

# TEN MECHANIC'S LIEN PITFALLS

by

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The Minnesota mechanic's lien law (Minn. Stat. § 514.01 - .17) is very technical in nature, and the procedure it sets forth for enforcing mechanic's liens differs greatly from that which applies to other lien or contract rights. This article is intended to alert practitioners enforcing mechanics liens to some of the many pitfalls contained in the law. This is neither a complete list nor an in depth discussion of the pitfalls listed. Other important areas of Chapter 514, for instance questions of who is entitled to a lien and the priorities between competing liens, are not discussed at all.

I hope that readers of this article, especially lawyers who do little or no lien work but may be called upon to do so in the future, will get the flavor of this area of the law and of the level of detail to which they will have to devote themselves in order to do the job properly.

## THE PITFALLS

### **1. Failing to give proper pre-lien notice. See Minn. Stat. § 514.011.**

Perhaps no other part of the mechanic's lien law has led to more litigation than the pre-lien notice provisions contained in §514.011. Failure to comply with the notice requirements is a complete defense to the lien. The section contains separate provisions for general contractors and subcontractors. It provides who to serve notices on and when. It sets forth the separate forms of the notice that must be used for contractors and subcontractors. It sets forth the service requirements for the notices. There are some rather complex exceptions to the notice requirements, pertaining to square footage, multiple dwellings and the common identity or control of the contractor and owner. See, e.g., *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228 (Minn. 2010) (property consisting of more than four family units applies only to multi-unit buildings such as apartments, condominiums, and townhouses and not single-family lots within a residential development). The provisions of Section 514.011 must be studied before they can be understood.

If you represent a builder or contractor on a regular basis it is a good idea to review that client's procedures and forms to make sure they are complying with the pre-lien notice statute. The pre-lien notice requirements are strictly construed by the courts. See *Wallboard, Inc. v. St. Cloud Mall, LLC*, 758 N.W.2d 356 (Minn. Ct. App. 2008); *Bendiske Concrete & Masonry, Inc. v. Barthel Const., Inc.* 515 N.W.2d 95 (Minn. Ct. App. 1994). However, subcontractors who make a "good faith" effort to serve the notice can still have a lien unless the owner proves that he was damaged by the failure to make proper service. See *Carolina Holdings Midwest, LLC v. Copouls*, 658 N.W.2d 236 (Minn. Ct. App. 2003). Remember that, if by the time the client brings the matter to you pre-lien notice has not been given, it will probably be too late.

## 2. Miss-describing the real estate.

### **514.08 Statement; notice; necessity for recording; contents.**

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**Subd. 2.** Statement by lien claimant; requirements. Such statement shall be made by or at the instance of the lien claimant, be verified by the oath of some person shown by such verification to have knowledge of the facts stated, and shall set forth:

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**(5) a description of the premises to be charged, identifying the same with reasonable certainty;**

The lien statement has to describe the right property. Don't rely on legal descriptions from tax records, sales brochures or your own client for that matter. Verify the legal description directly from the real estate records, either directly or through a stub abstract of title or a registered abstract. Also, be sure that you have all of the property that has been improved. Improvements to real estate often cover more than one parcel. If you miss a parcel in the lien statement the missing parcel won't be covered by the lien. You may be able to correct this by recording an amended lien statement, but only if the amended statement is placed of record within the 120 day and one year time limits. *See McCarron's Bld. Center v. Einertson*, 482 N.W.2d 529 (Minn. Ct. App. 1992.)

Also, if more than one parcel has been improved it is not permissible to allocate the entire lien to less than all of the property improved. This tactic has been tried where some of the improved property is subject to a prior mortgage in an effort to put all of the lien on the un-mortgaged land. *See, Premier Bank v. Becker Development, LLC*, (Minn. 2010), 785 N.W.2d 753. Under *Premier Bank*, a mechanics' lien claimant has the burden of proving the specific amount attributable to each lot under option in mechanics' lien statute allowing a claimant to file separate liens with proportionate amounts attributable to each lot where improvements benefit adjoining lots. *See, also* Minn. Stat. §514.09 generally pertaining to the improvements on adjacent tracts of land.

## 3. Mixing up Torrens and abstract property.

### **508.48 Instruments Affecting Title Filed with Registrar; Notice**

(a) Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded, or filed with the county recorder, shall, in like manner, affect the title to registered land **if filed and registered with the registrar in the county where the real estate is situated**, and shall be notice to all persons from the time of such registering or filing of the interests therein created. . . .

If the subject property is Torrens and you record the lien statement with the county recorder instead of the registrar of titles the property will not be affected, and the lien will expire before it is perfected. Sometimes property is part Torrens and part abstract, in which case you must both record the lien statement twice; once in Torrens and once in abstract. You can check with the Registrar of Titles of the county where the land is located to see if any portion of the subject property is Torrens.

