

Bulletin #89, Avoiding the Possible Pitfalls of a Partial Mechanic's Lien Waiver (July 26, 2005)

Most subcontractors would agree that one of the most tricky (and important) parts of any construction job is making sure you get paid all amounts to which you are entitled. Managing a large construction project can quickly become an administrative nightmare. Unfortunately, the finer details can get lost in the shuffle. A subcontractor is already concerned with issues, such as proper documentation, scheduling, delays, and overages. Subcontractors may not have the time or manpower to scrutinize the language on a lien waiver. However, the failure to scrutinize mechanic's lien waivers can be dangerous because the language of the waiver may result in a subcontractor giving up its right to seek payment for all amounts to which it is entitled.

Nearly all construction contracts require the subcontractor to provide a partial mechanic's lien waiver in order to receive payment. It is a routine part of the construction process. The fact that it is routine is also why it can be so dangerous and can jeopardize a subcontractor's right to recover payment.

A subcontractor must use care when agreeing to sign a partial mechanic's lien waiver because a subcontractor, who fails to review (and if necessary revise) the waiver, risks losing the right to recover on future claims. Furthermore, the subcontractor is required to submit the lien waiver with its application for payment, essentially waiving its lien prior to receiving any payment. This puts the subcontractor in a difficult situation as the mechanic's lien is often the only assurance the subcontractor has of getting paid. How to handle such situations often depends on the law in the jurisdiction where the subcontractor is working, as well as the specific language contained in the lien waiver.

What's Wrong with Signing a Partial Mechanic's Lien Waiver?

The answer is: Nothing – as long as it is a *partial* mechanic's lien waiver. A lien waiver is simply a document giving up a subcontractor's right to file a mechanic's lien. Therefore, if the document is actually only a lien waiver, a subcontractor waives the right to file a mechanic's lien but the subcontractor has still reserved its other claims.

The problem arises when the partial mechanic's lien waiver is actually a broader release of claims. A "release" is, by and large, more serious than a "lien waiver" because a lien waiver generally indicates only that you have given up your mechanic's lien rights. However, by signing a "release," a subcontractor can give up claims beyond its mechanic's lien rights. Mechanic's lien waivers may actually be a wolf in sheep's clothing, as general contractors and owners often include release language in a mechanic's lien waiver.

Dangers

Before you sign a mechanic's lien waiver, there are certain things you should be careful to avoid. It is important to look at the specific language contained in the mechanic's lien waiver. It is also crucial to consider the timing of the waiver. In certain jurisdictions, providing a lien waiver before you get paid may jeopardize your ability to recover the money due to you. Because laws may vary from jurisdiction to jurisdiction, it is recommended that you seek legal counsel. What this means is that, in some jurisdictions, you may be able to confidently sign a partial mechanic's lien waiver before you are paid (for example, in Minnesota, Minn. Stat. 337.10), while in other jurisdictions, you may need to be more cautious.

Look at the Language

Because a "release" is much broader than a "lien waiver," it is important for a subcontractor to watch out for "release" language and recognize whether the language of the document actually constitutes a "release," "lien waiver," or both. The first place a court looks, to decide if a subcontractor has given up any rights, is the language in the document. The legal process can be very unforgiving and it often does not matter if a subcontractor understands the language. Even though the document may be titled, "Lien Waiver," if the language itself is actually a release, a court will likely interpret the document as the subcontractor releasing or giving up an underlying cause of action or claim for labor done or materials furnished.

With few exceptions, a subcontractor that signs a written agreement, such as a waiver or release, is bound by the terms of the agreement regardless of whether the subcontractor reads and understands those terms. A court will only consider the subcontractor's intentions if the court thinks the language is unclear. Therefore, it is very important to make sure that you understand the language in the lien waiver you are signing to avoid unwittingly giving up your claims.

Navillus Case

In New York, the court recently considered a case involving a partial mechanic's lien waiver. Navillus Tile Inc. v. Turner Construction Co., 770 N.Y.S.2d 3 (2003). Fortunately for the subcontractor, the court found that the language in the waiver was unclear and considered the intent of the subcontractor when signing the waiver.

Navillus was a tile subcontractor that worked on the construction of a stadium for the United States Tennis Association ("USTA") in New York. Turner was a general contractor on the project. Navillus received progress payments throughout the project. A condition of receiving each payment was that Navillus had to sign a Partial Release and Waiver of Mechanics' and Suppliers' Liens ("Partial Release"). The Partial Release contained the following language:

The undersigned [subcontractor] ... waives and releases all liens, actions, debts, claims, demands and other rights now existing, against Owner [USTA] and Contractor [general contractor] on account of all work, services, equipment and/or materials performed or furnished by it in connection with the construction of the above-referenced Project through and including the date hereof ... conditioned upon receipt of payment (at which time such release shall be immediately effective and unconditional without further action)

...

It is worth noting that this provision was a broad mechanic's lien waiver and (significantly) a *release* of claims.

In May of 1997, before submitting its final payment application, Navillus submitted a claim to Turner seeking additional compensation for extra work caused by delays and inefficiencies. Navillus and Turner were unable to reach an agreement, and Navillus filed a lawsuit. Turner asked that the lawsuit be dismissed because Navillus released or waived its claims for additional compensation as a result of signing the 18

progress payment applications containing the Partial Release.

The judge dismissed Navillus' claims based on the release language in the payment application forms; finding that by the language of the release and waiver, Navillus gave up any claims it may have had against the general contractor.

