PENNSYLVANIA'S MECHANICS' LIEN LAW OF 1963 – THE OWNER'S PERSPECTIVE AFTER THE AMENDMENTS OF 2006 - 2014

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When a property owner undertakes a construction project, chances are that he looks forward to enjoying his new (or improved) property. Drawings in hand, he anticipates the day when his project will be complete and ready for occupancy.

The owner's priorities are clear: complete the project on time and on budget, hopefully without intervening disruptions to the construction process. To achieve these goals, an owner should familiarize himself with the legal risks and remedies attendant to the construction process. In particular, the owner should be aware of the Mechanics' Lien Law of 1963 ("Lien Law"), which allows unpaid contractors and subcontractors to file a lien against property in order to ensure the payment of debts owed to them in relation to the construction.

For the contractor and subcontractor, the Lien Law is a powerful tool to ensure that they are paid for their work. For the owner, the Lien Law is a source of risk. A lien impairs the owner's title to the property until it is removed. Further, an owner might end up paying twice for the same work in order to clear the lien.. With a thorough understanding of the Lien Law, however, the owner may be able to mitigate the risks.

I. Advance Lien Waivers under the Lien Law

Before the Lien Law was amended in 2006, owners in Pennsylvania had the means to protect themselves against almost any risk. Under Section 1401 of the law, owners could obtain lien waivers from contractors at the outset of the project, and enforce these waivers not only against the contractor who signed them, but against subcontractors with constructive

notice as well. While the enforceability of prospective lien waivers was not unique to Pennsylvania law, most of the other states in this region of the country did not allow them. Generally, advance lien waivers were void and unenforceable.

Moreover, under the 1963 Lien Law, the universe of potential lien claimants was limited; the law gave lien rights only to contractors and first-tier subcontractors. *See*, *e.g.*, *Brubacher Excavating, Inc. v. Commerce Bank/Harrisburg, N.A.*, 2010 PA Super 67, P7 (Pa. Super. Ct. 2010) (the right of a sub-subcontractor to file a mechanics lien was "a right that did not exist prior to the [2006] amendments to the Mechanics' Lien Law"); *B&B Builders v. TCR Byberry Creek P'ship & TCR Byberry Creek Constr.*, 27 Phila. 556, 567 (Pa. C.P. 1994) (lien claim dismissed because plaintiff was a sub-subcontractor, and "in accordance with § 1201(4) and (5) of the Mechanics' Lien Statute only contractors or subcontractors can assert mechanic's lien rights under the statute."). Thus, by obtaining and recording a prospective waiver, or by ensuring that the contractor paid its first-tier subcontractors, the owner could effectively insulate against the risk of liens.

In 2006, the General Assembly amended the Mechanics Lien Law (the "2006 Amendments").[1] The Amendments served to dramatically shift the legal landscape in Pennsylvania for owners. The 2006 Amendments increased the owner's exposure to lien claims in two ways: First, while Section 1301 continued to provide lien rights to the "contractor" and to "subcontractors", 49 P.S. 1301, the definition of "subcontractor" was expanded to include second tier subcontractors. *See* 49 P.S. 1201(5).[2] Consequently, lien rights were expanded to an additional tier of potential claimants.

[1] The 2006 Amendments became effective on January 1, 2007.

[2] In relevant part, the 2006 Amendments define "subcontractor" to mean "one who, by contract with the contractor, *or pursuant to a contract with a subcontractor in direct privity of a contract with a contractor"* who

Second, the 2006 Amendments severely restricted the circumstances under which owners could enforce prospective waivers of lien rights. Under the 1963 Lien Law, waivers were enforceable on all construction projects. The law simply provided that "[a] contractor or subcontractor may waive his right to file a claim by a written instrument signed by him or by any conduct which operates equitably to estop such contractor or subcontractor from filing a claim." 49 P.S. § 1401 (2005). With the 2006 Amendments, however, Section 1401 was revised to establish limitations with respect to the enforceability of such waivers. Enforceability depended, among other things, upon whether the subject property was "residential" or "nonresidential" under the law.

