

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the law offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esq. We welcome and appreciate your suggestions for future article topics.

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PREFILING BEFORE CONSTRUCTION NOTICE FOR LIENS IN THE COMMONWEALTH OF VIRGINIA

Priority determines which lien gets paid first after a foreclosure sale and which lien survives the sale. Mechanic's liens in Virginia have highest priority over any other form of lender except for the lender who provides money for the purchase of the real estate.

In other words, a mechanic's lien claimant will have priority over a construction lender. Additionally, a mechanic's lien will also survive a foreclosure on the sale of the property and bankruptcy will not define a contractor's lien rights.

Mechanic's Lien Agent (MLA):

For residential construction in Virginia, whether new or rehab, many projects have a mechanic's lien agent (MLA). It is imperative that you check the building permit which shall contain whether or not there is an MLA upon the project. If there is an MLA upon the project, any contractor supplying labor and/or materials must provide notice to the contractor that it is seeking payment for labor performed and materials provided. The notice to be provided by a contractor must contain the following: the name, mailing address, and telephone number of the person sending the notice; the building permit number; a description of the property outlining where you are sending your materials; a statement that the person filing such notice will seek payment for labor and/or materials provided. (Virginia Code § 43-4.01(B)).

The Statute is fairly liberal, indicating that any inaccuracy in the Notice as to the description of the property, shall not bar a person from claiming a lien pursuant to the title. As long as the property can be reasonably identified from the description, the Courts will deem that you have a proper Notice (Virginia Code § 43-4.01(B)).

Deadline for filing Notice:

Notice must be provided within 30 days after you provide labor and/or materials to preserve your lien rights. A contractor can provide Notice at a later time, but that lien will only be for labor and materials furnished after the Notice has been provided.

The MLA Notice is not recorded with any Court. It must be sent by registered or certified mail, or delivered in some manner to the mechanic's lien agent. The building permit is required to contain the name, address, and telephone number of the MLA. Therefore, your return receipt on your certified mailing should be kept in the file in order to prove delivery. If you deliver Notice via hand-delivery, you should generate an Affidavit of Service indicating the same. It is recommended that you receive a copy of the building permit before you enter into the contract or sell any and all materials or provide labor to

the project. The building permit must be conspicuously and continuously posted upon the property. If permits are posted, they often are removed or damaged, therefore, it is necessary that you receive a copy from the general contractor or whomever you are contracting with prior to starting work. If you have already filed your mechanic's lien when the permit is issued, no Notice of Mechanic's Lien Agent will be necessary for that claim.

The providing of Notice increases the chance of payment and decreases the risk that you will need to file a lien in the first place.

Virginia Code § 43-11 Protection:

There is additional protection for subcontractors and material men allowing them to get personal liability against the owner of the project if they follow several steps. The provision of this Code section is memorialized at Virginia Code § 43-11. Any subcontractor or person providing labor and/or materials to a general contractor or other subcontractor, may give notice in writing to the owner or his agent or the general contractor stating the nature and character of his work and the likely amount of his claim. The notification should be sent by certified mail or personal delivery to the owner of the property. The written notification should be sent before the claimant begins work.

After the work has been done, or materials furnished by the contractor, and before the expiration of 30 days from the time the building is completed or the work terminated, a notification shall be provided to the owner or through his agent or the general contractor with the correct amount outstanding, verified by Affidavit, of his claim against the general contractor or subcontractor for work done or materials furnished and of the amount due, the owner, or the general contractor, if he alone was notified, shall be personally liable to the claimant for the amount due to the subcontractor or persons furnishing labor and material by the general contractor or subcontractor, provided the same does not exceed the amount in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in case the general contractor alone is notified, the sum in which he is indebted to the subcontractor at the time the notice is given, or may thereafter become indebted by virtue of his contract with the

general contractor. But the amount which a person supplying labor and/or material to a subcontractor can claim shall not exceed the amount for which the subcontractor can file his claim.

The benefit of Virginia Code § 43-11 allows you to obtain personal liability by money judgment against the owner of the project in the event he fails to provide you with payment after you have provided the requisite notices. It must be understood that the personal liability will not exceed the sum in which the owner is indebted to the general contractor at the time he receives notice of the mechanic's lien and such indebtedness excludes the obligation the owner may have required to incur in order to complete the building so that what remains in the owner's hands after deducting such an obligation is applicable to the lien of the subcontractor under this Section.

The Law Office of Richard M. Sissman will provide you with a copy of MLA Notice under § 43-4.01 along with notice to be provided under Virginia Code § 43-11.

If you should have any further questions, please call Mr. Sissman at 703-903-9646 in Virginia.