STATE OF NEW JERSEY COMPENDIUM OF CONSTRUCTION LAW

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COMPENDIUM OF NEW JERSEY CONSTRUCTION LAW

New Jersey is similar to other states in many areas of construction law. This compendium addresses several specific areas where New Jersey construction law differs from other states.

I. THE NEW JERSEY CONSTRUCTION LIEN LAW.

A. General Requirements Applicable to All Construction Lien Claims.

The Construction Lien Law ("CLL"), N.J.S.A. 2A:44A-l to -38, governs the filing of liens in New Jersey. Pursuant to the CLL, a party must perform work under a contract to be entitled to file a construction lien claim. N.J.S.A. 2A:44A-3(a) provides, in pertinent part, that:

> Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price, subject to sections 6, 9, and 10 of [the CLL]. . . .

(Emphasis added). Accordingly, work performed or materials delivered pursuant to unsigned change orders are not lienable under the CLL.

N.J.S.A. 2A:44A-8 sets forth the form of a construction lien claim, and N.J.S.A. 2A:44A-6 describes how to file the claim. The lien claimant must sign, acknowledge, and verify its lien claim by oath. N.J.S.A. 2A:44A-6(a)(1).

Except as to residential projects, a construction lien claim must "be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed." N.J.S.A. 2A:44A-6(a)(2). Warranty or service calls, or other work, materials, or equipment provided after completion or termination of a claimant's contract is not used to determine the last day that work, services, material or equipment was provided. See N.J.S.A. 2A:44A-6(d).

Within ten (10) days of the lodging for record of a lien claim with the County Clerk, a lien claimant must also serve a copy of the construction lien claim upon the Owner, and, if any, upon the Contractor and Subcontractor against whom the claim is asserted. N.J.S.A. 2A:44A-7(a). Service can be effectuated via personal service; by registered mail, certified mail return receipt requested, or commercial courier; or ordinary mail addressed to the last known business or residence address of the owner, contractor, or subcontractor. N.J.S.A. 2A:44A-7(a) to -7(a)(2). Service of the lien claim outside the prescribed period does not preclude its enforceability unless the party not timely served proves by a preponderance of the evidence that the late service has materially prejudiced its position. N.J.S.A. 2A:44A-7(b). Service of the lien claim is a condition precedent to enforcement of the lien. Id.

A lien claimant forfeits its rights to enforce a lien and must "immediately discharge the lien of record" if it does not commence an action to establish the lien claim within: (1) "one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed;" or (2) "30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner . . . contractor, or subcontractor . . . requiring the claimant to commence an action to establish the lien claim." N.J.S.A. 2A:44A-14(a) to -14(a)(2).

B. Additional Requirements Applicable to Residential Projects.

Additional procedures must be followed before filing a construction lien claim on residential projects. A lien claimant must first file a Notice of Unpaid Balance and Right to File Lien (collectively, "NUB") with the local County Clerk together with a demand for Arbitration with the American Arbitration Association ("AAA") for leave to file a construction lien claim.[1] See N.J.S.A. 2A:44A-20; N.J.S.A. 2A:44A-21(b) to -21(b)(3). A construction lien claim can only be filed against a residential project after the AAA arbitrator issues a determination approving the filing of the lien claim. See N.J.S.A. 2A:44A-6, cmt. of the N.J. Law Rev. Comm'n (2009); N.J.S.A. 2A:44A-20; N.J.S.A. 2A:44A-21. In a revision to the CLL, effective January 5, 2011, the time for filing a residential construction lien was extended to 120 days, while the deadline for filing a NUB was reduced to 60 days. N.J.S.A. 2A:44A-6(a)(2); N.J.S.A. 2A:44A-21(b)(1).

Until recently, there was confusion in the law as to whether the multi-step residential lien filing process must be followed by suppliers of construction materials on large condominium and residential developments. In In re Kara Homes, 374 B.R. 542 (D.N.J. 2007), the Bankruptcy Court issued an opinion which appears to settle, for the time being, the confusion in the law. In that opinion, the court held that the multi-step process of the residential section of the CLL must be followed even when labor or material is intended to cover and to benefit an entire development and not just a single residential unit. The revised CLL adopts the court's holding in Kara Homes through a new set of defined terms, including the terms "residential construction contract" and "real property development." See N.J.S.A. 2A:44A-3; N.J.S.A. 2A:44A-6(b)(2).

C. The Three Tier Rule: A Construction Lien Is Only Available To Those Who Provide Labor or Materials to A Project Pursuant to A Contract With An Owner, General Contractor, or Subcontractor.

