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LAW CURRENTS An informational newsletter from
Richard A. Klass, Esq.

A Day Late and a Dollar Short

A comprehensive medical practice was opening up in an office building and needed extensive renovations in the space. The medical practice hired a construction company to handle the build-out of the office at a cost of over $250,000. The construction contract specified that the contractor would achieve "substantial completion" of the project within 3 months after work began in April 2012. Unfortunately, the project took a lot longer than anticipated (about 9 months). Finally, on January 16, 2013, the project was confirmed by the contractor as complete, and the work was approved by the county. There was even a confirming email from the contractor to the medical provider stating "We Passed!!!" An invoice marked "Final Billing" was rendered, and a Certificate of Compliance was issued by the Building Inspector on January 31, 2013.

Since the project took much longer to complete than anticipated and agreed-upon in the construction contract, the medical provider withheld final payment, claiming it suffered heavy losses including loss of business, substantial rent payments to the landlord for the unusable space and additional overhead expenses.

Mechanic's Lien Filed

Instead of directly addressing the client's concerns, on October 8, 2013, the contractor simply filed a "Notice of Mechanic's Lien" with the County Clerk. New York's Lien Law Section 10 provides a powerful collection tool to a home improvement or commercial contractor—the right to place a lien upon someone's house or building:

> §10(1) Notice of lien may be filed at any time during the progress of the work and the furnishing

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of the materials, or, **within eight months after the completion** of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished.

The "Eight Month" Rule

One of the fundamentals of the Lien Law is that its procedures are to be strictly followed by the lienor. Unlike other areas of law, in which harmless errors can be glossed over, the Lien Law requires punctilious compliance; otherwise, the lien will be invalid. This is mainly because the right to place a lien on someone's house is such a harsh remedy.

After being directed by the landlord to remove the mechanic's lien, the medical provider retained **Richard A. Klass**, *Your Court Street Lawyer*. The first step was to analyze the lien notice itself—and determine whether a proceeding could be brought to discharge the mechanic's lien under Lien Law §19(6) for being "facially invalid." This means that, from looking at the face of the notice of lien itself, it may be determined that the lienor does not have a valid lien.

In the lien notice, the contractor had stated that the last item of work was performed on "February 13, 2013." However the court ruled that all work was completed by January 31, 2013. Thus, the October 8, 2013, lien notice was filed *more than 8 months afterward* (late filing). This late filing would make the mechanic's lien invalid under the Lien Law. In *Ren. Reh. Systems Co., Inc. v. Faulkner*, 85 AD3d 752 [2 Dept. 2011], the court held that the failure of a mechanic's lien to be timely filed pursuant to the Lien Law was fatal to the mechanic's lien.

Extra Work Doesn't Count

In response to the proceeding brought by the medical provider to discharge the mechanic's lien, the contractor claimed that it sent a subcontractor to the premises to perform some work in March 2013; thus, its filing of the lien was timely. The medical provider challenged this claim by showing the court that the subcontractor only performed a normal service call for "no heat." It was argued that the court should follow the rule in *Nelson v. Schrank*, 273 AD72 [2 Dept. 1947], that a mechanic's lien is not timely filed when measured from the last date that extra work was performed when the extra work was not part of the original contract, anticipated when the original contract was made, or done in continuance of the work under the contract.

In discharging the mechanic's lien, the court held that there was no proof that the extra work completed was part of the original contract, was anticipated when the original contract was made, or constituted work completed under the original contract. Accordingly, the court granted the petition to discharge the mechanic's lien.

— Richard A. Klass, Esq.

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