A. **Nonresidential Property**

As noted, In 2006, the Lien Law Amendments introduced a new dichotomy into the law. The enforceability of advance lien waivers depended upon the classification of the property as a "residential building" or "nonresidential building." *See* 49 P.S. § 1401 (2007). With respect to nonresidential properties[3], the 2006 Amendments ushered in a new era for owners, contractors and subcontractors alike.[4] From the owner's perspective, the Amendments greatly reduced his ability to protect himself from liens. As a general rule, the Lien Law was amended to provide that, as to contractors, a lien waiver "is against public policy, unlawful and void unless given in consideration for payment for the work" and only to the extent such payments are actually received. 49 P.S. § 1401(b)(1) (2007). Thus, the owner was empowered

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supplies certain labor or materials. 49 P.S. 1201(5) (2007) (emphasis added). Prior to the 2006 Amendment, "subcontractor" included only those who provided labor or materials "by contract with the contractor[.]" 49 P.S. 1201(5) (2005).

[3] The classification of "residential" and "nonresidential" properties will be discussed in Subsection B, below.

[4] The 2009 Lien Law Amendments left this provision of the 2006 Amendments intact. *See* 49 P.S. § 1401(b) (2010).

only to obtain and enforce backward-looking lien waivers that were effective only to the extent the contractor had already received payment for work performed. *Id.* Contrary to longstanding practice under the 1963 Lien Law, owners of non-residential properties could no longer enforce prospective lien waivers from their contractors.

With respect to subcontractors, the 2006 Amendments left the owner in a slightly more favorable position. An owner could obtain a prospective lien waiver from subcontractors if "the contractor has posted a bond guaranteeing payment for labor and materials provided by subcontractors." *49 P.S. § 1401(b)(2) (2007).* Thus, while the Lien Law Amendments had a profound effect on the enforceability of lien waivers, the owner still retained a potential tool to limit the risk of subcontractor claims. By requiring the contractor to post a bond, the owner could by providing an alternative bond remedy to subcontractors, and make enforceable prospective subcontractor lien waivers. Through this mechanism, the owner might insulate itself from liability from subcontractor and sub-subcontractor lien claims.

However, the 2006 Amendments created certain ambiguities, and these ambiguities have not yet been clarified by the case law. For example, Section 1402(b)(2) lacks a number of important details. It provides only that lien waivers are enforceable against subcontractors if the contractor posts a bond "guaranteeing payment" for the labor and materials supplied by subcontractors. It is unclear what exactly this provision requires.

Under other Pennsylvania statutes pertaining to public works, the requirements for payment bonds are tightly prescribed. For example, Section 903 of the Procurement Code specifies that, with respect to certain public contracts, a payment bond must be executed in the amount of 50% of the contract price. For certain other contracts, the bond must equal 100% of the price. 62 Pa.C.S. § 903. Under the Lien Law, however, it is unclear whether a bond must

equal the entire contract price, or whether some other percentage thereof would be sufficient. Also, the Lien Law is silent with respect to what qualifications , if any, are required of a surety. GFor example, must a surety be authorized to do business in the Commonwealth, as explicitly required under the Procurement Code. *See* 62 Pa.C.S. § 903.

B. **Residential Property**

For owners of residential property, the Lien Law Amendments had a similarly profound effect on the enforceability of advance lien waivers, drastically reducing the circumstances under which advance lien waivers remained valid. To further complicate matters, the 2006 were further revised and modified in several important respects with the enactment of the 2009 Amendments. The effects of these Amendments are discussed below, as are additional Amendments added by Act 117 of 2014.

Under the 2006 Amendments, and with respect to residential buildings, advance lien waivers were available under two circumstances. First, if the prime contract price was less than $1 million, then the owner could obtain valid lien waivers from both the contractor and subcontractors. *See* 49 P.S. § 1401(a)(1) and (a)(2)(i) (2007)[5].

[5] The 2006 Lien Law provided that, with respect to residential buildings:

(1) A contractor may waive his right to file a claim against property for the erection, construction, alteration or repair of a residential building, in which the total contract price between the owner and the contractor is less than one million dollars ($ 1,000,000), by a written instrument signed by him or by any conduct which operates equitably to estop such contractor from filing a claim.

(2) (i) A subcontractor may waive his right to file a claim against property for the erection, construction, alteration or repair of a residential building, in which the total contract price between the owner and the contractor is less than one million dollars ($ 1,000,000), by a written instrument signed by him or by any conduct which operates equitably to estop him from filing a claim.

