

# **Mechanic's Liens Claims: How They Are Won and Lost**

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## **I. Mechanic's Lien Basics**

### **1. What is it and why a lien for contractors?**

A lien is a security interest in real estate.

Can be foreclosed (like a mortgage) with the property sold to satisfy the lien.

Policy: Its unfair for owner to enjoy improvements to their property if the contractor is not paid.

Owner may have to pay twice for the improvement.

### **2. Persons entitled to a mechanic's lien.**

Whomever "contributes to the improvement of real estate by performing labor, or furnishing, skill, material or machinery ... shall have a lien upon the improvement, and upon the land on which it is situated ... ." Minn. Stat. § 514.01.

Architects, engineers and land surveyors are entitled to a lien for their services even though their work is not an actual or visible improvement to the real estate itself. *Kirkwold Constr. Co v. M.G.A. Constr., Inc.*, 513 N.W.2d 241 (Minn. 1994).

Contractors and subcontractors: those who contract directly with the owner of the property for the improvement (contractors) and those who contract with a contractor to perform part of the contractor's work (subcontractors) are entitled to a lien.

Material suppliers: those who furnish materials that are to be incorporated into a project are entitled to a lien even if the materials are not ultimately used.

Laborers are entitled to a lien for their work contributing to the improvement.

### **3. Property subject to a mechanic's lien.**

Any private, transferable interest in real estate.

Private property only, not public property.

Public projects are subject to payment and performance bond requirements.

Homestead property is subject to mechanic's liens.

Mortgagee interests.

Leasehold interests. *Moorehead Lumber Co. v. Remington Packing Co.*, 206 N.W. 653 (1925).

#### **4. Enforcement of the Mechanic's Lien.**

A lien claimant must foreclose their lien by lawsuit in the county where the property is located. Minn. Stat. § 514.10.

Foreclosure of a mechanic's lien is conducted in the same matter as an action for the foreclosure of a mortgage upon real estate. Minn. Stat. § 514.10.

## **II. Where Lien Claimants Make Mistakes**

### **1. Pre-Lien Notice Errors.**

### **2. Lien Perfection Errors.**

### **3. Foreclosure Errors.**

Mistakes result in loss of mechanic's lien remedy or creation of points of dispute that increase the complexity and expense of the lien foreclosure litigation.

## **III. Properly Perfecting and Foreclosing a Mechanic's Lien**

### **1. Provide Pre-Lien Notice.**

Minn. Stat. § 514.011

#### **A. Contractor pre-lien notice.**

If written contract with owner, notice *must be in the written contract.*

If no written contract with owner, then notice must be delivered personally or by certified mail within 10 days after the work of improvement is *agreed upon.*

The required language is in the statute.

At least 10-point font, bold, all capital letters.

“A person who fails to provide the notice shall not have the lien and remedy provided by this chapter.” Minn. Stat. § 514.011.

#### **B. Subcontractor pre-lien notice.**

Required of every subcontractor (no direct contract with the owner).

Delivered personally or by certified mail to owner within 45 days of subcontractor's first labor, skill or material contribution to the project.

The required language is in the statute.

At least 10-point font, bold, all capital letters.

Only a good faith effort at compliance is required of *subcontractors*. Minn. Stat. § 514.011, subd. 2(b); *Merle's Const. v. Berg*, 442 N.W.2d 300 (Minn. 1989).

**C. The Multiple Dwelling Exception to the Pre-Lien Notice Requirement.**

“The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character.” Minn. Stat. §514.011, subd. 4b.

The “four family units” exception “applies only to multi-unit buildings, such as apartment buildings, condominiums, and townhouses, and not single-family lots within a residential development. *S.M. Hentgess & Sons, Inc. v. Mensing*, 777 N.W.2d 228 (Minn. 2010).

**D. The Non-Agricultural, Non-Residential Real Estate Exception to the Pre-Lien Notice Requirement.**

Minn. Stat. § 514.011: Pre-lien notice not required in connection with an improvement to property not in agricultural use and which is wholly or partially nonresidential in use if the work or improvement:

- (a) is to provide or add more than 5,000 total usable square feet of floor space;
- (b) is an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space; or
- (c) is an improvement to real property which contains more than 5,000 square feet and does not involve the construction of a new building or an addition to or the improvement of an existing building.

*C. Kowalski, Inc. v. Davis*, 472 N.W.2d 872 (Minn. Ct. App. 1991) (an office intended for operating a court reporting business and located within a residence constitutes a partially nonresidential use).

*Emison v. J. Paul Sterns Co.*, 488 N.W.2d 336 (Minn. Ct. App. 1992) (use of home office for business related tasks did not render the home “partially nonresidential in use”).

