

Mechanics' Liens

By Jeffrey L. Silberman, Kaplin Stewart

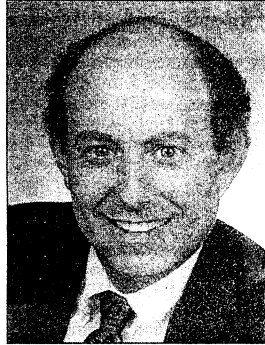
Mechanics' Liens in Pennsylvania . . . The times they are a changing

Starting January 1, 2007, the world of mechanics' liens as known (and loved) by transactional real estate professionals in Pennsylvania will drastically change.

Currently, the Pennsylvania Mechanics' Lien Law of 1963 (the Lien Law) allows a contractor to prospectively waive its right to file a mechanics' lien against the real estate by filing a waiver of liens agreement before starting work. Not only does the lien waiver negate the contractor's right to file a lien, but it also

serves to waive the right of the contractor's subcontractors to file liens against the job if the waiver is filed properly. This means that a contractor's only recourse if the owner does not pay is bringing a typical lawsuit against the owner. The powerful "hammer" of filing a mechanics' lien is not available.

Pennsylvania's lien law, on this particular issue, is in direct contrast to most other states, including New Jersey and Delaware. In Pennsylvania, all the owner/landlord need do is make sure the gen-



Jeffrey L. Silberman

eral contractor files a proper lien waiver, and the worry of mechanics' liens is effectively covered.

In states in which pre-commencement waivers are not permitted, the standard practice employed by owners and landlords to safeguard against the filing of mechanics' liens is the requirement that contractors and subcontractors deliver releases of liens in exchange for payments. This requires a substantial amount of diligence on the part of the owner/landlord, as the owner/landlord must be sure

that not only the contractor releases its right to file liens for work for which it has been paid, but the owner/landlord also has to monitor the general contractor's payments to its subs, because if the contractor does not pay the subs, the subs have rights to lien the project too.

Sleep soundly no more Pennsylvania owners and landlords. Earlier this year, Governor Rendell signed into law substantial amendments to the Lien Law. One of the most significant changes is making the filing of pre-construction (which means pre-payment) lien waivers unlawful and void as against public policy, with certain limited exceptions. As a result, like in most other states, the only way to prevent mechanics' liens is to make sure that, every time a payment is given to a contractor, the contractor and its subs release any right to file liens for work already completed and paid for.

The exceptions to this new rule pertain primarily to "Residential Buildings", which is property on which a residential building is constructed, or that

is zoned or otherwise approved for residential development. A contractor or subcontractor can sign a lien waiver for work on a Residential Building if the contract is less than \$1 million. For contracts in excess of \$1 million, a lien waiver signed by the general contractor will be enforceable against the subcontractor only if the general contractor posted a labor and material payment bond. The exceptions on non-residential projects apply only to subcontractors, and only if the general contractor posted a labor and material payment bond.

The new amendments apply to all contracts signed after January 1, 2007. The changes were not a surprise to many, but the effect is dramatic and will require owners/landlords to completely change how they administer their construction projects.

Jeffrey L. Silberman is a principal of Kaplin Stewart and a member of the Real Estate Transactions Department. His area of concentration is real estate transactions, particularly commercial and retail leasing, acquisitions and dispositions of real property and financing. ■