# A Subcontractor Just Filed A Mechanic's Lien On My New Restaurant. What Now?

By Kirk J. McCormick on December 1, 2017



You are the owner of a fine dining establishment located in the heart of the financial district. Business has been great – so great, in fact, that you recently decided to relocate to a new, larger location. In the process, you have spent tens of thousands of dollars to fit out the new space, including the installation of state-of-the-art equipment in the back of the house. Now, with the work almost finished and the grand opening right around the corner, you find out that one of your contractor's subcontractors has filed a lien on the new space. What does it all mean?

A mechanic's lien is a tool to both get a proprietor's attention, and an effort to enforce rights that a subcontractor may have. This article explains the basics of the mechanic's lien process and describes a few ways in which the lien can be removed.

## Mechanic's Lien in a Nutshell

A mechanic's lien is a method for securing payment for certain parties involved in construction. Essentially, a perfected mechanic's lien – one that complies with all statutory requirements for enforcement – acts as a mortgage on the property and provides the claimant with significant leverage by encumbering the property. In the context of a lease, the lien may apply to the leasehold interest of the restaurateur, and, in certain situations, may even apply to the fee interest of the owner of the underlying property.

In order to acquire this leverage, however, the claimant must strictly comply with the Massachusetts mechanic's lien statute (M.G.L. c. 254). Failing to do so will invalidate the lien and potentially leave the claimant without recourse.

## Potential Claimants

Nearly anyone involved in the construction process may file a mechanic's lien, provided the party claiming the lien (1) provided some "improvement" to the real property at issue, and (2) has a written contract. This includes as potential claimants not only the general contractor, subcontractors and suppliers, but also architects, engineers, and construction managers. It also includes those who provide rental equipment and tools.

## Timing Requirements

### Notice of Contract

The mechanic's lien claimant must file a Notice of Contract with the Registry of Deeds where the project is located within 90 days of the last date that services or materials were

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provided to the project, although there are certain exceptions (such as when a Notice of Substantial Completion or Notice of Termination is filed). Importantly, unless the claimant is the general contractor, the 90 days is calculated based on the date that anyone – including other subcontractors – last provided materials or services to the project. The Notice of Contract must contain certain information about the project, including a description of the land where the project is located. For subcontractors, the Notice of Contract also must include specific information regarding the subcontract, such as the subcontract price, change order amounts, and payment history, and a copy must be served on the owner.

**Notice of Identification**

For a second- or lower-tier subcontractor (i.e., a claimant that does not have a contract with the general contractor), a Notice of Identification may be – but is not required to be – sent to the general contractor within 30 days of beginning performance. The Notice of Identification informs the general contractor that the lower-tier subcontractor is performing and also preserves the amount for which the claimant may recover. Sending the Notice of Identification also potentially means the lien has greater value. This step is in addition to filing a Notice of Contract.

**Statement of Account**

The next step for the lien claimant is filing a Statement of Account. As with the Notice of Contract, the Statement of Account must be recorded with the Registry of Deeds. The Statement of Account must usually be recorded within 120 days of the last work at the project, although there are exceptions (such as when a Notice of Substantial Completion or Notice of Termination is filed). The Statement of Account must include the property description, the amount claimed, and the name of the property owner.

**Lawsuit**

No more than 90 days after recording the Statement of Account, the claimant then must file suit to enforce the lien. Failure to commence the lawsuit timely will result in the automatic dissolution of the lien.

**Record at Registry of Deeds**

The claimant must record a certified copy of the complaint with the Registry of Deeds within 30 days of filing the lawsuit or else the lien will be dissolved.

**"Amount Due"**

A key factor to consider regarding mechanic's lien claimants' rights is what is sometimes called the "amount due" requirement. As a general rule, no lien claimant is entitled to a lien greater than the amount owed to the party immediately above the claimant. For example, a subcontractor's lien cannot be greater than the "amount due" the general contractor under the general contractor's contract with the owner. Similarly, unless a second-tier subcontractor or supplier files a Notice of Identification, that party cannot obtain a lien greater than the "amount due" the subcontractor with which it contracted. The "amount due" is calculated as of the date the recorded Notice of Contract is provided to the Owner. If nothing is due the general contractor at the time the Notice of Contract is filed, the subcontractor has no lien rights.

**Challenges to the Lien**

The statute provides several options for challenging or discharging a lien. One method is a summary procedure for discharging a facially invalid lien. Under this procedure, an owner (or leaseholder, as is likely the case with a new restaurant) may commence a lawsuit to have the lien discharged if the undisputed documents show that the lien is invalid. One example of a facially invalid lien would be if the Notice of Contract was obviously untimely based on the last day work was performed. Another example would be if a Notice of Contract and Statement of Account were filed timely, but no lawsuit to enforce the lien was commenced within 90 days of filing the Statement of Account.

Another method of discharging a lien is bonding off the lien. In that case, the party seeking to discharge the lien obtains a bond in the amount of the lien and records that bond with the registry of deeds. In essence, the bond substitutes as security for the lien claimant without encumbering the property.

Of course, another method of discharging the lien is to negotiate a settlement with the claimant that requires the claimant to voluntarily dissolve the lien.

**Conclusion**

This article has only briefly explored the complicated nature of the Massachusetts mechanic's lien statute. A lien claimant is required to strictly comply with the statute, and failure to do so will invalidate the lien. An experienced construction attorney can guide you through understanding the lien process or otherwise resolving the underlying dispute to get the lien removed.

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