Navillus appealed the court's decision and argued that the Partial Releases only applied to the specific progress payments owed at the times it submitted the Partial Releases. Navillus claimed the Partial Releases were not general releases covering the more than \$4 million Turner owed for extra work, unpaid contract balance, and damages. Navillus also argued that it did not intend to waive future claims. Turner again argued that the language in the Partial Releases was clear and, therefore, Navillus waived its claims.

In this case, Navillus was lucky because the appellate court found that the language in the Partial Releases was uncertain as to what claims Navillus and Turner intended to waive when the Partial Releases were signed. Because "the intent to waive a right must be unmistakably manifested," and the release language was ambiguous or uncertain, the court found the trial court's decision was wrong and referred the lawsuit back to the trial court for a correct decision.

Suggestions When the Lien Waiver Waives More Than Just the Right to File a Mechanic's Lien

- 1. Period Covered by the Waiver.** In order to ensure that you are not waiving or releasing claims that arose during the period covered by a mechanic's lien waiver, you should indicate on the waiver any potential claims that may exist and specify that they are *not* covered by the release or waiver. This way, you will not later be precluded from making such a claim as a result of signing the mechanic's lien waiver. If you fail to specify those claims not covered by mechanic's lien waiver, you *could* end up releasing those claims you intend to release, as well as those you do not. If the waiver does not indicate that all claims are waived or released and the general contractor or the party making payment has suitable notice of a claim, you will likely not be prohibited from bringing a claim because you signed a release and accepted a payment.
- 2. Payment is a Condition.** Make sure that the mechanic's lien waiver is conditioned on your receiving payment for the labor done or materials furnished. In other words, if you do not receive payment, you do not release your claims. If the waiver is not conditioned upon the receipt of payment, you may have waived your rights even if you do not receive payment from the general contractor. Many mechanic's lien waivers accomplish this by including language, such as "upon receipt of payment." If such language is not present in the waiver, you should add it.
- 3. Only Claims Before the Waiver.** Make sure the mechanic's lien waiver applies only to claims that were made before the date of the release and not to claims that may be made in the future or potential future claims. If the mechanic's lien waiver applies to "all claims," you may be giving up your right to assert claims against the general contractor in the future, even if the claims have not yet arisen at the time that you signed the waiver.

Timing

A subcontractor must also be very cautious when it comes to the timing of tender of payment from the general contractor. Some jurisdictions have laws that provide greater protections to subcontractors, giving subcontractors the ability to sign a partial mechanic's lien waiver with confidence. However, a recent Wisconsin case shows how, in other jurisdictions, it can be dangerous to provide a mechanic's lien waiver in advance of payment.

Tri-State Mechanical Case

In Wisconsin, the court recently considered a case involving the timing of payment for a mechanic's lien waiver. Tri-State Mechanical, Inc. v. Northland College, 681 N.W.2d 302 (Wis.App. 2004). Unfortunately for the subcontractor, the court found that the mechanic's lien waiver was valid even though the subcontractor was not paid for its work.

Northland College ("Northland"), the owner, contracted with Frank Tomlinson Co. ("Tomlinson"), the general contractor, to build a new science building. Tomlinson subcontracted with Wynn O. Jones & Associates, Inc. ("Jones") to provide labor for the installation of the science lab case work materials. The subcontract contained a construction lien waiver provision that required Jones to provide a properly executed release and waiver of liens "as an explicit condition precedent to the accrual of Jones' right to final payment."

Jones performed all the necessary work and submitted the required final mechanic's lien waiver. While Northland paid Tomlinson the full contract price of nearly \$5 million pursuant to their contract, Tomlinson never paid Jones and Tomlinson went out of business. Jones then filed a mechanic's lien against Northland, and another subcontractor, Tri-State Mechanical, Inc., also filed a lien and started a lawsuit.

Northland argued that Jones' mechanic's lien waiver extinguished all mechanic's lien rights. The court agreed, and ruled that Jones could not maintain a lien claim because of the mechanic's lien waiver.

Jones appealed and argued that a Wisconsin law invalidated the mechanic's lien waiver provision in its subcontract and, therefore, the lien waiver that Jones tendered was also invalid. The appellate court agreed that the Wisconsin law invalidated provisions in construction contracts that required a subcontractor to waive its right to a construction lien before payment. The appellate court, however, disagreed with Jones' argument that the Wisconsin law consequently made the Jones' lien waiver void. The appellate court found that the Wisconsin law provided a subcontractor facing a void mechanic's lien waiver provision with a choice: "it can either tender a lien waiver prior to being paid or refuse to do so until it is paid. By giving the subcontractor a choice, the legislature has essentially made a policy decision that endorses whatever course of action the subcontractor takes." The appellate court concluded that because Jones furnished the mechanic's lien waiver before receiving payment, it chose to accept the risk of nonpayment. Jones' was left without the ability to file a lien against the property and without the ability to collect money because the general contractor was out of business. Under this very specific provision in Wisconsin statutes, Jones would have been better served by refusing to sign the mechanic's lien waiver.

Conclusion

It is important to carefully read a mechanic's lien waiver before agreeing to sign it. Failure to examine the mechanic's lien waiver could result in you waiving your right to seek payment for all amounts to which you are entitled and your right to recover on future claims. Even if it is an extra hassle, should a dispute arise between you and the general contractor or owner, you may be very relieved that you took the time to scrutinize the language in your mechanic's lien waiver. If you have questions about the language in a mechanic's lien waiver or the timing of providing a mechanic's lien waiver, you should seek competent legal advice.

(This article contains a general discussion of the law. You should consult with your attorney on the issues regarding your contract. This article does not constitute and should not be treated as legal advice as to any particular situation.)

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