

The Lien Law Section 59 Demand to Foreclose

When a New York property owner receives a mechanic's lien the first question that he or she usually asks is "how do I get rid of this lien?" Well, if the mechanic's lien is "valid on its face," and you want to challenge the validity of the lien, then you need the contractor to commence a lien foreclosure action so that you can challenge things like whether money is due and whether the work was properly performed.

What is foreclosing on a mechanic's lien?

Foreclosing on a mechanic's lien is a term used to refer to the lawsuit commenced by a lienor (usually the contractor, subcontractor or a supplier) to enforce its mechanic's lien. If the lienor is successful in the foreclosure action, then it can actually have the property sold at a public auction and the proceeds used to satisfy the debt. The property owner has the ability to defend against the lien on both procedural (something is wrong with the lien from a technical standpoint) and meritorious (no money is due) grounds.

Why would I invite someone to foreclose on my property?

Probably the most common part of a mechanic's lien that a property owner wants to challenge is the amount claimed due. Either the property owner believes that nothing is due and the mechanic's lien never should have been filed, or the property owner thinks that less (sometimes much less) is due than is set forth in the lien. However, even if you think you have proof that the amount claimed due is incorrect, that does not constitute a "facial defect" (see Lien Law Section 19) so you are left forcing the lienor to enforce the lien and foreclose upon it so that you can challenge it based upon the incorrect amount claimed as due and owing.

How do I demand foreclosure?

New York Lien Law Section 59 provides you with the answer. The statute allows the property owner, or even the general contractor¹, to serve a written demand on the lienor demanding that the lienor either foreclose on its mechanic's lien within 30 days of being served with the demand or to show cause before a court why the lien should not be vacated. The statute is very specific as to the process for serving the demand and the timing issues are crucial, so it is highly recommended that you consult a construction attorney to help you with the foreclosure demand process.

¹ Many contracts between owners and contractors require the contractor to keep the property free and clear of liens and to defend and remove any liens that are filed.

What happens once the demand to foreclose is served?

Essentially, once properly served with the Demand to Foreclose pursuant to Lien Law Section 59, the lienor has 30 days to commence foreclosure proceedings. If the lienor fails to do so then you can commence a special proceeding and seek to discharge the mechanic's lien for the lienor's failure to timely foreclose. The demand really forces the lienor to address the lien rather than allowing it to sit against the property for 1 year (the life span of a lien²). If the lienor ignores your demand, then you will likely be able to have the lien discharged through the Lien Law Section 59 special proceeding. If the lienor actually forecloses then you have your avenue to challenge the underlying validity of the mechanic's lien.

Is there any penalty to a contractor that forecloses on a lien that was improper?

If you can prove that a lienor intentionally and **willfully** exaggerated a mechanic's lien then, under the Lien Law, you can have the entire mechanic's lien declared void and recover damages against the lienor for the amount of the exaggeration plus, in some situations, attorneys' fees.

Vincent T. Pallaci is the managing member of Kushnick Pallaci PLLC (www.nyconstructionlaw.com) where his practice concentrates on construction and real estate development issues including enforcing and defending against mechanic's liens. The Long Island construction law firm of Kushnick Pallaci PLLC is based out of Bohemia, New York and handles a variety of construction law related claims including liens, defective work, property damage, payment disputes, delay claims and scope of work claims. Mr. Pallaci can be reached at (631) 752-7100 or vtp@kushnicklaw.com.

² Liens can also be extended in one year intervals. Commercial liens may be extended as of right by filing an extension but residential liens must be extended by Court order.