

## STATEMENT FROM STUART S. ZISHOLTZ

Every month I write articles indicating the importance of filing a mechanic's lien to protect your interests. If done properly, the filing of a mechanic's lien can be a beneficial tool in collecting payment. The ability to protect your receivable by maintaining a secured interest in the real estate should not be overlooked.

If after filing the mechanic's lien you do not receive payment, the lien is bonded or everyone is ignoring you, then the next tool available to you is to commence a foreclosure action.

As I have indicated in the past, a mechanic's lien foreclosure action is similar, in certain respects, to a mortgage foreclosure. The purpose behind the mechanic's lien foreclosure action is to sell the real estate in order to satisfy the mechanic's lien. Most of the time, the mechanic's lien is subject to the first mortgage. Thus, any foreclosure sale must first satisfy the mortgage before the mechanic's lien. If there are other mechanic's lienors, then all lienors share the fund, if one exists, pro rata, regardless of when the liens were filed.

Since the action to foreclose on the mechanic's lien is equitable in nature, New York State Lien Law does not permit a jury trial. Instead, the contractor is compelled to pursue its claim by having the case tried before a judge, an arbitrator or a referee. If no mechanic's lien is filed or you decide to pursue the claim under a theory of breach of contract, unjust enrichment or quantum meruit, then you are entitled to a jury trial unless your contract waives it. In those instances, the claims are deemed an action at law even though they are seeking the same amount of money and allege very similar allegations as a mechanic's lien foreclosure action.

A Judge recently rendered a decision in New York County that indicated that where the parties are foreclosing on a mechanic's lien and seeking a breach of contract or unjust enrichment as well, the contractor can have a jury trial for the claims asserted separate from the foreclosure action. This includes a counterclaim for back charges and offsets asserted by the Owner. Under ordinary circumstances, however, you should be aware that you are not entitled to a jury trial when foreclosing on a mechanic's lien. This bizarre decision allowed the jury to render a decision on the amount due the lienor under the breach of contract claim but permitted the Judge to issue a final Order foreclosing the property.

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 or the Association.