*Wallboard, Inc. v. St. Cloud Mall, LLC*, 758 N.W.2d 356 (Minn. Ct. App. 2008) (pre-lien notice required for tenant who improved leased space less than 5,000 square feet even though landlord’s property (the entire mall) exceeded 5,000 square feet).

*Ryan Contracting Co. v. O’Neill & Murphy, LLP*, 883 N.W.2d 236 (Minn. 2016) (“in use” refers to the use of the land at the time the lien attaches and “vacant land” is a nonresidential use and not an agricultural use).

## **2. Properly Record the Mechanic's Lien Statement.**

### **A. The Mechanic's Lien Statement Requirement.**

Minn. Stat. § 514.08: The lien ceases at the end of 120 days after doing the last of the work or furnishing the last item of skill, material or machinery, unless within this period:

(1) a statement of the claim is filed for record with the county recorder or, if registered land, with the registrar of titles of the county in which the improved premises are situated ... ; and

(2) a copy of the statement is served personally or by certified mail on the owner or the owner's authorized agent or the person who entered into the contract with the contractor.

The Statute states the required contents of the statement.

### **B. Improper Recording of the Statement.**

Torrens or Abstract property? Record in the proper office.

Torrens and Abstract property? Record in both offices.

*David-Thomas Companies, Inc. v. Voss*, 517 N.W.2d 341 (Minn. 1994) (holding lien on Torrens property void where lien statement was recorded with County Recorder rather than Registrar of Titles).

Property in multiple counties? Record in all.

Issue: The statement must identify the real property "with reasonable certainty." Minn. Stat. 514.08. An accurate, formal legal description is preferred.

Street address alone may describe the property "with reasonable certainty," but the County may not accept the document for recording without proper legal description.

## **3. Properly Serve the Mechanic's Lien Statement.**

Service by certified mail. Service is effective upon mailing, not receipt. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813 (Minn. 2004).

"Served personally" means actual delivery. The lien claimant or its agent can deliver the statement to the target. *Eclipse Architectural Group, Inc. v. Lam*, 814 N.W.2d 692 (Minn. 2012) (holding Minn. R. Civ. P. 4.02 service of summons rule does not apply to lien statement service).

Service on the owner, owner's agent *or* person who entered the contract with the lien claimant.

Practice tip: Serve both the owner and the party who contracted with the lien claimant.

An attorney's service of a mechanic's lien statement can trigger the obligation to comply with requirements of the Fair Debt Collection Practices Act. *Randall v. Paul*, 897 N.W.2d 842 (Minn. 2017).

#### **4. Timely Service and Recording of the Mechanic's Lien Statement.**

The lien statement must be served and recorded within 120 days of the claimant's last day of work. Minn. Stat. § 514.08.

The screen door doctrine: "Items of labor or material which are nominal or insignificant in amount and furnished for the sole purpose of extending the time for filing of the lien are not considered in determining the filing deadline." *R.M. Thompson, Jr. Lumber Co. v. Windsor Development Corp.*, 374 N.W.2d 493 (Minn. Ct. App. 1985).

Single or separate improvements: Whether or not multiple contributions are part of a single improvement or are separate and independent improvements for the purposes of the 120 day deadline is determined with reference to the "general purpose of the contract." *Kahle v. McClary*, 96 N.W.2d 243 (Minn. 1959). Factors include the lapse of time between contributions and whether the subsequent work "involved a trifling amount." *Id.*

No revival of the lien "when de minimus operations are performed for the sole purpose of extending the time for the lien." *Id.*

Practice tip: the drafting, serving and filing of a proper mechanic's lien can take time. Owner and contractor contact information may be difficult to obtain. A proper legal description for the property may be difficult to confirm. Commence preparations at least 30 days before the 120 day deadline.

#### **5. Claim the Lien Against All Contiguous Tracts of Land in Common Ownership.**

Claimant who provides labor or materials to one tract of land may file lien not only on tract improved, but on all contiguous tracts in common ownership. *LaValle v. Bayless*, 257 N.W.2d 283 (Minn. 1977); *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826 (Minn. Ct. App. 1994).

Time for determining contiguity of tracts of land is the time construction commenced. *LaValle v. Bayless*, 257 N.W.2d 283 (Minn. 1977).

Potentially important benefit to the lien claimant. There may be equity in contiguous property.

#### **6. Do Not Overstate the Amount of the Lien.**

Minn. Stat. § 514.08: The lien statement shall be verified and shall contain "a notice of intention to claim and hold a lien, and the amount thereof."

Minn. Stat. § 514.03: Generally, if the contribution is made under a contract with the owner and for an agreed price, the lien as against the owner shall be for the sum agreed upon. In all other cases, it shall be for the reasonable value of the work done, and of the skill, material and machinery furnished. In either case, less payments made to the claimant.

