



BARRISTERS TITLE  
— *services* —

## Mechanicsmen & Materialmen Liens

### I. NCGS 44A – Article 2 (“Old Rules”)

#### 1. Introduction

- a. Purpose of the statute is to provide a remedy to those that improve property and do not receive payment
- b. Lien Claimant is given a security interest in the property
- c. Problem/Issue: **Relation Back**
- d. Can only be asserted against Private Property

#### NCGS 44A-8

**“Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.”**

#### 2. Class of Persons

- a. Anyone who “improves” the property
  - i. Note: Anyone dealing with Owner is referred to as a “Contractor”
  - ii. The statute makes no distinction between “GCs” and “Subs”
- b. Builders
- c. Others not so Obvious
  - i. Graders
  - ii. Excavators

- iii. Fillers
- iv. Landscapers
- v. Repairmen
- vi. Rental Equipment Provider
- vii. Architects
- viii. Engineers
- ix. Surveyors
- x. Landscape Architects

3. Requirements to Lien property (NCGS 44A-8)

- a. Furnishes Labor, Materials or Equipment
  - i. The materials must be delivered to the site
  - ii. The materials must be used to improve the property
- b. Pursuant to a Contract
  - i. Express or implied
  - ii. Written or oral
- c. With the **Owner of the Real Property**
  - i. Two Obvious Scenarios
    - a. GC as Owner of Real Property
    - b. Remodel/Rehab
  - ii. Definition of "Owners"
    - a. Buyers  

Provided they close on the purchase [See *Carolina Builders Corp v. Howard-  
Veasey Homes, Inc.*, 324 SE2d 626 (1985).]
    - b. Agents
    - c. Spouses
    - d. Tenants

(In which case, the Lien attached to the Leasehold Interest [See *Miller vs. Lemontree Inn*, 233 Se2d 69 (1977)])

4. Claim of Lien Form

a. Requirements (NCGS 44A-12(c))

- i. Name and Address of Person Claiming the Lien
- ii. Name and Address of Record Owner
- iii. Description of Real Property
  1. The Description of the Real Property must be reasonably identify the property in question
  2. Address
  3. Metes & Bounds
  4. Lot and Block
- iv. Name of Person Who Claimant Contracted With
- v. Date Labor or Materials First Furnished
  1. Lien will relate back to this date
  2. Prevents an Owner from selling the property without settling up with the Contractor
- vi. Date Labor or Materials Last Furnished
- vii. General Description of the Labor or Materials Furnished

b. Where Filed? (NCGS 44A-12(a))

- i. The Claim of Lien must be filed in the Office of the Clerk of Superior Court in the County where the labor was performed or the materials were furnished

c. When Filed (NCGS 44A-12(b))

- i. The Claim of Lien must be filed within 120 days after the last furnishing of labor or materials
- ii. This requirement must be strictly complied with
- iii. Returning to the Job:

1. May result in extending the deadline provided that:
2. The additional work is within the general scope of the contract
3. The Owner assents to the additional work
4. The work is done in good faith and not for the sole purpose of extending the deadline (*See Beaman vs. Elizabeth City Hotel Corp., 163 SE2d 117 (1932)*)

d. Perfecting the Lien

- i. Must bring a lawsuit within 180 days after the last furnishing of labor or materials
- ii. Lawsuit may be filed within any County, provided that a *Lis Pendens* is filed in County where property is situated
- iii. If Lawsuit is not initiated within this time frame, Lien is extinguished by Law
- iv. If the Lien Claimant/Plaintiff loses, the Lien is extinguished

5. What to do at the Closing?

- a. Get your Calculator out - Have time frames been met by the Lien Claimant?
  - i. If the Claim of Lien was not filed within 120 days of the last furnishing that the claim is dead
  - ii. If it has been 180 days since the last furnishing and a lawsuit has not been filed than claim is dead
  - iii. Make sure Abstractor has checked all Counties in the Judgment Computer
- b. Pay the Claim of Lien at Closing
- c. Ask Seller to have Lien Bonded Over
  - i. Cash Bond
  - ii. Surety Bond

6. Claim of Liens on Funds/Subrogation Liens

- a. 2<sup>nd</sup> and 3<sup>rd</sup> Tier Contractors (Subs) are entitled to subrogate (“Step in the shoes”) of the 1<sup>st</sup> Tier Contractor (GC)
- b. Sub is entitled to assert a lien on real property to the same extent as the GC

