

The Ohio Mechanics' Lien Law

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The Ohio Mechanics' Lien Law (General Code, Sec. 8308 to 8380) has been the object of a great deal of criticism. In most cases, the criticism has been based on the fact that owners have occasionally had to pay double for the construction work done under contract with them. With only that fact before us, it might appear that all the statute has done is place an unjustifiable burden on those who build new homes or other structures. However, we must consider the situation as a whole to see whether such losses are necessary or whether, even if they are, the advantages of this legislation outweigh the disadvantages.

The underlying purposes of the Lien Law, which must be kept in mind while considering it, are (1) to protect the principal contractors from loss in cases of default in payment by the owner and (2) to protect the subcontractors, laborers, and materialmen in case of default by the principal contractor.

A definition of a lien is the first step toward understanding the Lien Law. A lien is a qualified right existing in favor of a creditor in the property of his debtor. This, in effect, makes the creditor (lienor) a part owner of the property. The lienor is given a right against the property in addition to any right he may have against the person owning the property. Even without statute, the English Common Law provided for liens in the case of personal property. For example, a person who repaired a wagon was granted a right in the wagon to secure the payment of the cost of the repairs. This right continued as long as he retained possession of the wagon. The English Common Law granted no such security to the workmen who improved real property or contributed to building structures on it. The only security that mechanics (including anyone from contractors to laborers) had was the personal credit of the person with whom they had contracted. Whenever needed, this was usually

inadequate. It took legislative action to procure for mechanics the advantages of a lien on the real property to secure the payment of their wages due. *Lumber Co v. Kent*, 124 Ohio St. 20, 176 N.E. 662, 9 O. Abs. 133 (1931).

The first mechanics' lien statute was enacted in Maryland in 1791. It is said that this law was passed pursuant to a suggestion made by James Madison, Thomas Jefferson, and others that it would encourage master builders to contract for the erection of houses (in the then new national capital) if they were granted the payment of their just claims. *Park v. Heater Co.*, 20 N.P. (N.S.) 150, 28 O. Dec. (N.P.) 141 (1917). It seems that, directly or indirectly, all mechanics' lien laws have grown out of this suggestion.

The purpose of these laws has been stated in different ways, but it might be most nearly accurate to say that because the contractors, laborers, and materialmen have improved or created the property on which they have worked or to which they have supplied materials, they have a right to be paid out of the land and the building on it. *Bullock v. Horn*, 44 Ohio St. 420, 7 N.E. 737 (1886).

Ohio passed its first Mechanics' Lien Law in 1823, but it was operative only in Cincinnati. More counties were brought within the operation of the law in 1833, 1840, and 1843. Demann, *Ohio Mechanics Lien Law* (1929) pp. 29-31. Until 1894, liens were granted only to those who had a contract directly with the owner of the property, but the Act of 1894 (91 Ohio Laws 135) extended liens to laborers, materialmen, and subcontractors. The state supreme court held this act unconstitutional as an interference with a citizens freedom of contract. *Palmer & Thompson v. Tingle*, 55 Ohio St. 423, 45 N.E. 313 (1896). The federal court disregarded this decision and held that the act did not violate the federal constitution, *Hotel Co. v. Jones*, 193 U.S. 532, 140 F.D. 337 (1904), but this did not change the fact that such liens (those granted to persons not having a contract directly with the owner) were unenforce-

able in the state courts. However, since the amendments to the Ohio Constitution in 1912, there can be no question as to the constitutionality of the statute. *Lumber Co. v. Paper Co.*, 26 O.C.C. (N.S.) 413, 5 Ohio App. 253 (1916). Section 33 of Article II expressly gives the legislature power to pass laws providing for mechanics' liens. The legislature passed such laws in 1913 and 1915. 103 Ohio Laws 369 and 106 Ohio Laws 522; General Code Sec. 8308 to 8380.

A law is effective only as the courts interpret it. The statute itself provides that it shall be liberally construed, for it is a remedial measure. General Code Sec. 8323-8. However, there is a doctrine that laws in derogation of the Common Law, as this is, shall be strictly construed. The courts solve this problem by saying that they will construe the statute strictly in determining the existence of a lien, insisting on strict compliance with the requirements, but that they will construe it liberally in enforcing a lien once it is established. In *re Kinane*, 14 O.L.R. 531, 62 Bull. 37 (1916).

Liens are provided for contractors, subcontractors, laborers, and materialmen. Sec. 8309 provides that persons doing any work in connection with a coal mine may acquire a lien on the mine. Section 8310 is the principal section of the statute. It states that anyone who, by virtue of a contract, express or implied, furnishes labor, materials, machinery, or fuel for constructing any structure, drilling oil wells, or draining land shall have a lien on the material furnished and the property improved. The next section, 8311, gives to those constructing roads, sidewalks, or ditches a lien on the property improved or on the abutting property. These provisions are stated so definitely in the statute that the courts have little leeway for interpreting them. Section 8323-9 defines the classifications of lienors more specifically. The only distinction which is not obvious from the terms is that between materialmen and subcontractors. A person who furnishes both materials and labor is a subcontractor and not a materialman. This is important, for

the requirements for perfecting a subcontractor's lien are somewhat different from those for a materialman's.

