



Enforcing A Mechanic's Lien Under The New Rhode Island Statute

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In the wake of Justice Michael A. Silverstein's 2003 decision in *Sells/Greene Bldg. Co., LLC v. Rossi, i.e.*, the decision in which Justice Silverstein declared the Rhode Island Mechanic's Lien Statute unconstitutional,¹ our Legislature has taken considerable interest in this field of legislation. Most practitioners interested in this area of the law are now aware of the legislature's addition of Section 17.1, which section, introduced shortly after the Rossi decision, served as the basis for the Supreme Court's determination that as amended, the Statute is constitutional as the prompt post-deprivation hearing afforded by this section cured the Statute's prior due process defects.² What some practitioners may not be aware of, however, is that more recently, via legislation introduced on May 3, 2006, by Senators Joseph A. Montalbano, Michael J. McCaffrey, and John

F. McBurney, the legislature amended approximately twenty additional sections of Title 34, Chapter 28. On July 14, 2006, these changes became law without Governor Carcieri's signature, and took effect as of October 1, 2006.³

In light of the extensive revisions, the following information explains, in chronological order, the current procedure for obtaining and perfecting a mechanic's lien in Rhode Island under the new statutory scheme. Given the time-sensitive nature of perfecting and enforcing such a lien in Rhode Island, the legislation changed the time frames for the filing or responding to virtually all pleadings and notices, including the Notice of Intention, *lis pendens*, Complaint to Enforce, and Citation. These changes as well as general procedures for perfecting and enforcing a mechanic's lien in Rhode Island are the focus of the following discussion.

1) Notice of Possible Mechanic's Lien: R.I. Gen. Laws § 34-28-4.1.

This provision is an entirely new addition to the Mechanic's Lien Statute and only applies to persons contracting directly with the owner of the property on which work is to occur. Accordingly, this step in liening a

property will be inapplicable to most lienors and, in particular, subcontractors as such individuals are traditionally defined. Nonetheless, this new step will undoubtedly be of considerable interest to general contractors and the like. The content of this notice is statutorily prescribed, and a form for the notice is provided in Section 4.1.

Service. Pursuant to Section 4.1, general contractors and other entities directly contracting with the owner of a property on which work is to take place must now send the owner by certified mail, return receipt requested, a Notice of Possible Mechanic's Lien within ten (10) business days of commencing work or delivering materials to the property. Incidentally, the term "materials" now includes "the rental or lease of any equipment."⁴ Recording of this notice is not required.

The failure of a general contractor to comply with the foregoing, of course, does not affect the rights of other persons providing labor and/or materials. Those individuals and entities may nonetheless perfect a mechanic's lien. The general contractor's rights, however, narrow considerably. Specifically, the general contractor loses the right to subsequently file and perfect a lien on the property and is required to "indemnify and hold harmless" the property owner to the extent that the owner has not, in fact, paid other potential lienors.

One issue that may arise in connection with this new requirement is determining when work commenced, as this determination may decide whether a general contractor has strictly complied with the requirements of the statute. Should one be so fortunate as to be in a position to influence the contract during the formation stage, it may be wise to include a provision in the contract stating a work commencement date so as to avoid this potentially fatal issue.⁵

2) Notice of Intention: R.I. Gen. Laws §§ 34-28-4, -9.

Unlike Section 4.1 above, Section 4, as described herein, applies to all persons desiring to perfect a mechanic's lien. Accordingly, it is the first step for most aspiring lienors. As with the Notice of Possible Mechanic's Lien, the content of a Notice of Intention is statutorily prescribed, and a form is provided in Section 4, which requires that a person with first-hand knowledge of the claim execute the notice under oath. In other words, the lienor's attorney cannot execute it.

The Notice of Intention may be considered the single most crucial step in liening a property, as the timing of the notice determines what work and material may be covered by the prospective lien. Previously, a potential lienor had 120 days to send the notice to the property owner. However, the 2006 legislation enlarged this timeframe to 200 days.

Service. Section 4 provides that "any and all liens claimed" under this chapter "shall be void and wholly lost" unless the lien claimant sends the property owner a Notice of Intention by prepaid registered or certified mail with return receipt requested within 200 days after performing the work or delivering the materials that are subject of the desired lien.

Recording. Subsequent to or simultaneously with mailing of the notice, the lien may be perfected by filing the notice in the land evidence records with the Recorder of Deeds in the town where the property is located for an eight-dollar fee, provided, however, that the Recorder of Deeds may refuse to record a Notice of Intention that fails to properly reference the name of the property owner of record.

Once the lien is recorded, it protects all work performed by the lienor within 200 days prior to the recording date. For example, if a Notice of Intention was recorded on August 1, 2007, it would protect all work

performed since January 13, 2007, which time span constitutes the “Lien Period.”⁶ As a practical matter, it is good practice to obtain a date-stamped copy of the filing as this will serve as evidence that the Notice of Intention has been received for recording and provides information necessary to complete a Complaint to Enforce, which subject is addressed below.

