggerated amount, but you also become responsible for the owner's legal fees.

The bottom line is be legitimate. If you do a days work, you are entitled to a days pay. Do not be afraid to file a claim for the balance you believe is due and owing. Do not, however, engage in underhanded tricks or underhanded tactics. The Lien Law gives a subcontractor a very strong and powerful weapon. Do not abuse it or the ramifications could be severe.

Never let your lien time run out!

For a free copy of our updated pamphlet pertaining to Mechanic's Liens and Payment Bond Claims, feel free to contact me.

ZISHOLTZ & ZISHOLTZ, LLP
200 Garden City Plaza – Suite 408
Garden City, New York 11530
(516) 741-2200