

STATEMENT FROM STUART S. ZISHOLTZ

We all know that a major problem in the construction industry is payment. A developer or owner wants his building constructed expeditiously, and in return, the contractor wants his requisitions paid equally expeditiously. The owner or developer gets what he wants but tries to delay his responsibility for payment to avoid calling down on construction loans, paying interest, and to ultimately beat the contractor into the ground to obtain a favorable “settlement”. Sometimes, a tug of war develops. This is what we call the “golden rule” i.e., he who holds the gold makes the rule.

The Prompt Payment Act in New York mandates that owners and developers pay their contractors promptly on projects costing in excess of \$150,000. An interest charge of 1% per month is imposed on late payments and authorizes the contractor to stop work if payment is not made. Public projects and some housing developments are exempt.

The law also provides for progress payments on contracts with a duration of over sixty days. Payment must be made within seven days of the submission of any requisition or the completion of the work.

By definition, a contract is defined as one providing for the construction, alteration, repairs, maintenance, removal or demolition of a building or structure and the development or improvement of vacant land.

The kicker here is that the owner or developer has the right to withhold payment on written notice when the owner or developer deems the work performed not satisfactory. Payment must be released when the alleged defects are corrected.

On November 17, 2023, the Prompt Payment Act was amended to allow contractors and subcontractors to submit a final invoice upon reaching substantial completion of the project and

limit the right of owners and general contractors to withhold retainage in excess of 5% of the contract sum. Previously, a final invoice can only be submitted upon complete performance and retainage in a “reasonable amount” could be withheld. The twist here is that the Prompt Payment Act states that the parties to a construction contract can agree to supersede certain terms and conditions of the Act. Thus, it is possible that while the Prompt Payment Act allows for a final invoice to be submitted upon substantial completion and retainage to be reduced to 5%, the contract terms may overrule the statute.

The law is meant to provide additional security for the contractor. However, the recent amendments have not been addressed by any court. Therefore, do not delude yourself into thinking that every owner or developer will jump through the hoop to pay in a timely fashion. Procrastination is a long-established habit that is difficult to break. It does, however, give us some more ammunition. The law provides penalties and added on costs if an owner and developer plays games.

None of this eliminates the need for filing mechanic’s liens when necessary and the institution of actions when necessary. You should always file your lien timely and protect your receivables. It’s a simple process that should never be overlooked.

Never let your lien time run out!

For a free copy of a pamphlet pertaining to Mechanic's Liens and payment bond claims, kindly contact me.

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