3) **Lis Pendens: R.I. Gen. Laws §§ 34-28-10, -11, -12; 9-4-9.**

Section 10 provides that “any and all liens” under this chapter “shall be void and wholly lost” unless the lien claimant files with the Recorder of Deeds in the town where the property is located a notice of *lis pendens*. Previously, lienors had 120 days to accomplish this step. However, the 2006 legislation narrowed this window considerably. Now, as described below, the lienor must record his *lis pendens* within forty days of recording the Notice of Intention. As with the previous notices, the content of a *lis pendens* is statutorily prescribed, and a form is provided in Section 11.

Service. The *lis pendens* must be mailed, postage prepaid, within seven days of its recording to all parties to be named in the complaint, i.e., the property owner of record and any current mortgagees. Though this step is not mentioned in the Mechanic’s Lien Statute itself and failure to comply with it does not invalidate an otherwise properly filed *lis pendens*, it is nonetheless an express requirement of R.I. Gen. Laws § 9-4-9(b) of which the practitioner should be aware, as one’s right to a mechanic’s lien is determined *stricti juris*.⁷ Therefore, failure to comply may provide a property owner or mortgagee with an argument that you have not strictly complied with all statutory requirements.

Recording. The *lis pendens* must now be filed within 40 days of the recording of the Notice of Intention.⁸ Again, it is good practice to obtain a date-stamped copy of this filing so as to have at the ready all information necessary to draft a proper Complaint to Enforce. The filing fee is eighty dollars, and, unlike the situation with the recording of a Notice of Intention, the Recorder of Deeds has no discretion to refuse to record a *lis pendens*.

4) **Complaint to Enforce: R.I. Gen. Laws §§ 34-28-10, -13, -14.**

The next step in enforcing a mechanic’s lien is the filing of a “complaint to enforce” in the superior court for the county in which the lien property is located. In the event of a filing in the wrong county, the lienor may remedy his error by simply filing a Motion for Transfer of Venue. Most practitioners will note that this pleading used to be known, and sometimes still is referred to as a Petition to Enforce. However, the legislature changed that verbiage in the 2006 legislation.

As with the notices above, the contents of a Complaint to Enforce are statutorily prescribed. In particular, Section 13 requires that the nature of the work and dates on which it was performed be set forth with particularity.⁹ The description of the property, however, may be by street address, lot and plat, metes and bounds, or alternatively, by reference to the contract between the general contractor and property owner.¹⁰ In addition, the complaint must set forth the names of all other persons who have filed Notices of Intention, and the names of all persons holding any record title, claim, lease, mortgage, attachment, or other lien or encumbrance with respect to the subject property.

Filing. As with the *lis pendens*, the 2006 legislation narrowed the window for filing a complaint to enforce from 120 to 40 days. In addition, the lienor must be mindful that the complaint must be filed on the same day or within seven days after the filing of the *lis pendens*. Once this step is accomplished, the matter proceeds “pursuant to the rules of civil procedure, in a non-jury proceeding.”¹¹

5) **Publication: R.I. Gen. Laws § 34-28-14.**

Upon filing the Complaint to Enforce, the Clerk of the Superior Court notifies all persons identified by the plaintiff as holding a lien or other encumbrance to respond and “make out their demands against the property.”¹² This notification is initially provided by way of a single advertisement in a local newspaper.¹³

Service. The plaintiff must mail, postage prepaid, a copy of the clerk’s advertisement to the interested persons he has identified in the complaint at least ten days before.

6) **Citation: R.I. Gen. Laws §§ 34-28-14, -15.**

In addition to the advertisement discussed above, the Clerk of the Superior Court must provide notice to every interested individual identified in the Complaint to Enforce by issuing each such individual a Citation. Within the Citation, the clerk must set forth a day certain by which to respond and show cause why the plaintiff’s lien should not be enforced for the amount claimed and attach to it a copy of the lienor’s Complaint to Enforce. The clerk’s failure to do this, however, has no effect on a lienor’s right to enforce his lien against the subject property.¹⁴

Service. Issuance of the Citation “starts the period by which each individual must file an Account and Demand, which is the answer of each party.”¹⁵ Since the 2006 legislation, each such individual must be served with a Citation at least five days prior to the return date, rather than the previous ten days. A sheriff, deputy sheriff, or constable may effect service by leaving an attested copy of the citation at “the last and usual place of abode of each of the persons to be cited.” Alternatively, if the individual resides out-of-state, the citation may be sent “by registered or certified mail, to the persons prepaid, addressed to their last known residence or place of business.” If none is known, “no further service shall be necessary.”