Only entities that have a contractual relationship with either an owner, general contractor or a subcontractor may file a construction lien claim. Third tier subcontractors and below (i.e., those entities that provide materials or labor pursuant to a contract with a sub-subcontractor, sub-sub-subcontractor, etc) cannot file a construction lien claim. See

[1] A NUB can also be filed when a potential lien claimant desires to seek priority over subsequently filed conveyances, leases or mortgages affecting property to which improvements have been made. In non-residential cases, a NUB constitutes appropriate notice of record of the potential lien claimant's desire for priority. See N.J.S.A. 2A:44A-20(b).

Eastern Concrete Materials, Inc. v. Tarragon Edgewater Assoc., LLC, 402 N.J. Super. 583, 585 (App. Div. 2008) (construction lien claim was invalid where the lien was filed by an entity that furnished materials pursuant to a contract with a sub-subcontractor).

D. If A Contractor Enters Into Multiple Contracts On A Project, A Construction Lien Claim Should Be Filed Within 90 or 120 Days of The Date Labor is Last Performed Under Each Contract.

In situations where contractors/material suppliers enter into multiple contracts on a project, the CLL is not clear as to whether a lien must be filed within 90 or 120 days of the date work was last performed on the entire project or whether the lien must be filed within 90 or 120 days of the date work was last performed under each contract. Usually, this issue arises when a contractor issues a purchase order and then issues a new purchase order (as opposed to a change order or an amendment to the original purchase order) because the owner requests additional work to be performed. For instance, if a Contractor were to issue four (4) purchase orders for a project which required work to be performed on September 1, 2008, October 1, 2008, November 1, 2008 and December 1, 2008, and were to file a construction lien claim on January 1, 2009 to secure the value of all the work that was supplied under all four purchase orders, it is conceivable that a court could determine that the lien is willfully overstated thereby subjecting the contractor to sanctions under N.J.S.A. 2A:44A-15(a).[2]

Under the above scenario, there are four "contracts" at issue. The statutory text of the CLL suggests that a lien claim should be filed within 90 or 120 days of the date work was last performed under each "contract." N.J.S.A. 2A:44A-3(a) states "[a]ny contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract shall be entitled to a lien for the value of the work or services performed, or materials and equipment furnished in accordance with the contract and based upon the contract price . . . ." (Emphasis added). The form of a Construction Lien Claim contained in N.J.S.A. 2A:44A-8(2) contains a Claimant's Representation and Verification which requires the claimant to verify that the "amount claimed at the date of lodging for record of the claim, pursuant to claimant's contract" described in the construction lien claim. (Emphasis added).

The CLL was enacted in 1994, and there is no caselaw addressing this issue. Caselaw applying New Jersey's old Mechanic's Lien Law, the predecessor to the CLL, instructs that a lien would have to be filed within 90 days of the date materials were last delivered under each purchase order. Sikkema v. Packard, 79 N.J. Super. 599 (Law Div. 1963); Rigberg v. Narduc Development Corp., 47 N.J. Super. 588 (Ch. Div. 1957). The

[2] Pursuant to N.J.S.A. 2A:44A-15(a), if a construction lien claim is without basis, the amount of the lien claim willfully overstated, or the lien claim is not filed in substantially the form set forth in N.J.S.A. 2A:44A-8, or not filed in accordance with the time provided in N.J.S.A. 2A:44A-6, a lien claimant forfeits all claimed lien rights and its right to file subsequent lien claims for material claimed within the forfeited lien. Notably, the statute states "[t]he claimant shall also be liable for all court costs, and reasonable legal expenses, including . . . attorneys' fees, incurred by the owner, . . . contractor [or] subcontractor, in defending or causing the discharge of the lien claim." N.J.S.A. 2A:44A-15(a). Additionally, the claimant can be subject to liability for damages to any party adversely affected by the lien claim. Id.

easiest way to avoid this scenario and the possible imposition of sanctions under N.J.S.A. 2A:44A-15 is for work to be performed on a project under one contract/purchase order. Additional work should be performed pursuant to an amendment or a change order to the original contract/purchase order.

