The Parameters of the Illinois Mechanics Lien Act and the Risks Involved for Contractors, Subcontractors, and Owners

Lien on Me

By Thomas G. Cronin

A party's failure to pay under the terms of a contract is certain to cause both legal and financial distress, and construction contracts are no different. While the Illinois Mechanics Lien Act (770 ILCS 60/1 *et seq.* (West 2004) (the "Act") may not be as popular or as well-known as other avenues for justice, its bite is certainly worse than its bark. Compliance with the Act can protect the financial and legal interests of everyone involved on a jobsite and will ensure that the proper parties are paid. It is always vital for companies and individuals to protect their financial interests, and given the current economic climate, this particularly applies to construction.

The focus of this article concerns the Act's structure of notices and deadlines by which workers and owners must abide in order to protect their financial interests. By providing a cautionary look into the most notable—and often misused—guidelines of the Act, you will be equipped in advising any client involved on a jobsite of the financial risks at stake.

Function of the Illinois Mechanics Lien Act

The Act, whose origins date back to the 1700s, protects the financial and legal interests of contractors and subcontractors who have provided labor, materials, or improvements upon real property. The Act provides a road map for recovery that, when followed properly, allows a contractor or subcontractor to collect money owed. It is an integral part of—and automatically included in—every construction agreement in Illinois, regardless of whether the contract is worth $50 or $50 million.

Generally, if an owner refuses or is unable to pay for the work performed, the contractor or subcontractor can file a mechanics lien against the property. If all notice requirements and deadlines have been met and the lien has been properly perfected, a contractor can foreclose on the property to recover what it is owed. However, even the slightest error in compliance can harm those entities the Act was meant to protect.

Mind the Guidelines and Deadlines

It sounds simple, but the best way for a contractor to protect its interest is to follow the Act's direction. Failure to pay attention to the details, however, happens more often than it should, and the penalty can be financially crippling. The guidelines and deadlines vary depending upon a party's classification, and every party's status is broadly yet clearly defined. For instance, a contractor is any party who contracts directly with the owner or with whom the owner has authorized to contract. 770 ILCS 60/1 (West 2004). A subcontractor is any party who provides labor, services, material, or other "forms of work" for the contractor. 770 ILCS 60/21 (West 2004). Essentially, a subcontractor is anyone other than a contractor and owner, including subcontractors of subcontractors at every tier.

In terms of preparing the lien itself, contractors' and subcontractors' liens must contain a brief statement of the claimant's

contract, the balance due, and a sufficiently correct description of the lot. The lien must be verified by the claimant's affidavit and may be filed at any time after the claimant's contract is made. The final step in properly perfecting a mechanics lien requires both contractors and subcontractors to record their liens within four months of their last day of work, and the lien must be recorded in the office of the recorder of the county where the property is situated. Aside from this, the principles that every contractor and subcontractor must follow are unique to each, and adherence to the Act depends upon one's classification.

Above anyone, subcontractors must be vigilant with the notice requirements set forth in the Act. For instance, a subcontractor working on an owner-occupied, single family home must serve a notice of lien to the owner or occupant no later than 60 days after its first day of work on the site; delivery of materials or machinery to the site qualifies as initial work. As set forth in section 5(b) of the Act, this written notice should be sent by registered or certified mail (return receipt requested) and must contain the name and address of the subcontractor, the date when the first work began or the first materials were delivered, the type of work to be performed or materials to be delivered, and the name of the contractor requesting the work. The same section instructs the subcontractor to include certain "Notice to Owner" language which cautions the owner of the subcontractor's right to file a mechanics lien in the event of nonpayment. 770 ILCS 60/5 (West 2004).

For any project other than owner-occupied, single family homes, a subcontractor must file its notice of lien within 90 days after its last day of work. Punch-list items, warranty work, or repairs do not constitute final work. In case there is any confusion, section 24 provides a sample notice that subcontractors are recommended to use. *See* 770 ILCS 60/24 (West 2004). The purpose of this notice cuts two ways: It not only helps secure a subcontractor's financial interests in being paid for its services, but it also puts the owner on notice of what a subcontractor is owed.

A subcontractor who neglects to properly and timely serve its notice of lien within the 90-day requirement has not lost all hope in its ability to recover in the event of nonpayment, but hope is all the subcontractor has left. Specifically, the only exception where a subcontractor's 90-day notice requirement is unnecessary is where a contractor has properly provided the owner with a "sworn statement" which gives notice of the amounts due each subcontractor. *See*770 ILCS 60/24 (West 2004). This exception is not without its perils: Should the contractor's sworn statement list the incorrect amount, the subcontractor is only protected to the extent of the amount listed therein. Even worse, should the contractor's sworn statement fail to even mention a particular subcontractor on site, that subcontractor is left with no practical lien options. Thus, the misplacement of a digit or decimal point or the omission of a name can have a drastic—and potentially bankrupting—effect.

While general contractors do not have to grapple with the same notice requirements that are demanded of subcontractors, they do have to comply with the aforementioned sworn statement. Every contractor and subcontractor in Illinois should be keenly aware of the sworn statement requirement in section 5 of the Act. Here, the contractor has a duty to give the owner a verified statement or affidavit with the names and addresses of all subcontractors providing any materials or labor on the project, including the amounts due or to become due.