7) **Account and Demand or Claim: R.I. Gen. Laws § 34-28-16.**

To preserve priority with respect to the lien property, interested individuals must file an Account and Demand or claim, depending upon the type of interest held. In the case of persons claiming a lien, the lienor must file an Account and Demand, which is a pleading that substantially mirrors a Complaint to Enforce, except that the former need not contain any listing of other lienors or otherwise interested individuals.

If the interested individual holds title, claim or any other encumbrance, on the other hand, he must file “a claim setting forth the particulars thereof and praying for the relief and priority to which the person shall deem himself or herself entitled.”¹⁶ Otherwise, the interested party may lose his priority unless he actually mailed and filed his own Notice of Intention before the filing of the complaint, was not mailed a copy of the aforementioned advertisement, had no actual notice of the Citation on or before the return day, was not served or mailed a Citation in connection with the case, and had no actual notice of the Complaint to Enforce on or before the return day on the Citation.

Safe Harbor. An interested party who fails to file an Account and Demand or claim on or before the return date on the Citation may nevertheless preserve his priority by entering an appearance in the case “within twenty (20) days after the return day, or within such other time as may be allowed by the superior court pursuant to Rule 60(b) of the Superior Court Rules of Civil Procedure.”¹⁷

8) Right to Accelerate: R.I. Gen. Laws § 9-2-18.1.

While an action to enforce a mechanic's lien generally proceeds according to the normal course of a non-jury civil action,¹⁸ one option that distinguishes such an action from other civil actions is that the Court, upon any party's motion, may grant a priority assignment to the proceeding.¹⁹ Whereas a contract claim may take 2-3 years before the Court reaches it for trial, an accelerated mechanic's lien claim may be reached within as little time as six months.²⁰

Endnotes

¹ See *Sells/Greene Bldg. Co., LLC v. Rossi*, 2003 R.I. Super. LEXIS 66, at 47 (April 23, 2003).

² See *Gem Plumbing & Heating Co., Inc. v. Rossi*, 867 A.2d 796, 818 (2005).

³ Pub. L. ch. 630, § 4.

⁴ See R.I. Gen. Laws § 34-28-3.1 (2007).

⁵ Noted in the continuing legal education seminar entitled *Mechanics' Liens*, A 2007 Update, presented by Thomas W. Heald, Esq., Roger N. LeBouef, Esq., and Jeffrey H. Gladstone, Esq., in Providence, Rhode Island (April 26, 2007).

⁶ See Joseph J. Reale, Jr. & Amy E. Stratton, *Construction Payment Remedies In Rhode Island*, 24 (2003).

⁷ See *Rossi*, 867 A.2d at 803.

⁸ See, e.g., *In re CNN Dev. Corp.*, 112 Bankr. 1, 2 (D.R.I. 1990) (declining to enforce claimant's lien after claimant failed to file its petition to enforce and lis pendens within the statutorily required time frame).

⁹ See, e.g., *McPherson v. Greenwell*, 61 A. 175, 179-80 (holding insufficient

a statement of account for "extra work done on said house"); but see *Tilcon Gammino, Inc. v. Commercial Assocs.*, 570 A.2d 1102, 1106 (R.I. 1990) (holding the failure to particularize a claim not to be a jurisdictional defect); *Murphy v. Guisti*, 48 A. 944, 945 (R.I. 1901) (same); see also *Kelley v. Dunne*, 316 A.2d 341, 342-43 (R.I. 1974) (holding that a petition to enforce may be amended to cure defects); *Art Metal Constr. Co. v. Knight*, 185 A. 136, 145 (R.I. 1936) (same).

¹⁰ See *Murphy*, 48 A. at 944.

¹¹ See R.I. Gen. Laws § 34-28-16.2.

¹² See also *Hawkins v. Boyden*, 55 A. 324, 325 (R.I. 1903) (holding sufficient notice served on trustee in bankruptcy).

¹³ Specifically, Section 14 requires that the advertisement be placed "in some public newspaper published in the city or town where the property against which the lien is claimed is located, but, if there shall be no public newspaper published in the city or town, then by one advertisement in some public newspaper published in the county where the property is located." See R.I. Gen. Laws § 34-28-14.

¹⁴ See *Frank N. Gustafson & Sons*, 599 A.2d 730, 732-33 (reversing the dismissal of a mechanic's lien petition where the court clerk failed to issue a citation to a property owner who nonetheless had actual notice of the proceeding).

¹⁵ See *Reale & Stratton*, *supra* note 6, at 26.

¹⁶ See R.I. Gen. Laws § 34-28-16(a)(2).

¹⁷ *Id.*

¹⁸ See R.I. Gen. Laws § 34-28-16.2; *Reale & Stratton*, *supra* note 22, at 26.

¹⁹ See R.I. Gen. Laws § 9-2-18.

²⁰ See *Reale & Stratton*, *supra* note 6, at 26.