49 P.S. § 1401(a) (2007).

Second, as with nonresidential properties, advance lien waivers from subcontractors could be enforced "provided the contractor has posted a bond guaranteeing payment for labor and materials provided by subcontractors." *Id.* at (a)(2)(ii). This mechanism was available to the owner irrespective of the prime contract price. *Id.*

Of course, it was important to understand whether or not the property qualified as a "residential building" under the law. The 2006 Amendments provided only that a "residential building" is "property on which there is a residential building, or which is zoned or otherwise approved for residential development." 49 P.S. § 1201(14) (2007). This definition left a number of questions unanswered. For example, would a ten story condominium building with two floors of retail be classified as residential for purposes of the Lien Law? Thus, owners were left without clear guidance as to whether they could protect themselves through the use of advance waivers. Unfortunately, there is a dearth of case law interpreting the subject.

This definition changed in 2009 when a new round of Lien Law Amendments were enacted. Under the 2009 Amendments, Section 1401(a) was amended to provide that: "A contractor or subcontractor may waive his right to file a claim against residential property by a written instrument signed by him or by any conduct which operates equitably to estop such contractor from filing a claim." 49 P.S. § 1401(a). This provision is limited by its terms to "residential property" but is otherwise largely reminiscent of the 1963 Lien Law. Most notably, the $1 million contract price limitation was removed, so that residential property owners are free to obtain waivers on any "residential" project, no matter how valuable.

As a significant caveat, however, this change was also accompanied by a major revision to the definition of "residential property." In particular, the 2009 Amendments define "residential property" to mean:

> property on which there is or will be constructed a *residential building not more than three stories in height*, not including any basement level, regardless of whether any portion of that basement is at grade level, or which is zoned or otherwise approved for residential development on which there is or will be constructed a residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is at grade level, planned residential development or agricultural use, or for which a residential subdivision or land development plan or planned residential development plan has received preliminary, tentative or final approval on which there is or will be constructed a residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is at grade level, pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code."

49 P.S. § 1201(14). This subsection of the Lien Law, as amended, is clear in some respects. Height, for example, is now a definitive criterion for classifying residential property. Indeed, considering the examples given above, the ten story condominium building would appear not to be "residential property" under the 2009 Amendments. Thus, the owner of even a modest condo within a larger building could not protect itself with advance lien waivers when contracting for improvements to its apparently "non-residential" property (although it might by requiring a payment bond from its prime contractor avail itself of the method available to an owner of "non-residential" property for validating prospective waivers from subcontractors).

A further twist was added for a subset of owners of residential properties by the further amendments to the Lien Law made by Act 117 of 2014. For owners of this class of residential properties, protection was afforded against subcontractor claims which would require double payment – even in the absence of a prospective lien waiver. The 2014 Amendments added a new subparagraph to 49 P.S. § 1301, to provide:

> (b) Subcontractor. A subcontractor does not have the right to a lien with respect to an improvement to a residential property if:

(1) the owner or tenant paid the full contract price to the contractor;

(2) the property is or is intended to be used as the residence of the owner or subsequent to occupation by the owner, a tenant of the owner; and

(3) the residential property is a single townhouse or a building that consists of one or two dwelling units used, intended or designed to be built, used, rented or leased for living purposes. For the purposes of this paragraph, the term "townhouse" shall mean a single-family dwelling unit constructed in a group of three or more attached *units in which each unit extends from foundation to roof with a yard or public way on at least two sides*.

(emphasis added).

Correlative to this provision, the 2014 Amendments provided certain mechanisms, in 49 P.S. § 1510, to effectuate the intent of this provision, where the contractor is paid in full subsequent to lien filing, or for *pro tanto* discharge where an amount less than the full contract price has been paid to the prime contractor. The Amendments provided:

(f) Residential Property.

(1) A claim filed under this act with respect to an improvement to a residential property subject to section 301(b) shall, upon a court order issued in response to a petition or motion to the court by the owner or a party in interest, be discharged as a lien against the property *when the owner or tenant has paid the full contract price to the contractor*.

(2) Where the owner or tenant has paid a sum to the contractor which *is less than the sum of the full contract price*, a claim filed under this act with respect to an improvement to a residential property subject to section 301(b) shall, upon a court order issued in response to a petition or motion to the court by the owner or a party in interest, cause the lien to be reduced to the amount of the unpaid contract price owed by the owner or tenant to the contractor.

(emphasis added).