A lien may attach to any interest that the person contracting for the building may have in the land or may subsequently acquire. General Code Sec. 8310; *Golmer v. Bede*, 11 Ohio App. 137, 31 O.C.A. 56 (1919). This means that even if the contracting party is only a part owner of the land, a lessee of the property, or merely holding under a contract of sale, the lienor may acquire a right to a share of such interest. That the contracting party has no title to the land or has lost what he did have does not prevent a lien from attaching to the building, for the lien attaches not only to the land but to the structure and the material furnished. In case land is held under a contract of sale, the lien will attach only to the interest of the vendee, and the interest of the vendor will be preferred to the mechanics' liens. General Code Sec. 8317.

In order that the furnishing of labor and materials may form a basis for a lien, it must be done under a contract with the owner or his agent. General Code Sec. 8310; *Park Co. v. Development Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924). This contract may be express or implied, that is, a written or oral agreement between the parties or a contract implied from their acts. It is not necessary that the contract provide for a lien, for the statute becomes a part of any building contract. *Iron Co. v. Murray*, 38 Ohio St. 323 (1882). However, a lien may arise only in case there is a debtor-creditor relationship between the parties, and no debt will arise until the contract has been completely or substantially performed. *Mehurin v. Stone*, 37 Ohio St. 49 (1881). Complete performance includes performance to the satisfaction of the architect or engineer, *Jones v. Fath*, 101 Ohio St. 47, 126 N.E. 878 (1920), and substantial performance means complete performance but for unimportant and unintentional deviations from the specifications.

If, during construction, the contractor draws money from

the owner, he must first make a sworn statement listing all the persons, laborers, subcontractors, and materialmen, to whom money is due. This includes similar statements by the subcontractors and certificates by the materialmen. General Code Sec. 8312. It is not mandatory that the contractor (or subcontractor) supply such a statement each time he draws money, but he must file one before he is entitled to a lien. *Park v. Development Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924). However, at any time, the owner may demand a statement, and any payments made in accordance with it will be considered paid directly to the original contractor. General Code Sec. 8312. These statements are for the protection of the owner, *In re Kinane*, 14 O.L.R. 531, 62 Bull. 37 (1916), and no lien can be perfected by a contractor or subcontractor until he submits such a statement. *Iron Works v. Realty Co.*, 108 Ohio St. 314, 140 N.E. 325 (1923); (materialmen) *Chemical Co. v. Realty Co.*, 27 O.L.R. 378, 6 O. Abs. 495 (1928). And the owner cannot waive this requirement. *Moss v. Lebowitz*, 2 O. Abs. 521 (1924).

The most important act in perfecting a mechanic's lien is the filing of an affidavit. Any person who seeks to establish a lien must file an affidavit with the county recorded within sixty (60) days after the last work or material is furnished. General Code Sec. 8314; *Cott-Mohrman Co. v. Foundry Co.*, 12 Ohio App. 51, 31 O.C.A. 141 (1919). This affidavit must (1) state the amount due the lien claimant, (2) describe the property on which the lien is claimed, (3) give the name of the person to whom the labor or material was furnished, (4) state the person against whose interest the lien is claimed. The form of the affidavit is prescribed by statute, and the courts insist on the technical perfection of the affidavit. This document may be sworn to by either the claimant or his agent. After it is filed, a copy must be served on the owner. General Code Sec. 8315. Once established, a lien remains as a claim against the land for six years. General Code Sec. 8321.

A lien is enforced by means of foreclosure. The owner's interest is foreclosed, and the land is sold to satisfy the claim of the lienor. If a lienor fails to bring action on his lien, the owner may demand that he commence action, and if he does not commence action within sixty (60) days after receiving this notice, the lien will be discharged. General Code Sec. 8319. A lien is assignable, and so the notice to commence suit must be given to the person then owning the lien. General Code Sec. 8323-6 and 8319.

If there are other claims against the land existing at the time of the foreclosure, and if the amount realized from the sale is insufficient to pay all of them, the problem of the priority of the liens arises. Though mechanics' liens are not perfected until the time of filing the affidavit, they are considered as existing as of the time that work was first commenced under the *original contract*. General Code Sec. 8321; *Geer v. Tuggle*, 22 N.P. (N.S.) 129, 20 O.D. 552 (1919). Substantial action must be taken towards construction before it can be said that work has been commenced. *Becker v. Wilson*, 30 Ohio App. 340, 165 N.E. 108 (1929). Because of this, there is no priority among mechanics' liens, and if there is not sufficient money to pay all their claims, they will share the fund pro rata. *Choteau v. Thompson*, 2 Ohio St. 114 (1843). If the owner of the land holds title under a contract to purchase the land, the vendor of the land has a lien which is prior to those of mechanics. *Golmer v. Bede*, 11 Ohio App. 137, 31 O.C.A. 56 (1919). If a mortgage is given before the work is commenced, it will be prior to the mechanics' liens, but if it is given subsequent to the commencing of work, it will be subordinate. A mortgage to procure money to build the structure will usually be given priority over a mechanic's lien.