Minn. Stat. § 514.74: In no case shall a lien exist for a greater amount than the sum claimed in the lien statement, nor for any amount, if it be made to appear that the claimant has knowingly demanded in the statement more than is justly due.

Honest mistake, inadvertence or careless bookkeeping will not void lien. *Cox v. First Nat. Bank v. Aitkin*, 415 N.W.2d 385 (Minn. Ct. App. 1987).

To void the lien for overstatement, there must be a showing of fraud, bad faith or intentional demand for more than that due. *Delvea v. Turner*, 118 N.W.2d 436 (1962).

Lien amount can include contract interest only if the contract is with the owner. Otherwise, only statutory interest. *Lyman Lumber Co. v. Cornerstone Const., Inc.*, 487 N.W.2d 251 (Minn. Ct. App. 1992).

Practice tip: Lien claimants' account receivable reports typically include an interest element. When preparing a lien statement, be particularly careful to exclude interest calculations and take care to state an amount that is plainly supportable. Defendants will surely claim that the lien is overstated.

The defense of overstatement is an affirmative defense that is waived if not raised in responsive pleadings. *Lyman Lumber Co. v. Cornerstone Const., Inc.*, 487 N.W.2d 251 (Minn. Ct. App. 1992).

## **7. Commence the Foreclosure Action.**

### **A. In General.**

Except as otherwise provided in the mechanic's lien statute the action shall be conducted in the same manner as an action to foreclose a mortgage. Minn. Stat. § 514.10.

The Rules of Civil Procedure govern *unless* they are inconsistent or in conflict with the mechanic's lien statute. Minn. R. Civ. P. 81.01(a) & Appendix A.

Venue: an action to foreclose a mechanic's lien must be commenced in the district court of the county in which the real estate (or some part thereof) is located. Minn. Stat. § 514.10.

No right to a jury trial. *Engler Bros. Const. Co. v. L'Allier*, 159 N.W.2d 183 (Minn. 1968); *Johnson Service Co. v. Kruse*, 140 N.W. 118 (Minn. 1913).

### **B. Filing Before Service Required.**

The complaint must be filed with the court before it is served and the summons must state that the complaint has been filed. Where the summons is served before the complaint is filed,

service is ineffective. Minn. Stat. § 514.11; *Miles Const. Co. v. Krumrey*, 133 N.W.2d 361 (Minn. 1965).

The summons must contain a description of the real property involved and a statement that the object of the action is to foreclose a lien against the property. Minn. R. Civ. P. 4.041.

### **C. Filing of Notice of Lis Pendens Required.**

“At the beginning of the action” the plaintiff shall file a notice of lis pendens in the office of the county recorder and/or registrar of titles. Minn. Stat. § 514.12, subd. 1.

Failure to file a notice of lis pendens does not preclude the claim or affect the court’s jurisdiction. *Julius v. Callahan*, 65 N.W. 267 (Minn. 1895).

Failure to file a notice of lis pendens after the year in which the lien could be foreclosed “shall be conclusive evidence that the lien may no longer be enforced.” Minn. Stat. § 514.12, subd. 3.

### **D. Intervention.**

All those claiming liens on the same improvement “shall intervene in the original action by answer” and any lien claimant not named as a defendant “may answer the complaint and be admitted as a party.” Minn. Stat. § 514.12, subd. 2. No motion to intervene is required. *O.B. Thompson Electric Co. v. Milliman & Larson, Inc.*, 128 N.W.2d 751 (Minn. 1964).

### **E. Bonding Over the Lien.**

Once an action has been brought, anyone having an interest in the lien property may apply to the court to have the property released from the lien. Upon hearing, the court shall fix a sum of money or an amount of a bond to serve as substitute security for the lien. Upon deposit of the cash or bond with the court, the lien shall be released of record and the claimant shall have the same right of lien against the money or bond as it had against the property released. Minn. Stat. § 514.10.

## **8. Commence Foreclosure Action Within One Year of Last Day of Work.**

Minn. Stat. § 514.12: No lien shall be enforced in any case, unless the holder thereof shall assert the same, either by filing a complaint or answer with the court administrator, within one year after the date of the last item of the claim as set forth in the recorded lien statement; and, no person shall be bound by any judgment in such action unless made a party thereto within the year . . . .

*Mavco, Inc. v. Eggink*, 739 N.W.2d 148 (Minn. 2007). Court held mortgagee was not a “person” against whom a mechanics’ lien could not be enforced after the one-year period for commencing the action expired. “No person” means “no other mechanic’s lienholder.”