C. **Enforcing the Lien Waiver**

The discussion above focuses on Sections 1201 and 1401 of the Lien law, which provide, respectively, the legal framework for the owner to understand the class of contractors and subcontractors to whom lien rights are available, and the types of properties for which the owner can obtain advance waivers of those lien rights. Armed with an understanding of where waivers are valid, the owner can focus on obtaining the waiver and taking steps to enforce it. To that end, Section 1402 sets forth the requirements for enforcing advance lien waivers.

First, whether the owner seeks to enforce a waiver against a contractor or subcontractor, the owner should obtain the waiver in writing.[6] *See* 49 P.S. § 1401(a) ("A contractor or subcontractor may waive his right to file a claim against residential property by a written instrument signed by him); *id.* at § 1402(a) (providing that "a *written* contract between the owner and a contractor, or a separate *written* instrument signed by the contractor, which provides that no claim shall be filed by anyone" is enforceable as a waiver of lien rights) (emphasis added). Where the contractor or subcontractor has signed the written waiver, the owner need not do anything more. Section 1402 of the Lien Law simply provides that the written waiver "shall be binding" with respect to that contractor or subcontractor. 49 P.S. § 1402(a). In other words, subject to Section 1401, an advance lien waiver in writing is self-executing.

Alternatively, under certain circumstances, the owner may bind a subcontractor to the contractor's advance waiver, even where the subcontractor has not himself executed a

[6] The Lien Law further provides that, with respect to residential property, a contractor subcontractor may also waive their lien rights "by any conduct which operates equitably to estop such contractor from filing a claim." 49 P.S. § 1402(a). An equitable estoppel of filing lien rights may be found where, for example, the court foinds the doctrine of laches applicable. *See Kelly Sys. v. Koda*,2008 Pa. Dist. & Cnty. Dec. LEXIS 250, *9-*10 (Pa. County Ct.2008)Nonetheless, an owner would be well-advised to obtain the waiver in writing, where possible, to avoid the litigation likely to revolve around asserting such a waiver. Indeed, the courts have not defined with any particularity the types of conduct likely to give rise to estoppel. *Id.*at *5.

waiver. *See Floors, Inc. v. Altig*, 2009 PA Super 2, P23 (Pa. Super. Ct. 2009). But, in order to do so, the owner must take steps to ensure that the subcontractor was on notice that the waiver was intended to cover the subcontractor. *See* 49 P.S. § 1402(a) (for waiver to be effective against subcontractor, the subcontractor must have notice that waiver "provides that *no claim shall be filed by anyone*[.]") (emphasis added). Otherwise, the subcontractor is not bound by a waiver signed by the contractor, and is within his rights to file a lien against the property.

Thus, to bind a subcontractor to the contractor's waiver, the owner must have at least one of the following: (1) proof that the subcontractor had actual notice of the written waiver *before* he started his work; or (2) proof that the subcontractor has constructive notice of the written waiver within certain time periods. The Lien Law requires that the owner provide "proof" that the subcontractor had "actual notice" of the waiver "before any labor or materials were furnished by him[.]" 49 P.S. § 1402(a). In the alternative, the owner may provide "proof that [the written waiver] was filed in the office of the prothonotary [within certain time periods]." *Id.* In particular, the waiver must be filed: (1) "prior to the commencement of the work upon the ground"; (2) "within ten (10) days after the execution of the principal contract"; or (3) at least "ten (10) days prior to the contract with the claimant subcontractor." *Id*; *see Floors, Inc. v. Altig*, 2009 PA Super at P23 ("Because [the subcontractors had constructive notice of the filing of the Stipulation of Waiver of Liens and since it had been filed before Appellant began any work on Appellees' property, the stipulation is binding on it as well, and we find that the trial court did not err in considering the same.").

It is important to note that constructive notice is established where *any* of these three time periods are satisfied. An owner need not meet all three. *Bennar v. Cent. Mausoleum Co*., 304 Pa. 569 (Pa. 1931). Thus, if an owner files the waiver with the prothonotary eleven

days after executing the prime contract, only four days prior to execution of the subcontract, but prior to any work commencing, the owner has met its burden of establishing constructive notice. Consequently, the lien waiver would be enforceable against the subcontractor. In *Bennar v. Cent. Mausolem Co*., 304 Pa. 569 (1931) (interpreting an identical provision of the prior, 1901 Lien Law), the owner filed the waiver with the prothonotary before the work began and within ten days after execution of the prime contract. Because at least one of the requisite time periods was met, the "Claimant's contention that the stipulation must also have been filed 'not less than ten days prior to the contract with the claimant' cannot be sustained." *Id.* at 571. Indeed, the statute is clearly written in the disjunctive. *Id.* at 572.