There is a situation in which one mechanic's lien is prior to another's. This arises when a contractor and subcontractor claim liens on the same work or material. The subcontractor's

lien is prior. Similarly, laborers or materialmen's liens will prevail over subcontractors. General Code Sec. 8322.

The statute is designed to meet two situations: first, where the owner is unable to pay; and second, where the contractor fails to turn over to the subcontractors, etc., the money paid him by the owner. In the first situation, the owner hasn't even paid once for the work done, and so it could hardly be called unjust to allow the workmen to be paid out of the property. However, in the second situation, the owner has paid once and will have to pay again or have his property sold under foreclosure. It cannot be questioned that this places a considerable burden on the owner. But the subcontractor, who did not get his money from the contractor, would be under just as serious a burden if he did not have the protection of the statute. It is a question of deciding between two innocent parties. In providing for mechanics' liens, the legislature has exercised its constitutional authority to say that if either the owner or the contractor (subcontractor, laborer, etc.) is going to lose, the owner shall. He is the person whose property is improved. He receives the benefit of the labor and materials which go into the building. He is the person who selects the original contractor and holds him out as responsible and worthy of credit. Why should not he be required to choose a responsible contractor? *Gilbert v. Heinsath*, 11 O.C.C. 339, 3 O.D. 497 (1895).

Furthermore, there are means by which the owner may protect himself from having to pay twice for his building. His least dependable protection is an action against the original contractor whose default caused the losses. The value of this protection is lessened by the fact that usually, the reason for the default is that the contractor is insolvent.

The Lien Law is construed in favor of the owner, for the courts require strict compliance with the provisions of the statute in order to perfect a lien. If the affidavit is not filed or notice given to the owner within the statutory period, the lien is forfeited, and if the sworn statements of payments due are not

furnished by the contractor and subcontractor, they forfeit their liens. *Schuhholz v. Walker*, 111 Ohio St. 308, 145 N.E. 537 (1929).

The owner may demand that the statements of debts due for work and materials furnished be given at any time, and any payment made in accordance with this report will be considered made directly to the original contractor. General Code Sec. 8312.

If a person is building with funds borrowed from a building and loan association, arrangements can be made to decrease the likelihood of losing money because of mechanics' liens. One association protects itself and the owner by deferring payment of the last one-fourth of the contract price until more than sixty days after the house is complete. Also, the contractor is required to bring a signed statement from each subcontractor, etc., that he has been paid. If there are any that haven't, the money will be paid directly to them instead of the principal contractor. When the sixty day period has expired, the loan association will be able to know whether or not any liens have been perfected. Any that have will be settled before any payment is made to the principal contractor. The margin of protection is one-fourth the contract price.

The owner may even require that all contracts contain an express waiver of the right to claim a lien, for this right may be waived by contract. *Iron Co. v. Murray*, 38 Ohio St. 323 (1882).

The most usual method employed to protect the owner from loss is to require the contractor to execute an indemnity bond to keep the owner free from loss because of liens or any form of breach or default. cf. *Indemnity Co. v. Stone*, 100 Ohio St. 373, 126 N.E. 405 (1919). In such a case, the party ultimately responsible is the surety company that guarantees the contractor's performance of his bond. If any liens are established because of the default of the contractor, the surety company will usually settle them without too much of a controversy.

Normally, the premium on such a bond would be one and one-half percent ($1\frac{1}{2}\%$) of the contract price for the work to be done.

The Mechanics' Lien Law is obviously a great safeguard to the interests of those furnishing labor and materials for construction. It places a burden on the one for whom the labor and materials are furnished, but this is not an unavoidable burden, for he has adequate means of protection.

To summarize: a contractor may get a lien against the property if the owner doesn't pay; a subcontractor may get a lien against the property if the contractor doesn't; these men must, however, observe the required technicalities to perfect their liens; the owner may be put under a terrific burden by the default of the principal contractor if he is not careful; if he exercises care, he can protect himself.

Owners and contractors must be conscious of the Mechanics' Lien Law. It has granted a new protection to contractors and placed a new burden on owners. It can be justified only if the protection afforded is more desirable than the burden imposed. This article has been confined to a general consideration of the Lien Law, but perhaps it has been sufficient to show that if all persons affected know of its existence and act on such knowledge, it should operate to the advantage of contractors without imposing oppressive responsibilities on owners.

(A detailed and comprehensive study of the statute and decisions relating to it has been made by H. F. Demann in his book *Ohio Mechanics Lien Law*, Anderson Co., Cinn., 1929.)