The sworn statement protects the claims of subcontractors who are named therein by putting the owner on notice of amounts due. Further, by providing the sworn statement with the correct amounts, a contractor can help protect its subcontractors' interests where a subcontractor fails to comply with its own requirements. Even though the owner has a duty to require the contractor to provide this statement, the responsibility generally falls upon the contractor. Where an owner pays a contractor before receiving the sworn statement, the owner may be compelled to pay again, even if the contract price has already been paid in full.

Recently, the Illinois Supreme Court dealt with this very situation involving a subcontractor's dispute with an owner in its attempt to enforce a mechanics lien. In *Weather-Tite, Inc. v. University of St. Francis, et al.,* the Court looked into whether an owner had a duty to retain sufficient funds to pay a subcontractor as reflected in the general contractor's sworn statement. No. 107108, 2009 WL 1416108 (Ill. May 21, 2009). In *Weather-Tite, Inc.*, the University, as owner, hired a general contractor to perform renovation work on a residence hall; in turn, the general contractor hired Excel Electric, Inc. as a subcontractor for the project. 2009 WL 1416108 at *1. On several occasions, the general contractor provided sworn statements requesting payment from the University, with each statement properly listing the subcontractors on site and the amounts due each. *Id.* For the first sworn statements, the University paid the general contractor the total amount owed on each statement, with the general contractor then paying each subcontractor the amounts owed. *Id.* For the final statement, the University wired the entire remaining balance to the contractor's bank, which then applied a setoff and used a certain amount of the funds to satisfy an outstanding debt of the contractor. *Id.* This resulted in Excel (among other subcontractors) not being paid the final balance owed for its electrical work, totaling just under $131,000. *Id.* Excel promptly brought a mechanics lien claim against the University and sought to foreclose. *Id.* The trial court granted the University's motion for summary judgment, finding that Excel did not have an enforceable mechanics lien; the appellate court, finding that the owner had a duty to retain sufficient funds, reversed. *Id.*

In affirming the appellate court's decision, the Supreme Court relied upon the plain language of section 5 in finding that an owner has a duty to require the contractor's sworn statement "*before*" paying the contractor any funds. 2009 WL 1416108 at *2 (emphasis included). In fact, the Court took one step further in referring to section 27 of the Act, which mandates that when notified by the sworn statement, an owner must retain from the total amount due an amount sufficient to pay all subcontractor bills. *Id.* at *3. Any payments made by an owner to the general contractor after receipt

of the sworn statement are considered illegal and in violation of the subcontractors' rights. *Id.* Thus, the Court found that Excel was entitled to—and the University was responsible for—a lien of $130,948.48, which was the amount shown to be due Excel on the general contractor's final sworn statement. *Id.* at *5.

The *Weather-Tite, Inc.* decision is the most recent and authoritative example of how the Act is meant to work. The decision also serves as a display of security for subcontractors and a warning to owners. Had the University complied with the Act's requirements by retaining sufficient subcontractor funds, mechanics lien claims could have been avoided altogether.

How to Avoid Litigation

Now that the most significant applications of the Act have been set forth, every party to a contract can avoid a mechanics lien dispute by following its guide.

General Contractors

Compliance with section 5 of the Act is the best way a contractor can protect its interests. After all, no money is owed to the contractor until the sworn statement is provided. For best practice, contractors should submit several sworn statements to the owner as work on the jobsite progresses. By supplying the owner with the sworn statement, a contractor will have a claim to recover any unpaid funds that are attached to the property and be able to foreclose on the lien to satisfy a judgment.

Subcontractors

Failure to abide by the appropriate notice requirements leaves a subcontractor's fate up to the general contractor, and leaving this to chance can be futile, as discussed above with incorrect amounts or the lack of reference to a subcontractor. A subcontractor can help protect its interest, however, by ensuring that its identity and the correct amount owed are contained in the general contractor's sworn statement. A subcontractor can even submit a sworn statement of its own. After all, a subcontractor is less likely than a general contractor to miscalculate its own amount or omit its own name.

Owners

Even though the Act is meant to protect the interests of contractors and subcontractors in the event of nonpayment, owners can protect themselves in the event of a nonpaying contractor. For starters, every owner should demand a sworn statement from the general contractor. The language of section 5 imparts an equal duty upon an owner in requesting a sworn statement as it does on a contractor in providing one. Owners can—and should—also require a sworn statement from every subcontractor on site. An owner who makes payments in reliance of a sworn statement will be protected against the claims of subcontractors not listed therein.

Most importantly, owners must withhold all subcontractor funds owed before making any payment to the general contractor. As *Weather-Tite, Inc.* has shown, where a contractor does not or cannot pay the subcontractors, an owner who is in receipt of a sworn statement and who makes payment to the contractor in full can be held liable to the subcontractors as if no payment was ever made. Thus, an owner's best practice should be to request a sworn statement, retain sufficient funds in order to pay any subcontractors, and eventually make such subcontractor payments upon receiving notice of subcontractor claims. Owners should also require a lien waiver from the contractor once a subcontractor is paid as well as request lien waivers from subcontractors when the contractor is paid.

Conclusion

The implications for non-compliance with the Act can be devastating, but understanding its purpose and abiding by its guidelines can prevent both legal and financial headaches for everyone involved. After all, the ultimate goal with a construction contract is for contractors, subcontractors, and owners to avoid any litigation at all. If all parties are familiar with the Act and comply with its requirements, disputes can be avoided and everyone can go home—or stay home—at the end of the project. ■

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