Finally, it is important to note that the contractor's written waiver, to be effective against subcontractors, must be executed in an arms-length transaction between owner and contractor. Under the Lien Law, an owner has no power to bind a subcontractor to any waiver executed by the owner's agent.

In particular, Section 1407 provides that a contract for improvement "made by the owner with one not intended in good faith to be a contractor *shall have no legal effect* except as between the parties thereto, even though written, signed and filed as provided herein, but such contractor, as to third parties, shall be treated as the agent of the owner." 49 P.S. § 1407. Thus in *Morrissey Constr. Co. v. Cross Realty Co.,*1969 Pa. Dist. & Cnty. Dec. LEXIS 120, 17-18 (Pa. C.P.1969), the lien waiver filed by the owner and his purported "contractor" was void and of no effect as to the actual contractors who worked on the project. The "contractor" was actually the owner's agent, who was not, in good faith, intended to actually perform construction, but rather simply signed a waiver as such in order to prevent liens. *Id.* The labels "contractor" and "subcontractor" have specific meanings under the Lien Law. An owner cannot hope to bind his

contractor to waivers merely by executing and filing a "prime contract" and lien waiver with a middleman.

In sum, an owner of property must obtain a waiver in writing from the contractor, and if seeking to enforce that waiver against a subcontractor, must provide notice to the subcontractor in the manner established by the Lien Law.

II. The Owner's Remedies

While the advance lien waiver, where available, is the owner's most effective means of avoiding risk, the reality under the Lien Law, as amended, is that advance lien waivers are no longer universally available. Even where waivers are available, there are a number of ambiguities in the law. These ambiguities may lead an owner to believe it has secured an enforceable waiver, but a court may hold otherwise. As a consequence, the owner should be aware of the remedies available to him in the event a lien is filed.

A. Preliminary Objections

Section 1505 of the Lien Law allows the owner to file preliminary objections to the lien claim on the grounds that the property is immune or exempt from being liened or that the lien claimant failed to comply with the Lien Law. This procedural mechanism allows the owner to obtain a ruling from the court at the outset, in advance of the trial on the merits. *See* 49 P.S. § 1505, cmt. Thus, where the objections are sustained, the owner may be able to obtain dismissal of the lien before going through the expensive and time-consuming litigation process.

In relevant part, the text of the statute states that "[a]ny party may preliminarily object to a claim upon a showing of *exemption or immunity of the property from lien*, or *for lack of conformity with this act*." 49 P.S. § 1505 (emphasis added). Fortunately for the owner, the Lien Law is a complicated statute with a number of procedural requirements a claimant must follow. Moreover, courts routinely hold that, in order to succeed on a lien claim, the claimant

must "strictly comply" with the law. Indeed, "[i]n order to effectuate a valid lien claim, the contractor or subcontractor must be in strict compliance with the requirements of the Mechanics' Lien Law." *Delmont Mech. Servs. Inc. v. Kenver Corp.*, 450 Pa. Super. 666, 672 (Pa.Super. 1996). Thus, missteps by lien claimants are not uncommon. The owner can, and should, file preliminary objections asserting any failure by the claimant to strictly comply with the lien law. Notably, the Superior Court "has construed section [1505] to permit the waiver of liens issue to be raised by preliminary objections." *Q-Dot, Inc. v. Atl. City Elec. Co.*, 289 Pa. Super. 155, 158 (Pa. Super. Ct. 1981).

The Lien Law empowers an owner to object to a lien claim on the grounds that the property is immune or exempt from lien. To that end, Section 1303 of the Lien Law provides a collection of circumstances under which property is exempt from a lien. For example, an owner's interest in property is exempt from lien to the extent a tenant, rather than the owner, contracted with the contractor for improvements. 49 P.S. § 1303(d). Therefore, unless the owner assents to the contractor's improvements in writing, there can be no lien on the property. *See Key Automotive Equip. Specialists v. Abernethy*, 431 Pa. Super. 358, 365(Pa. Super. Ct.1994).

Similarly, in the case of a lien for alterations or repairs, if a previous owner contracts for improvement, but sells the property to a new owner before a lien is filed, the lien is lost. 49 P.S. § 1303(c).