**4. Not recording or serving the lien statement within 120 days from last item.**

**514.08 Statement; notice; necessity for recording; contents.**

**Subdivision 1. Notice required.** The lien ceases at the end of 120 days after doing the last of the work, or furnishing the last item of skill, material, or machinery, unless within this period:

(1) a statement of the claim is filed for record with the county recorder or, if registered land, with the registrar of titles of the county in which the improved premises are situated, or, if the claim is made under section 514.04, with the secretary of state; and

(2) a copy of the statement is served personally or by certified mail on the owner or the owner's authorized agent or the person who entered into the contract with the contractor.

There are really several pitfalls here. Don't rely on your client to tell you when the last item date is, investigate this yourself by looking at invoices, job records, delivery slips, etc. Remember that invoicing a job is not, in and of itself, a lienable item. Some work or delivery of materials must have taken place.

Don't rely on being able to go back to the job site to do more work to extend the date. Although case law is somewhat lenient about going back to the site to do additional work, *see, e.g., Poured Concrete Foundation, Inc. v. Andron, Inc., et al*, 529 N.W.2d 506 (Minn. Ct. App.1995), the new work must be part of the original contract to improve the property. Going back to the job to do some minor or inconsequential work in order to extend the lien period will probably result in losing the lien through the expiration of the 120 period.

Remember that work on a second improvement cannot be the last item for the previous improvement, even if it was ordered by the same person for the same property. The second job is a **separate improvement**. Each improvement has its own last item date which starts the 120 day period.

Although the recording of the lien statement is relatively straightforward, serving it on the owner can cause problems. Property changes hands, especially new construction. Often, it's hard to get up to date title information from the courthouse. A deed to the property in question may be "in the gap" between its recording and its appearance on the courthouse records. *See, e.g., Marque Plumbing, Inc. v. Barris*, 380 N.W.2d 174 (Minn. Ct. App. 1986). When serving by certified mail it has been held that service is complete when it was deposited in the mail. *Eischen Cabinets Co. v. Hildebrandt*, 683 N.W.2d 813 (Minn.

2004). This is a reversal of previous case law. When in doubt serve personally. *See Eclipse Architectural Group, Inc. v. Lam*, 799 N.W.2d 632 (Minn. Ct. App. 2011).

**5. Overstating the amount due.**

**514.74 Inaccuracies in lien statement.** In no case shall the liens given by this chapter be affected by any inaccuracy in the particulars of the lien statement; but, as against all persons except the owner of the property, the lien claimant shall be concluded by the dates therein given, showing the first and last items of the claimant's account. In no case shall a lien exist for a greater amount than the sum claimed in the lien statement, **nor for any amount, if it be made to appear that the claimant has knowingly demanded in the statement more than is justly due.**

If you intentionally overstate the amount of your client's lien the lien could be lost completely. *See, e.g., Tschida Excavating, Inc. v. Tracy*, 1995 WL 593051 (Minn. Ct. App. Oct. 10, 1995); *Cf. Cox v. First Nat. Bank of Aitkin*, 415 N.W. 2d 385 (Minn. Ct. App. 1987). However, a mere bookkeeping mistake will not be fatal. *Witcher Const. Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404 (Minn. Ct. App. 1991).

**6. Failing to file the complaint before serving the summons.**

**514.11 Commencement of action; proceedings.** The action may be commenced by any lienholder who has filed a lien statement for record and served a copy thereof on the owner pursuant to section 514.08, and all other such lienholders shall be made defendants therein. **The summons shall state that the complaint has been filed with the court administrator and shall be of no effect unless such complaint be in fact so filed.** It shall contain a notice that the action is brought to foreclose a lien, giving the amount thereof, and a brief description of the premises affected, and of the improvement out of which the lien arose, and shall require each defendant to file an answer to the complaint with the court administrator within 20 days after service on the defendant. Such answer, in addition to all other matters proper to be pleaded, shall set up any lien claimed by the defendant, and demand the enforcement thereof. No copies of such complaint or answer need be served on any party, upon demand or otherwise, and all averments of the answer shall be taken as denied without further pleading.

This is a big difference from the typical civil case in which you don't need to file the complaint before starting the case. In a mechanic's lien foreclosure action, the complaint must be filed before the summons is served. *AAA Elect. & Neon Service, Inc. v. R-Design*

Co., 364 N.W. 2d 869 (Minn. Ct. App. 1985). Remember too that the summons in a mechanic's lien foreclosure action has to say different things than a normal summons.