- c. Applies when the GC has not been paid in full
- d. Describes the situation when a 2<sup>nd</sup> or 3<sup>rd</sup> Tier Contractor (Sub) provides notice to the Owner of non-payment
- e. If Notice is given to Owner subsequent to payment in full of 1<sup>st</sup> Tier Contractor (GC), then there is no liability to Owner
- f. If Notice is given to Owner prior to payment in full of 1<sup>st</sup> Tier Contractor (GC), then there is potential liability to Owner and Claim of Lien can become attached to the real property
- g. A complete defense to a Claim of Lien on Funds exists if:
  - i. Owner hires GC;
  - ii. 1<sup>st</sup> Tier Contractor (GC) is paid in full by Owner *prior to receiving notice of non-payment to 2<sup>nd</sup> Tier Contractor (Sub)*;
  - iii. GC executes a Lien Waiver
- h. If Owner receives notice from a Sub, Owner should refuse to pay the GC until the Owner confirms that the Sub has been paid and released the lien

## 7. Old Lien Waiver Forms

- a. Form 1 (No Recent Improvements)
  - i. Refinances
  - ii. Most Purchases between Individuals
  - iii. Signed by Sellers
  - iv. Borrowers in refinance transactions
- b. Form 2 (Construction Recently Completed)
  - i. New Construction
  - ii. Renovation/Rehab
  - iii. Signed by:
    - 1. Sellers/Borrowers
    - 2. All Contractors who have contracted directly with the Owner
- c. Form 3 (Construction in process or Immediately Contemplated)

- i. Development vs. Vertical Loans
- ii. Limited Scenario
- iii. Signed by:
  - 1. Sellers/Borrowers
  - 2. All Contractors who have contracted directly with the Owner
- d. Who Signs?
  - i. Anyone who has Contracted with “Owner”
  - ii. How do we know that?
  - iii. Repairs – Punch List Items
  - iv. Advantages of having a layer between Owner and GC

II. NCGS 44A – Article 2 (“New Rules”)

1. Appointment of Lien Agent

- a. Note: Not a change in the law. Addition to pre-existing law
- b. [www.LiensNC.com](http://www.LiensNC.com)
- c. Creation of the Rating Bureau
- d. Self-funded site managed by third party vendor
- e. Appointed by Owner
- f. Identity of Lien Agent has to be made available to any Contractors who improve the property
  - i. In Contract with GC
  - ii. In Contract between GC and Subs
  - iii. Posted on the job site
  - iv. QR Codes

2. Exception(s)

- a. **Any** construction under \$30,000.00
- b. Improvements to an **existing dwelling Unit** to be occupied by the Owner

- c. In these two cases, playing by “Old Rules”
- d. Note: Failure to Appoint Lien Agent = playing by “Old Rules”

3. Potential Lien Claimants

- a. Contractors must file a Notice of Potential Lien Claimant with the Lien Agent ***prior to the recordation of the Deed or Deed of Trust***
- b. GC is presumed to be a Potential Lien Claimant (PCL) as the Owner has to provide the identity of the GC when it appoints the Lien Agent
- c. Special rules for “Design Professionals” due to the fact that much of their work is done prior to acquiring the land (also a presumed PCL)
- d. Note: Contractor can lien the property pursuant to the “Old Rules” by filing a Claim of Lien

4. What happens at Closing?

- a. Attorney must check the LienNC site prior to closing to identify any Potential Lien Claimants
- b. Safe Harbor for Attorneys = 5 Days by Statute
- c. Underwriting Expectations = As close in time to the Closing as possible
- d. Attorney must obtain Lien Waivers from all Potential Lien Claimants
  - i. GC
  - ii. Design Professionals
  - iii. Contactors who have posted notice to the LiensNC website
- e. 15 Day loophole

5. New Lien Waiver Forms

- a. Form 5 (No Recent Improvements)
  - i. Signed by Owner only (Seller or Borrower)
  - ii. Certifies that:
    - 1. A Lien Agent was Appointed
    - 2. Appointment is posted and is conspicuous

3. GC has been give notice of Lien Agent
  4. Design Professionals have been give notice of Lien Agent
  5. No one has begun work in the past 15 days (closes loophole)
- b. Form 6 (Construction Recently Completed)
    - i. Waiver
    - ii. Signed by Contractors who are waiving their rights to lien
  - c. Form 7
    - i. Subordination
    - ii. Signed by Contractors who are subordinating their rights to lien
6. Scenarios – Which Form do I use?:
- a. Owner Contracts with Multiple Parties – No Lien Agent Appointed
  - b. Agent of Owner Contracts with Multiple Parties – No Lien Agent Appointed
  - c. New Construction less than \$30,000.00
  - d. Lien Agent Appointed - Claim of Lien Form filed with Clerk’s office prior to recordation
  - e. Owner fails to properly post Notice of Appointment of Lien Agent
  - f. Owner properly appoints Lien Agent and two contractors have filed Notices of Potential Lien Claimants
  - g. Owner Contracts with (one) GC – No Lien Agent Appointed
  - h. Owner as GC – No Lien Agent Appointed
  - i. Remodel for more than \$30,000.00 in which the property will be used by current owner upon completion
  - j. Owner identifies a contractor on Form 5 who first began work 11 days prior to closing