An "immune" or "exempt" property, however, need not necessarily be defined by the circumstances set forth in Section 1303. To the contrary, the Superior Court has held that the Lien Law "permits preliminary objections to be filed by any party who can demonstrate that the property in question is subject to some type of exemption or immunity from lien. On its face, section 1505 is simply *not* limited to those categories of exemption or immunity delineated by

section 1303." *Mele Constr. Co. v. Crown Am. Corp.*, 421 Pa. Super. 569, 575 (Pa. Super. Ct. 1992) (emphasis added). Thus, an owner may, for example file preliminary objections on the grounds that the contractor contracted with an easement holder, whose interest in the property is exempt from lien.[7] While this scenarios is not specifically set forth in Section 1303, under *Mele*, it is nonetheless a valid basis for preliminary objections.

Among the many provisions of the lien law with which a claimant must comply is Section 1503, which requires the claimant to include a number of details about the parties, construction work, and liened property in his filing. *See* 49 P.S. § 1503.[8] In *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 2 (Jan. 7, 2010), the court sustained the owner's preliminary objections that the contractor had failed to strictly

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[7] The right to lien under the Lien Law applies to "Every improvement and the *estate or title of the owner in the property*[.]" 49 P.S. § 1301 (emphasis added). An easement, however, "cannot be an *estate or interest* in the land itself, or a right to any part of it[.]"*Coffin v. Old Orchard Dev. Corp.*, 408 Pa. 487, 494 (1962) (emphasis added).

[8] Section 1503 provides that "The claim shall state:

(1) the name of the party claimant, and whether he files as contractor or subcontractor;.

(2) the name and address of the owner or reputed owner;.

(3) the date of completion of the claimant's work;.

(4) if filed by a subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;.

(5) if filed by a contractor under a contract or contracts for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor or materials furnished;.

(6) in all other cases than that set forth in clause (5) of this section, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof;.

(7) the amount or sum claimed to be due; and.

(8) such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them."

49 P.S. § 1503.

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comply with Section 1503. The contractor "had conducted work on multiple structures on the property" but its lien claim provided insufficient detail for the owner to ascertain "which materials were used for which structures or which improvements were made for each structure[.]" *Penstan*, 2010 Pa. Dist. & Cnty. LEXIS at *5. Thus, the court sustained the owner's preliminary objections, finding that the claim failed to provide a sufficient description of the improvement and of the property. *Id.*

The Lien Law has a number of important timing requirements. Under Section 1501 of the Lien Law, the claimant is required to provide notice to the owner at least thirty days prior to filing its lien claim. 49 P.S. § 1501(B.1). Subsequently, within one month after filing its claim, the claimant is required under Section 1502 to serve notice of the filing on the owner. 49 P.S. §1502(a)(2). That notice must provide certain details to the owner, including the court, case number, and date of filing. *Id.* In *Scaffidi v. Sumner Bldg., LLC*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 610 (Ct. Com. Pl. Oct. 7, 2010), the contractor filed a lien claim, but failed to comply with the notice requirements of Sections 1501(B.1) and 1502(a)(2). Specifically, the contractor filed his lien claim one day after providing written notice to the owner of his intention to file the lien. *Id.* at *5-6. To the court, this was a "clear violation of Section 1501(B.1)." 2010 Pa. Dist. & Cnty. Dec. LEXIS 610 at *6. Moreover, after filing claim, the contractor could not establish that it had served notice of filing upon the owner within one month, as required by Section 1502. *Id.* at 7. Based upon these failures to strictly comply with the law, the court sustained the owner's preliminary objections to the claim.

Under Section 1502(a)(1), in order to perfect a lien, the claimant must file its claim "within six (6) months after the completion of his work." 49 P.S. § 1502(a)(1). Failure to comply with this provision is grounds for a court to sustain an owner's preliminary objections.

In *Neelu Enters. v. Agarwal*, 2012 PA Super 276 (Pa. Super. Ct. 2012), the subcontractor filed a lien claim on June 23, 2011. In the claim, he alleged that his work was completed on January 10, 2011. The owner filed preliminary objections on the grounds that the claim was barred as untimely pursuant to Section 1502(a)(1). The owner alleged and provided evidence that in fact, the subcontractor had completed its work on December 8, 2010, thus requiring that the claim be filed by June 8, 2011. The trial court was convinced that the contractor's work was completed on December 8, 2010, and therefore sustained the preliminary objections, dismissing the claim as untimely. On appeal, the Superior Court affirmed the trial court's dismissal of the claim. 2012 PA Super at 831-32.