II. THE CLAIM PROCESS UNDER THE MUNICIPAL MECHANICS' LIEN LAW AND THE PUBLIC WORKS BOND ACT.

The Municipal Mechanics' Lien Law, N.J.S.A. 2A:44-125 (the "Lien Law"), and the Public Works Bond Act, N.J.S.A. 2A:44-143 et seq. (the "Bond Act") (collectively, the "Acts"), provide certain statutory protections for those who supply labor or materials on public works projects. As originally enacted, the Acts made the general contractor (the "Contractor") unconditionally responsible for monies owed by its direct subcontractor (the "Subcontractor") to those who supplied labor or materials to the Subcontractor (hereinafter the "Third Tier Claimants"). Prior to August 24, 1996, a Third Tier Claimant seeking to perfect its lien under the Lien Law was only required to file a Notice of Claim with the public agency after the Subcontractor's debt had accrued. Likewise, prior to August 24, 1996, a Third Tier Claimant seeking to assert a claim under the Bond Act was only required to give notice to the Contractor's surety after the Subcontractor's debt had accrued. After providing these notices, a Third Tier Claimant could pursue the remedies afforded by the Acts against the Contractor even if the Contractor did not know of that Third Tier Claimant's involvement in the project and regardless of whether the Contractor had already paid its Subcontractor for the labor or materials supplied by that Third Tier Claimant.

Effective August 24, 1996, however, the New Jersey Legislature amended the Acts to provide protection to the Contractor and to eliminate the "payment problems that sometimes arise on public improvement construction sites when a general contractor has hired subcontractors, who, in turn, have hired other subcontractors that are unknown to the general contractor." *See Assembly Local Gov. Committee, Statement Assembly Bill No. 1034 (N.J. 1996).* In essence, the amendments to the Lien Law and Bond Act were intended to protect the Contractor from having to pay twice for the same work, labor or equipment. As stated by the Legislature, the amendments were enacted to impose advance notice requirements upon Third Tier Claimants to "eliminate the potential confusion" that arises when a Contractor must pay a Third Tier Claimant "to discharge a valid mechanics' lien . . . for material or labor for which the subcontractor has already received payment." *Assembly Local Gov. Committee, Assembly Bill No. 1034 (N.J. 1996)* (emphasis added).

The advance notice requirements now imposed upon Third Tier Claimants under the Lien Law and Bond Act afford the Contractor and the Owner an opportunity to ascertain the identity of these Claimants before the Subcontractor requisitions the Contractor for its work. In this manner, the Contractor can make appropriate arrangements to ensure that these Third Tier Claimants are paid out of the Subcontractor's requisitions, either by joint check or by payment directly to the Claimant with the Subcontractor's consent.

Although the amendments to the Lien Law and Bond Act were made effective August 24, 1996, they have not been uniformly applied since then. This is so because claimants have generally been permitted to follow the original statutes on projects that pre-dated August 24, 1996 in some respect (i.e., where bids were received or the general contract was awarded prior to that date). Indeed, today we are still litigating claims under the old Acts. However, since these claims are now few and far between, it is useful to focus on the significant changes that took effect with the 1996 amendments as they are virtually certain to apply to any claims asserted from this point forward.

A. The Municipal Mechanics' Lien Law Notice Provisions.

First, the Lien Law applies to counties, cities, towns, public commissions and boards or other municipalities; it does not apply to the state or state agencies.

To be covered under the Lien Law, one must perform labor or furnish materials (including certain enumerated examples in the statute). A successful claimant will establish a lien against the unpaid funds in the hands of the Owner when the lien is filed. The lien does not attach to any real property.

Under N.J.S.A. 2A:44-132 of the Lien Law, a Lien Claimant may file a "Notice of Lien Claim":

> at any time before the whole work to be performed by the contractor for the public agency is either completed or accepted by resolution of the public agency, or within 60 days thereafter . . . .

The claim is to be filed with the chair person "or other head officer or with the secretary or clerk of the public agency." Id.

Pursuant to N.J.S.A. 2A:44-133, the Notice of Lien Claim must identify, among other things, the amount of the claim and the party from whom the monies are due. Once such a Lien Claim is filed, the public agency can compel the Contractor to show cause why the Claim should not be paid and, if the Contractor fails to demonstrate that the Claim is unfounded and untrue, the public agency can pay the Claimant out of funds due the Contractor. N.J.S.A. 2A:44-135 to -136. Alternatively, the Claimant can seek enforcement of its Lien Claim in Court. N.J.S.A. 2A:44-137. If the Lien Claim is proven to be valid, the Claimant is entitled to a judgment directing the public agency to pay the Claim out of monies due the Contractor. N.J.S.A. 2A:44-140.