**7. Not starting action, or joining in an existing action, within one year of last item date.**

**514.12 Notice of lis pendens.**

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**Subd. 3. One-year limitation.** No lien shall be enforced in any case unless the holder thereof shall assert the same, either by filing a complaint or answer with the court administrator, within one year after the date of the last item of the claim as set forth in the recorded lien statement . . . .

Failure to start a mechanic's lien foreclosure action, or to join in an existing action, within one year of the last item date is a jurisdictional defect which cannot be remedied. *J.W. Hulme Co. Inc. v. Reiling*, 448 N.W.2d 109 (Minn. Ct. App. 1989). Of course other rights, such as contract rights, are not lost. Remember, the one year period starts from your client's last item date, not from the last item date of another party's lien and not from the date that the lien statement was recorded.

You don't need to start the action yourself. In fact, you're not supposed to start a separate action once another lien claimant has started an action regarding the same improvement (§514.11 Subd. 2 "One action for all"). When someone else starts the action they are supposed to search the title, find your lien statement and name your client as a defendant. You then file an answer and cross claim setting forth your client's rights to a mechanic's lien. You can also intervene in the action to and assert your client's rights that way. You can even file an answer and cross claim if your client was not named as a defendant, for instance if your client's lien was recorded after the Plaintiff started the action. Just remember that you have to file your answer with the Court within one year from your client's last item date. If the action is started within one year of your client's last item date, but your answer is more than one year after, the lien is lost.

If you start the action you will need to do a thorough search of the real estate records, either yourself or through an abstract or title company. All parties holding an interest in the property should be joined, and their purported interests should be described in the complaint. And don't forget to file your notice of lis pendens either.

**8. Failing to name/serve record owners and encumbrancers of the subject property within one year.**

**514.12 Notice of lis pendens.**

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**Subd. 3. One-year limitation.** . . . and, **no person shall be bound by any judgment in such action unless made a party thereto within the year**; and, as to a bona fide purchaser, mortgagee, or encumbrancer without notice, the absence from the record of a notice of lis pendens of an action after the expiration of the year in which the lien could be so asserted

shall be conclusive evidence that the lien may no longer be enforced and, in the case of registered land, the registrar of titles shall refrain from carrying forward to new certificates of title the memorials of lien statements when no such notice of *lis pendens* has been registered within the period.

The above provision appears to require that anyone with an interest in the property be made a party within one year of the last date of contribution of labor or material to the project. That was what most lawyers thought until the case of *Mavco, Inc. v. Eggink*, 739 N.W.2d 148 (Minn. 2007). In *Mavco* it was held that some parties, such as lenders, don't have to be served within the one year period. The law after the *Mavco* case is confusing as to who needs to be served within the one year period. The best practice to avoid these complications is to serve everyone who has a known interest in the property. And remember that the one year period starts from the last item date, not from the date that the lien statement was recorded.

**9. Failing to comply with licensing requirement.**

**§326B.845. Penalties**

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**Subd.2 Lien Rights.** An unlicensed person who knowingly violates sections 326B.802 to 326B.885 [pertaining to the licensing of residential contractors] has no right to claim a lien under section 514.01 and the lien is void. . . .

Persons who fit the definition of “residential contractors” in M.S. §326B.802 must comply with the provisions of sections 326B.802 to 326B.885 in order to legally enforce a mechanics lien.

**10. Relying on another party to properly initiate the foreclosure action.**

**514.12 Notice of *lis pendens*.**

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**Subd. 2. One action for all.** After such filing, no other action shall be commenced for the enforcement of any lien arising from the improvement described, but all such lienholders shall intervene in the original action by answer, as provided in section 514.11. Any such lienholder not named as a defendant may answer the complaint and be admitted as a party. If more than one action shall be commenced in good faith, all shall be consolidated and tried as one, under such order of the court as may best protect the rights of all parties concerned.

When more than one lien is filed against a property the lien law states that only one action should be brought and that all other lien claimants assert their liens through cross claims (Minn. Stat. § 514.11; *see* Section 7, *supra*). Attorneys asserting mechanic's liens as defendants will be tempted to assume that the plaintiff met all of the service and filing requirements for foreclosing the lien. This is very dangerous because if the plaintiff's

attorney makes a mistake it will probably mean that your client's lien is rendered invalid. Moreover, since different liens will probably have different last item dates, your lien could expire even if the plaintiff's attorney does a do a proper job. *See, e.g., J.W. Hulme Co. Inc. v. Reiling*, 448 N.W.2d 109 (Minn. Ct. App. 1989).

To minimize this risk, you should always examine the court file and, if necessary, ask to see proofs of service and filing from the plaintiff's attorney to make sure the action has been properly commenced. Of course, this must be done before your client's lien expires. If there is any doubt, you may start a separate action and have the two actions consolidated under Minn. Stat. § 514.12 subd. 2.

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