Practice tip: Regardless of *Mavco*, a lien claimant should join all those with an interest in the lien property in the foreclosure action so that the validity and priority of all interests can be judicially determined.

Practice tip: Obtain an owners and encumbrances report to determine who has interests in the property.

Generally, all mechanic's liens are coordinate and without priority among themselves. The liens for an improvement relate back to the date of the "actual and visible beginning of the improvement on the ground." Minn. Stat. § 514.05, subd. 1 & 514.15; *Miller v. Stoddard*, 56 N.W. 131 (Minn. 1983).

## **9. Blanket Liens Must be Foreclosed Against the Whole Property Liened.**

Minn. Stat. § 514.09: "A lienholder who has contributed to the erection, alteration, removal, or repair of two or more buildings or other improvements situated upon or removed to one lot, or upon or to adjoining lots, under or pursuant to the purposes of one general contract with the owner, may file one statement for the entire claim, embracing the whole area so improved; or, if so electing, the lienholder may apportion the demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each, respectively."

Under *Premier Bank v. Becker Develop., LLC*, 785 N.W.2d 753 (Minn. 2010), the lien claimant has two options:

(1) file one lien "for the entire claim" that "embrac[es] the whole area so improved" (the "Blanket Lien"); or

(2) "apportion the demand between the several improvements, and assert a lien for a proportionate part upon each."

The purpose of giving lien claimants a blanket lien option is to relieve lien claimants of the burden of keeping separate accounts and filing separate liens for each lot.

Blanket liens must be foreclosed against the whole and apportioned pro rata against each lot subject to the lien. *Premier Bank v. Becker Develop., LLC*, 785 N.W.2d 753 (Minn. 2010) (holding blanket lien claimant cannot seek to foreclose the entire amount of its lien against certain lots upon which it enjoyed a first priority lien).

Issue: is the use of square footage an appropriate apportionment method? The *Premier Bank* court simply spread the blanket lien equally across the 59 lots in the development.

Common interest community: liens must be apportioned to units per percentage of common expense liability attributable to the unit. Minn. Stat. § 515B.3-117. This is generally a square footage apportionment.

## **10. Judgment and Foreclosure Sale Procedure.**

Judgment: the judgment shall direct a sale of the real estate for the satisfaction of all the mechanic's liens asserted. Minn. Stat. § 514.15.

Delivery of transcript: the lien claimant must deliver a certified copy of the transcript of judgment to the sheriff. Minn. Stat. § 581.03.

Post notice of sale: the notice of sale must be posed in 3 public places in the county at least 6 weeks before the foreclosure sale. Minn. Stat. §§ 550.18(2) & 645.12.

Publish notice of sale: the notice of sale must be published for 6 weeks before the foreclosure sale. Minn. Stat. §§ 550.18(2) & 645.11.

Serve notice of sale: the lien claimant must serve the judgment debtor, persons in possession and persons who requested notice with the notice of sale at least 4 weeks before the foreclosure sale. Minn. Stat. §§ 550.19 & 580.032.

Foreclosure sale held: Minn. Stat. § 550.20.

Sheriff's report of sale: the sheriff must prepare a report of the sale and file it with the court. Minn. Stat. §§ 514.15 & 581.08.

Motion for confirmation of sale: the court must confirm the foreclosure sale. Minn. Stat. §§ 514.15 & 581.08.

Deficiency judgment entered: after the foreclosure sale is confirmed, a deficiency judgment may be entered against the party personally liable. Minn. Stat. § 581.09.

File sheriff's certificate of sale: the lien claimant must file the sheriff's certificate of sale in the office of the county recorder and/or registrar of titles within 20 days after the order confirming the sale. Minn. Stat. § 581.08.

## **11. Redemption.**

Redemption by owner: the owner may redeem from the foreclosure sale within 6 months of the date of the order confirming the sale. The owner must file a certificate of redemption with the county recorder and/or registrar of titles within 24 hours after the expiration of the owner's redemption period. Minn. Stat. §§ 514.15; 550.24(b); 550.27 & 580.26.

Redemption by junior lien creditor: if the owner does not redeem, junior lien creditors may redeem within successive 7 day periods in the order of the priority of their liens. Must file a notice of intention to redeem in the office of the county recorder and/or registrar of titles and deliver a copy to the sheriff at least 1 week prior to the expiration of the owner's redemption period. Minn. Stat. §§ 514.15; 550.24(c) & 580.24. A certificate of redemption must be recorded within 4 days after redemption is made. Minn. Stat. §§ 514.15; 550.27 & 580.26. An affidavit of redemption indicating the amount claimed due must be recorded and delivered to the sheriff within 24 hours after redemption is made. Minn. Stat. §§ 514.15; 550.24(c) & 580.25.