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Effective August 24, 1996, the Lien Law was amended to provide substantially greater protection to the Contractor with respect to Lien Claims asserted by Second and Third Tier Claimants. In addition to having to file the Notice of Lien Claim pursuant to N.J.S.A. 2A:44-132, the following notice requirement was imposed upon such Second and Third Tier Claimants under N.J.S.A. 2A:44-128(b):

> Any person who may seek to assert a lien under subsection a. of this section shall, within 20 days of the first performance of work or performance of work or delivery of labor or materials to a subcontractor, file with the [municipal clerk, c.f.o. of the county, or chair of the commission, board or authority, applicable to that public agency] written notice that he or she has furnished labor or materials to the subcontractor. The notice shall contain the name, address and telephone number of the person providing the labor or materials, the name and geographical location of the public improvement for which the labor or materials have been supplied, the name of the subcontractor to which the labor or materials have been supplied, a description of the labor or materials supplied, and the date that the labor or materials were first supplied to the subcontractor. . . . Failure to provide this written notice as required within 20 days of the first performance of work or delivery of labor or materials to the subcontractor shall be a bar to secure a lien for the labor or materials provided, unless there is money owing from the contractor to the subcontractor to whom the labor or materials were provided, in which case the lien shall be limited in value to a sum not greater than the money owing from the contractor to the subcontractor.

(Emphasis added).

In sum, this amendment provides that a Second or Third Tier Claimant cannot assert a Lien Claim against the Contractor for labor or materials supplied to the Subcontractor more than 20 days prior to the date the claimant files its initial written notice, except to the extent that the Contractor owes any money to the Subcontractor when the Second or Third Tier Claimant files its Notice of Lien Claim.

Example

A Third Tier Claimant provides a Subcontractor with $10,000 worth of materials between September 1st and September 10th, and $20,000 worth of materials between September 11th and September 30th. The Third Tier Claimant files its written notice on October 1st and files its Notice of Lien Claim on November 1st, by which date the Contractor has discharged all payment obligations to the Subcontractor. In this example, the Third Tier Claimant's lien is perfected for the $20,000 worth of materials supplied between September 11th and September 30th, but is void as to the materials supplied before September 11th, because the Contractor did not owe the Subcontractor any monies as of the date the Notice of Lien Claim was filed.

B. The Bond Act Notice & Suit Limitation Provisions.

The Bond Act requires the Contractor on a public works project to furnish to the public agency a bond in an amount equal to 100% of the Contract price to secure payment

for labor or materials supplied to the Contractor or its subcontractors. N.J.S.A. 2A:44-143; N.J.S.A. 2A:44A-144. Prior to the August 24, 1996 amendments to the Bond Act, N.J.S.A. 2A:44-145 only required the following notice:

> any person to whom any money shall be due on account of having performed any labor or furnished any materials . . . [on the project] shall, at any time before the acceptance of [the project] or within eighty days thereafter, furnish the sureties on the Bond required by this article a statement of the amount due to him.

Once having provided such notice, the claimant could bring an action on the bond eighty (80) days after the project was finally accepted. Id.

As amended, N.J.S.A. 2A:44-145 now imposes additional notice obligations upon all payment bond "beneficiaries"[3] who are not in direct privity with the Contractor (i.e., Third Tier Claimants). Specifically, it provides as follows:

> Any person who may be a beneficiary of the payment bond, as defined in this article, and who does not have a direct contract with the contractor furnishing the bond shall, prior to commencing any work, provide written notice to the contractor by certified mail or otherwise, provided that he shall have proof of delivery of same, that said person is a beneficiary of the bond. If a beneficiary fails to provide the required written notice, the beneficiary shall only have rights to the benefits available hereunder from the date the notice is provided.

Id. (emphasis added).

As such, a Third Tier Claimant cannot now assert a claim under the bond for payment of any labor or materials provided prior to the date that the written notice required under this statute is given to the Contractor.

The August 24, 1996 amendments to the Bond Act also changed the timing for filing of statements of claim with the surety as well as the time to bring suit on the bond. As previously mentioned, under the original act, claimants had up to eighty (80) days after acceptance of the entire Project to file a Statement of Claim with the surety. A claimant filing such notice would then have up to one (1) year from the date the entire project was formally accepted to file suit. N.J.S.A. 2A:44-145 to -146. This process left claimants at the mercy of the general contractor and owner if disputes unrelated to the claimants' work prevented the project from being accepted.

[3] In an apparent attempt to clarify the identity of those protected by the Bond Act, N.J.S.A. 2A:44-143, as amended, expressly defines "beneficiaries" under the payment bond as both "subcontractors or material suppliers in contract with the contractor" and "subcontractors or material suppliers in contract with the subcontractor to the contractor."