Under Section 1306(b), a contractor who performs work on multiple properties under a single contract must apportion its lien claims as to each affected property, unless the improvements form a "single business or residential plant[.]" 49 P.S. § 1306(b). Thus, where the contractor has provided work to several properties of an owner's subdivision, the owner may preliminarily object if the contractor simply files a single, aggregated claim. In *Martin Stone Quarries v. Robert M. Koffel Builders*, 2001 PA Super 318 (Pa. Super. Ct. 2001), the contractor did just that. The contractor in that case provided labor and materials for improvements to a planned residential subdivision. At the time the contractor provided his labor, the lots had not yet been subdivided, the contractor was aware that the property was going to be subdivided into multiple lots, and had been provided the plans showing the plan for new lots. After a payment dispute arose, the contractor filed a single lien claim as to the entire property, and the owner filed preliminary objections, arguing that apportionment was required under Section 1306. *Id.* at P5. Under these circumstances, the Superior Court held that the improvements were more akin to

separate lots than a single "residential plant" and the preliminary objections were properly sustained. *Id.* at P8-P9.

The owner, moreover, may limit the scope of a lien that has been claimed against an excessive portion of the owner's property. Under Section 1304, the owner may object "that a lien has been claimed against more property than should justly be included therein[.]" 49 P.S. § 1304. The court, upon taking evidence, may thus limit the lien claim to the appropriate boundaries. An owner, therefore need not suffer a lien on his entire property where the contractor has filed the lien in connection with improvements for only a small portion thereof.

B. **Discharge**

In many instances, the owner may simply want to discharge the lien as quickly as possible. Section 1510 of the Lien Law allows an owner to discharge a lien by paying into court the amount alleged due in the lien claim:

> Any claim filed hereunder shall, upon petition of the owner or any party in interest, be discharged as a lien against the property whenever a sum equal to the amount of the claim shall have been deposited with the court in said proceedings for application to the payment of the amount finally determined to be due."

49 P.S. § 1510(a). While removing the lien is an attractive result to any owner, this remedy has clear practical limitations. Depending on the size of the claim, and the owner's liquidity, paying the full claim amount may not be feasible for every owner in every circumstance. But, subsection (d) of Section 1510 may provide some relief to those owners. Subsection (d) allows an owner to enter "approved security" into court in lieu of cash (in double the amount of the claim, unless a lesser amount is allowed by the court), which shall also have the result of discharging the lien. 49 P.S. § 1510(d). Where possible, these provisions may provide means for the owner to quickly remove the lien. Aside from removing the lien on the property, this

provision of the lien also guarantees the return of any portion of the deposit that is not deemed due to the claimant. *See* 49 P.S. § 1510(c).

C. **Rights Against Contractor**

In the context of a lien claim by a subcontractor, Section 1601 empowers the owner to turn to the contractor for relief from the subcontractor claim. Under that provision, the owner is empowered to retain, out of any payments due the contractor, an amount sufficient to cover any losses due to the lien claim. Section 1601 provides:

> An owner who has been served with a notice of intention to file or a notice of the filing of a claim by a subcontractor may retain out of any moneys due or to become due to the contractor named therein, a sum sufficient to protect the owner from loss until such time as the claim is finally settled, released, defeated or discharged.

49 P.S. § 1601. Of course, to the owner who has already paid his contractor his full due, this remedy is of little value, as there are no further payments "due or to become due" to the contractor. *Id.* An owner, then, would be well advised to withhold retainage from his contractor in the normal course, and to hold such payments from the contractor until the time has passed for a subcontractor validly file a lien or until it is provided satisfactory proof of full payment to subcontractors.

In order to avail himself of the right to withhold retain payments due the contractor, the owner must provide notice to the contractor pursuant to Section 1602. In particular, the notice must notify the contractor of the name of claimant subcontractor, as well as the amount the owner will withhold. 49 P.S. § 1602(b)(1). Further, the notice must state "that unless the contractor within thirty (30) days from service of the notice settles, undertakes to defend, or secures against the claim as provided by section [1603], the owner may avail himself

of the remedies provided by section [1604]." 49 P.S. § 1602(b)(2). The notice, moreover, must be properly served as prescribed by Section 1602(c).

After receipt of the notice, the contractor must, within 30 days (1) settle or discharge the lien claim; (2) agree in writing to defend the owner; or (3) furnish the owner with sufficient security to protect him from the claim. 49 P.S. § 1603.

