



March 2018

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SUBCONTRACTOR'S PATH TO PAYMENT HAS BECOME EASIER

Last summer, the Governor signed into law a provision that strengthens a subcontractor's hand when pursuing a past due payment on private non-residential construction projects.

Traditionally, subcontractors looked to mechanic's liens to obtain "collateral" for amounts they are owed for work on a private project. Mechanic's liens, however, are not a magic wand. They are of little value if there is no equity in the property against which the subcontractor recorded a mechanic's lien. Also, mechanic's lien's statutory procedures, including notice provisions, recordation and foreclosure deadlines, and sometimes convoluted service requirements, must be carefully followed, or the subcontractor risks waiving its lien rights. Thus, direct actions against the owner by the subcontractor are sometimes warranted.

However, the efficacy of these claims against owners were sometimes limited by the owners' rights to withhold final payments, usually retainage, for extended periods of time after completion of the project. This can create significant cash flow problems for a subcontractor, particularly if that subcontractor provided services during the early phases of the project. Subcontractors *could* bring claims against their general contractor, but GC's often include paid-when-paid or paid-if-paid clauses in their agreements with the subcontractors and therefore argue that because the owner has not paid them, they don't have to pay the subcontractor.

Now with the enactment of the new law: (1) subcontractors who have completed their work but have not been paid can make demand on owners to place funds in escrow, and the owners must release all retainage. If the owner refuses to escrow funds, and the subcontractor files a lawsuit and ultimately prevails, the subcontractor may recover the attorney's fees it incurred and interest; and (2) all retainage must be paid by the owner within 30 days of the issuance of a certificate of final completion or an equivalent written acceptance of the construction project work.

Attorney Bowen is a partner in the litigation department at Kahan, Kerensky and Capossela and represents subcontractors, general contractors, and owners in construction disputes involving public and private projects.