As amended, N.J.S.A. 2A:44-145 no longer requires a claimant to await formal acceptance of the entire project before filing a statement of claim with the surety. Now, the claimant or "beneficiary" is to file its statement of claim with the surety company within one (1) year "from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project . . . ." Id.

Also, the amended version of N.J.S.A. 2A:44-145 no longer requires a claimant to await formal acceptance of the entire project before bringing suit on the bond. Now, the claimant can bring suit ninety (90) days after filing the Statement of Claim with the surety "but in no event later than one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project." Id.

In other words, the claimant must bring an action against the surety within one (1) year from the last date that work was performed or materials were supplied, *provided the claimant issued a notice of claim to the surety at least ninety (90) days before.* Otherwise, the claimant's time period is effectively only nine (9) months, because suit cannot be brought against a surety for at least 90 days after notice of the claim is delivered to the surety.

C. Effect of Bond Act Amendment on Subcontractor Payment Bonds.

The Bond Act applies only to the payment bond required of the Contractor on public works projects. The Act does not require payment bonds required from any subcontractor to conform with its provisions. Therefore, it is the Contractor's responsibility to ensure that any bonds required from its subcontractors conform with the aforementioned notice and suit limitations. Equally as important, the subcontractor's bonds should be written to afford coverage for those who not only supply labor or material directly to the subcontractor, but also to any lower tier sub-subcontractors. In that manner, the Contractor can ensure that it will not face exposure under its own payment bond for claims that cannot be made against the subcontractor's surety. In order to accomplish this, the Contractor should insist that the bond requirements are written into both the subcontract and the subcontract payment bond (although our courts have held that as long as the bond requirements are set forth in the subcontract, incorporation of the subcontract by reference in the subcontract payment bond is sufficient to bind the surety to those obligations).

III. PROMPT PAYMENT ON CONSTRUCTION PROJECTS.

For all contracts entered on or after September 1, 2006, New Jersey law governing prompt payment on construction projects has been significantly revised.

Previously, New Jersey law addressed only prompt payment between contracting parties on projects for State Agencies (N.J.S.A. 52:32-32 to -39, the “New Jersey Prompt Payment Act”) and, on all other projects, addressed only payments to Subcontractors and

suppliers—not payments by Owners to Prime Contractors (N.J.S.A. 2A:30A-1 to -2).[4] The law now establishes deadlines for payment between essentially all contracting parties, on virtually all types of construction work (except certain federally-funded transportation projects), and applies at all levels of New Jersey government and on all private projects. The new law also provides stronger remedies to unpaid parties in the form of penalty interest and the ability to suspend work.

Although the *remedies* for failure to pay promptly are the same for both unpaid Prime Contractors (one who contracts directly with the Owner) and Subcontractors, Sub-subcontractors, or suppliers (awaiting payment from Prime Contractors or upper tier Subcontractors), the required *timing* of payment (and certain other exceptions) varies depending on whether a party is acting as a Prime Contractor, or as a Subcontractor, Sub-subcontractor, or supplier.

A. **Timing of Payments**.

The Act generally requires Owners to pay Prime Contractors within thirty (30) calendar days after the billing date. N.J.S.A. 2A:30A-2(a). The key to the new law is that, within twenty (20) days of its receipt of the Prime Contractor's invoice, an Owner must now either accept the work or must provide a written statement of both the amount withheld and reason for withholding. Id. If the Owner fails to provide such written objection, the work is deemed "approved and certified," and the Owner must pay the Prime Contractor within thirty (30) days of the billing date, or the Prime Contractor can institute its remedies of penalty interest and/or suspension of work, as discussed further below. N.J.S.A. 2A:30A-2(a), (c), and (d).

Payment to Subcontractors, Sub-subcontractors, and suppliers, on the other hand, must generally be made within ten (10) days of the Prime Contractor's receipt of payment from Owner (or, in the case of Sub-subcontractors, within ten (10) days of the Subcontractor's receipt from the Prime Contractor, etc.). N.J.S.A. 2A:30A-2(b). Notably, by explicitly providing that the Act's payment requirements apply where the "parties have not otherwise agreed in writing," the Act retains a previously-existing opt-out related to payment terms for Subcontractors, Sub-subcontractors, and suppliers. Id. As such, Subcontract Agreements may be modified to allow different payment terms to be agreed to between Prime Contractors and their Subcontractors or suppliers (or between Subcontractors and their Sub-subcontractors or suppliers), as long as it is done in writing.

