

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



Byron Saintsing leads a practice group focused on matters involving [construction law](#), commercial and business litigation, representation of [equipment lessors](#), charter schools, and education law, and commercial creditor bankruptcy. Byron has written and lectured on many topics pertaining to construction and equipment leasing, including editing materials on North Carolina's adoption of Article 2A of the Uniform Commercial Code.

Subcontractor Lien Rights

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Subcontractors may encounter difficulties in collecting payments for work performed on construction projects. However, a subcontractor is not left out in the cold if he does not receive such payment. An unpaid subcontractor that supplied labor or materials for the improvement of real property may be entitled to a lien against: (A) funds or (B) the improved real property.

(A) Lien Against Funds

A first tier subcontractor may have a lien on funds owed to the general contractor by the owner. Second tier and third tier subcontractors may also have a lien against the funds owed to the party with whom they dealt. However, a second and third tier subcontractor's right to a lien on funds held by an owner may be cut off by the general contractor or person higher in the chain if that person is owed no monies at the time or after the notice of lien is served. A second and third tier subcontractor will nevertheless want to serve a notice of claim of lien on all parties. This is because it will preserve a second or third tier subcontractor's right to wrongful payment against any party paying out money to someone higher in the chain after notification of the lien. Finally, a subcontractor more remote than a third tier subcontractor may only have one remedy. That remedy is a lien on funds owed to the person with whom they contracted.

A lien on funds is perfected by giving notice of the lien to the party against whom the lien is asserted. For example, if a third tier subcontractor asserts a lien on funds owed by the owner to the general contractor, the third tier subcontractor will serve the owner with the notice. If the third tier subcontractor asserts a lien against funds owed by the general contractor to the first tier subcontractor, then the third tier subcontractor will serve the general contractor with the notice. A lien notice must take the form set forth in the statute governing lien rights. Regardless of what entity the lien is asserted against, the lien claimant is only entitled to the amount owing to the entity above him in the construction chain.

There is no statutory deadline for the filing of a lien on funds, and the lien on funds does not need to be filed at the courthouse. One should not wait, however, to serve the notice of lien on funds because once a higher tiered subcontractor is paid, the lien on funds will be cut off as to all subcontractors lower than the paid subcontractor.

(B) Lien Against The Real Property

Even though a lien on funds may be cut off by payment, a first, second, and/or third tier subcontractor may be afforded a second remedy. The second remedy is a subrogated lien against the improved real property.

Subrogation means one party “stepping into the shoes of another.” First tier subcontractors may have a subrogated lien against the real property via the right of the general contractor. A second and third tier subcontractor may have a lien against the improved real property via the right of the first tier subcontractor. A second and third tier subcontractor’s lien against the property may still be valid even if the first tier subcontractor is not owed any money. Subcontractors more remote than third tier subcontractors do not have lien rights against the property.

A second and third tier subcontractor’s right to a lien against the real property may be cut off if either: (a) the contractor, within 30 days of acquiring a building permit, posts a Notice of Contract on the building site and files a copy of the notice with the Clerk’s office in the county where the property is located, and the second or third tier subcontractor fails to serve the contractor with a Notice of Subcontract or; (b) after posting and filing the Notice of Contract and service of the signed Notice of Subcontract, the contractor serves the second or third tier subcontractor with a Notice of Payment. Where, however, the contractor fails to post a Notice of Contract, a second and third tier subcontractor may still have a lien against the real property.

One may enforce a subrogated lien by: (a) providing the owner and contractor with notice of the lien within 120 days of last furnishing of labor or materials; (b) filing a lien and the notice of lien and; (c) perfecting the lien by filing a complaint within 180 days of last furnishing labor or materials. The claim of lien and notice must be served and filed in the county where the Project is located.

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