However, if the contractor does not comply with Section 1603 and fails to settle the claim, furnish a defense, or security, the owner may turn to Section 1604. Under that provision, the owner may pay the claim, and then (1) be subrogated to the subcontractor's rights against the contractor, including any collateral held by the subcontractor against the contractor, or (2) defend against the claim, in which case the contractor shall be liable to the owner for all reasonable costs and attorneys' fees, and the owner may simultaneously withhold payment from the contractor under 1601. 49 P.S. § 1604.

D. **Right to Limit Claims**

Finally, with respect to subcontractor liens, the owner has the ability under Section 1405 to limit the amount of claims to the unpaid amount of the prime contractor price. Thus, where subcontractor liens, in the aggregate, exceed the remaining sum due to the contractor, the owner may file an application in court limiting each such lien "to its pro-rata share of the contract price remaining unpaid, or which should have remained unpaid, whichever is greatest in amount at the time notice of intention to file a claim was first given to the owner, such notice inuring to the benefit of all claimants." 49 P.S. §1405. However, for an owner to avail itself of this right, the subcontractors must be notice of the total contract price through either: "actual notice of the total amount of said contract price and of its provisions for the time or times for payment thereof before any labor or materials were furnished by him" or constructive notice, established through filing the contract with the prothonotary" (in the time

and manner provided for under 49 P.S. § 1402 for filing advance line waivers intended to bind subcontractors). *Id.*

III. Non-Statutory Remedies

There are also a number of non-statutory remedies available to the owner that should be utilized as a regular practice. Foremost of these protections is an indemnity provision in the prime contract. By inclusion of a provision in the contract that requires the contractor to "indemnify, defend and hold harmless" the owner from all claims by subcontractors in relation to their work on the project, the owner achieves two closely-related goals: insulation from the legal expenses of defending the lien claim, and providing additional incentive for the contractor to ensure that the subcontractor is paid. Where subcontractors are paid, after all, there is little likelihood of a lien claim.[9]

Second, as a precondition to each progress payment to the contractor, the owner should ensure that the contractor executes a payment certification. The certification should state that the contractor has paid his subcontractors in full for all amounts due thus far. A parallel provision should also be included in the prime contract. The effect of the contract provision and certification is that the owner now has a contractual basis to seek relief against the contractor in the event a lien is filed. With proof of the contractor's certification in writing, the owner can be more confident that liability for the debt would ultimately fall to the contractor.

The payment certification, while beneficial in its own right, should also be used in conjunction with lien waivers. While advance lien waivers, as discussed above, are only available in limited circumstances, the Lien Law explicitly allows the owner to obtain waivers

[9] In addition to including the indemnity provision in the prime contract, the owner should require the contractor to include similar provisions to each of its subcontractors. The Lien Law, after all, extends lien rights to sub-subcontractors, and the owner should well-prepared to make sure that indemnity is provided for in each tier between himself and potential lien claimants.

"given in consideration for payment for the work, services, materials or equipment provided and only to the extent that such payment is actually received." 49 P.S. § 1401(b). Thus, to the extent of each progress payment, the owner can reduce his exposure to lien claims by requiring the contractor and subcontractor to waive their rights to lien. Moreover, by obtaining payment certifications from the contractor, the owner will have an important source of proof that "such payment [was] actually received."

Finally, the owner should consider requiring the contractor to execute a payment bond with a surety. While the cost of the bond will increase the project price, it may well be a worthy investment for the owner. The bond can, after all, allow the owner to obtain enforceable advance waivers from subcontractors as it provides unpaid subcontractors are a source from which to seek payment other than the property itself. While the bond will not serve to insulate the owner from lien claims by the prime contractor, and is thus only a limited protection, it may, depending upon the size of the job, remove sufficient lien risk to outweigh the costs of obtaining the bond, where feasible.

IV. Conclusion

While the Lien Law is a powerful tool for contractors and subcontractors, it also provides a number of important remedies to the owner. Though the right to obtain advance waivers has been severely restricted with the 2006 and 2009 Amendments, waivers are nonetheless available to shield the owner from risk under certain circumstances. Even where a lien is filed, the statute allows the owner to look to the contactor to relief, and to otherwise limit the amount or scope of the claim. With a thorough understanding of the rights available to it, and with a robust contract protecting its rights, the owner may mitigate the risk of lien claims.