B. **Remedies for Unpaid Parties**.

The law provides unpaid parties with two remedies: a penalty interest remedy and a suspension of performance remedy.

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[4] The recent revisions discussed herein are reflected in the latter statute, N.J.S.A. 2A:30A-1 to -2. Where the revised statute provides stronger remedies than those that existed under the "New Jersey Prompt Payment Act," the new revisions expressly supersede previously existing law. N.J.S.A. 2A:30A-2(e).

The unpaid Prime Contractor, Subcontractor, Sub-subcontractor or supplier (or "Payee"), if not promptly paid (and where payment is not disputed by the Owner in writing, nor falls within other applicable exceptions discussed further below), is entitled to charge penalty interest (prime rate plus 1%) beginning on the day after payment was required until the date the payment check is finally drawn. N.J.S.A. 2A:30A-2(c).

In addition to the interest penalty, the law now permits an unpaid party—once certain conditions are met—to suspend work (without liability for breach of contract) until payment is made. In order to exercise this provision, the Payee must first provide seven (7) days' written notice, and three additional conditions must then be met. N.J.S.A. 2A:30A-2(d). If, after written notice, the amount remains unpaid, no written statement of the amount and reason for withholding was provided, and the Payor is not "engaged in a good faith effort to resolve" the payment issue, then, and only then, can the Payee suspend work and properly claim protection under the Act. N.J.S.A. 2A:30A-2(c) and (d).

C. Exceptions.

The law provides three noteworthy exceptions.

First, parties may not invoke the penalty interest remedy or suspension of work remedy on certain federally-funded transportation projects. N.J.S.A. 2A:30A-2(c) and (d). Notably, the definition of what projects are exempt varies for the two remedies. Interest penalties cannot be asserted on "Transportation Projects" (as defined in N.J.S.A. 27:1B-3, the "New Jersey Transportation Trust Fund Authority Act") where that project is receiving federal funding and where the awarding agency has been notified by the federal government that with will be classified as a "high risk grantee." N.J.S.A. 2A:30A-2(c). The suspension of work remedy cannot be invoked on "Transportation Projects" where that project is receiving federal funding and where "the application of this provision would jeopardize federal funding because the owner could not meet the federal standards for financial management systems [as required under federal law]." N.J.S.A. 2A:30A-2(d). Perhaps more important than the varying definitions of exempt projects, the law does not expressly require Owners to indicate in their bid specifications or contracts whether these exceptions apply. As such, it may be prudent for contractors to request such information during the bidding phase on transportation projects that will receive, or are likely to receive, federal funding.

Second, the revised law provides a potentially significant exception with regard to payments to Subcontractors, Sub-subcontractors, and suppliers where partial payments are made during for ongoing work on the same project. In that situation, a Prime Contractor or Subcontractor may withhold the amount of money owed for work already completed if that Subcontractor, Sub-subcontractor or supplier's work is not being performed to the "satisfaction of the prime contractor or subcontractor, as applicable." N.J.S.A. 2A:30A-2(b).

Third, the law recognizes an exception for those public owners that require authorization by a governing body prior to approval of Prime Contractor invoices. Instead of the twenty (20) day notice requirement for disputing invoices, such owners have until

the "next scheduled public meeting of the entity's governing body" within which to approve or dispute an invoice, and then (assuming approval) must pay the approved amount within the entity's "subsequent payment cycle." N.J.S.A. 2A:30A-2(a). However, in order for such a public entity to properly invoke this exception, it must explicitly indicate this exception in both its bid specifications and its contracts. Id.

D. Optional Dispute Resolution Required Contract Clause Litigation & Recovery of Costs and Attorneys Fees.

Finally, the Act provides that prompt payment disputes *may* be resolved through an *optional* dispute resolution process (presumably mediation or arbitration). N.J.S.A. 2A:30A-2(f). To this end, the Act requires that all contracts within the scope of the law must provide that prompt payment disputes "may be submitted to a process of alternative dispute resolution."[5] Id. The law specifically excludes bidding disputes, disputes over award, or disputes over the formation of contracts or subcontracts from the optional dispute resolution process. Id. If parties choose not to invoke the optional alternative dispute resolution process, and a lawsuit is filed to collect pursuant to this Act, the prevailing party is entitled to recover reasonable costs and attorneys' fees. Id.

IV. AFFIDAVIT OF MERIT.

A. Affidavit of Merit – Introduction.

In a lawsuit alleging professional malpractice or negligence by specified licensed individuals (including architects, engineers and licensed land surveyors) seeking damages for property damage, personal injuries or wrongful death, a plaintiff must, within sixty (60) days after the date of a defendant's filing of an answer to the complaint, serve upon each defendant an affidavit by an appropriately credentialed person that a reasonable probability exists that the actions of the defendant deviated from the applicable standards for the profession or occupation. N.J.S.A. 2A:53A-27. The time for service of the affidavit of merit can be enlarged for an additional sixty (60) days. Id. Absent exceptional circumstances, the failure to serve the affidavit of merit within 120 days of the filing of the defendant's answer may render the action subject to dismissal with prejudice. Paragon Contrs., Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422-23, 423 n. 3 (2010); Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218 (1998), modified in part by, Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

B. Qualification of Affiant.

An individual signing an affidavit of merit must hold an appropriate license in New Jersey or some other state. The affiant must have particular expertise in the general area or specialty at issue in the matter, as demonstrated by a broad certification or having

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[5] This requirement appears to be a remnant of earlier versions of the law, which originally proposed that all prompt payment disputes be brought to binding arbitration before the American Arbitration Association under its expedited rules. The enacted version of the law watered down that requirement and now requires contractual references to, instead, this optional, nonbinding, dispute resolution.

dedicated at least five (5) years of his/her practice substantially to the general area or specialty involved in the action. N.J.S.A. 2A:53A-27. In a recent Appellate Division case involving an affidavit of merit issued by a licensed engineer criticizing the construction administration and design services provided by a licensed architect, the court held that "to support claims of malpractice or negligence liability, the [affidavit of merit] must be issued by an affiant who is licensed within the same profession as the defendant." Hill Int'l Inc. v. Atlantic City Bd. of Education, 438 N.J. Super. 562, 569-70 (App. Div. 2014). The like-licensed requirement applies even where the "professional licensure laws overlap to some degree." Id. at 570. The court, however, carved out certain exceptions to the requirement. The plaintiff need not rely on an affidavit from a like-licensed expert "in circumstances where the plaintiff's claims are confined to theories of vicarious liability or agency and do not assert or implicate deviations from the defendant's professional standards of care." Id.

The affiant may not hold a financial interest in the outcome of the action, but may nevertheless serve as an expert witness in the matter. N.J.S.A. 2A:53A-27.

C. Service of Affiant as Expert Witness.

The affiant may serve as expert witness in the case for the plaintiff and testify at trial. N.J.S.A. 2A:53A-27. However, the plaintiff is not required to use the affiant as a testifying expert witness and may retain another qualified individual to serve in that capacity. Id.

D. Time for Service of Affidavit of Merit.

In applicable cases, the plaintiff must serve an affidavit of merit on the defendant within sixty (60) days of the defendant's filing of an answer in the matter. N.J.S.A. 2A:53A-27.

E. Service of Affidavit of Merit on Other Parties.

When an affidavit of merit is served upon a defendant professional it must also be served contemporaneously upon all other defendants in the case. N.J.S.A. 2A:53A-27.

F. Extension of Time for the Service of Affidavit of Merit.

The initial sixty (60) day time period for the service of the affidavit of merit after the filing of the defendant's answer to the complaint may be extended by the court for one (1) additional time period which cannot exceed sixty (60) days upon a showing of good cause. N.J.S.A. 2A:53A-27.

G. Sworn Statement In Lieu of Affidavit.

A plaintiff need not serve an affidavit of merit in an applicable case if the defendant has failed to provide the plaintiff with records or other information that would bear upon the ability of the plaintiff to prepare an affidavit of merit. In such instances, the plaintiff in lieu of serving an affidavit of merit may serve a sworn statement that sets forth the following:

1) the defendant has failed to provide the plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit;

2) a written request therefore along with, if necessary, a signed authorization by the plaintiff for the release of the medical records or other records or information requested, has been made by certified mail or personal service; and

3) at least forty-five (45) days have elapsed since the defendant received the request.

N.J.S.A. 2A:53A-28.

H. Failure to Serve Affidavit of Merit.

A plaintiff's failure to timely comply with the affidavit of merit requirements in a professional malpractice case is tantamount to a failure to state a claim upon which relief can be granted and thus may render the case subject to dismissal with prejudice. N.J.S.A. 2A:53A-29; see Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218 (1998), modified in part by, Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003); Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304 (App. Div. 2001). A plaintiff may nevertheless attempt to establish that (1) extraordinary circumstances prevented it from timely filing the affidavit of merit, or that (2) it substantially complied with the affidavit of merit statute and therefore the court should either not dismiss the complaint in any capacity or not dismiss with prejudice. See Paragon Contrs., Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422-23, 423 n. 3 (2010) (noting that "[w]here extraordinary circumstances are present, a late affidavit will result in dismissal without prejudice," and that where a plaintiff takes actions that substantially comply with affidavit of merit statute, a complaint should not be dismissed due to a technical violation of the statute).

I. Cases Not Deemed to be Common Knowledge.

Expert testimony (and affidavit of merit) required to demonstrate duty of care and proximate cause where the plaintiff's dentist extracted the wrong tooth. Risko v. Ciocca, 356 N.J. Super. 406, 411 (App. Div.), certif. denied, 176 N.J. 430 (2003).

J. Affidavit of Merit Required in Res Ipsa Loquitor.

An affidavit of merit is required in cases in which the plaintiff claims the *res ipsa loquitur* doctrine applies unless the case is one in which the common knowledge doctrine is also applicable. Risko v. Ciocca, 356 N.J. Super. 406, 411-12 (App. Div.), certif. denied, 176 N.J. 430; see also Hubbard v. Reed, 168 N.J. 387, 397 (2001).

K. Common Knowledge.

Although there is no express exemption set forth within the affidavit of merit statute, decisional authorities have established that a plaintiff in a professional malpractice action need not provide an affidavit of merit where the common knowledge doctrine applies and an expert witness will not be called to testify as to the defendant's alleged deviation from the appropriate standard of care. See Hubbard v. Reed, 168 N.J. 387 (2001).

L. Affidavit of Merit Not Required – Common Knowledge.

The following cases further illustrate particular factual circumstances in which New Jersey courts have held that an affidavit of merit was not required. Hubbard v. Reed, 168 N.J. 387, 396-97 (2001) (holding affidavit of merit not required in suit against dentist who extracted the wrong tooth); Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 316-17 (App. Div. 1999) (In legal malpractice case in which the plaintiff claimed the defendant law firm improperly settled his case without his permission, affidavit of merit not required.); Janelli v. Keeper, 317 N.J. Super. 309, 310-13 (Law Div. 1998) (finding no affidavit of merit required as to claim that chiropractor used excessive force during chiropractic manipulation resulting in two fractured ribs).

M. Ferreira Conference Requirements and Developments

In Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), the Supreme Court of New Jersey created and mandated that a case management conference be held in the early stage of malpractice actions to ensure compliance with the requirements of the Affidavit of Merit statute and "to remind the parties" of the sanctions that will be imposed (namely dismissal with prejudice) if the obligations under the Affidavit of Merit statute are not fulfilled. Ferreira, 178 N.J. at 147.

The Supreme Court of New Jersey subsequently held in Paragon Contrs., Inc. v. Peachtree Condominium Ass'n, 202 N.J. 415 (2010), that the failure to hold a Ferreira conference does not provide a safe harbor from the requirements of the Affidavit of Merit statute. Specifically, the Court stated that while the "clear purpose" of a Ferreira conference is "to help attorneys and litigants to avoid the dismissal of meritorious claims," the "parties are presumed to know the law and are obliged to follow it" and that "reliance on the scheduling of a Ferreira conference to avoid the strictures of the Affidavit of Merit Act is entirely unwarranted and will not serve to toll the statutory frames." Paragon, 202 N.J. at 424-426.

As part of a continuing effort to ensure that litigants comply with the requirements of the Affidavit of Merit statute, in A.T. v. Cohen, 231 N.J. 337 (2017), the Supreme Court of New Jersey announced "additional administrative steps to promote adherence to the [Affidavit of Merit statute's] salutary goal of promptly culling frivolous malpractice claims and to promote the effective use of court and attorney resources so that meritorious cases may advance efficiently." A.T. v. Cohen at 352-353. Specifically, the Court stated that the Judiciary's electronic filing and notification case management system would be updated so that parties litigating professional malpractice claims are issued electronic notices

regarding "(1) the [Affidavit of Merit] filing obligation and (2) the scheduling of a Ferreira conference." Id. at 353. The Court also issued a "cautionary note," stating that "[c]ounsel are on notice that disregarding the scheduling of the conference, or waiving the conference, will not provide a basis for relief from [Affidavit of Merit statute] obligations." Id.

Connell Foley LLP has offices in Roseland, Jersey City, Newark, New York, Cherry Hill and Philadelphia. Construction law has been a focus of its practice for more than 50 years. For more information, contact partner Peter J. Smith, Esq. Thanks to Stephen R. Turano, Esq. for his assistance with the 2018 updates to this Compendium.

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