

CONSTRUCTION LAW

Expert Analysis

# Creating Effective Mechanics' Lien Waivers

**M**echanics' lien waivers are designed to preclude lien claimants from filing liens with respect to work for which payment is due and has been made. The goal of the payer—whether it is an owner or general contractor—should be to confirm not only that monies due have been paid but that the payee has no other unasserted claims unless, in the case of a progress waiver given during the course of the project, claims are specifically identified on the lien waiver. Far too often, however, progress lien waivers have been considered mere receipts for monies due and not as a waiver of unasserted claims. This article will offer drafting suggestions to prevent a progress lien waiver from being considered merely a receipt for payment.

### Lien Waivers in General

Section 34 of New York's Lien Law voids any contract that purports to waive a potential lienor's right to file a mechanic's lien. Under a specific carve out in Section 34, however, lien waivers for payments received at or after the potential lienor received payment are enforceable. Lien waivers that are given after payment is received and which generally cover payments received in a prior pay period are considered "trailing" lien waivers. Lien waivers that are given contemporaneously with payment for the current period are considered "conditional" lien waivers, i.e., conditioned on



By  
**Kenneth M. Block**



And  
**John-Patrick Curran**

the actual receipt and clearance of funds. The principles discussed below apply with equal force to both types of waivers, although we believe a conditional lien waiver gives the payer the most complete protection.

To function as an effective release, the lien waiver must contain both unequivocal statements demonstrating relinquishment of claims and additional provisions addressing pending claims.

### Lien Waivers as Receipts

When owners make payments to contractors, or general contractors make payments to subcontractors, it is common practice to require the potential lienors to sign a lien waiver that acknowledges receipt of the payments and generally releases the owner or general contractor from any other liens to which the potential lienor may be entitled. The use of general (i.e., nonspecific) release language has, however, led courts to treat waivers as mere receipts for payments rendered and not as a release of lien

for other claims or monies earned or not yet due, such as pending change order requests or retainages.

For example, in *Penava Mechanical Corporation v. Afgo Mechanical Services Inc.*,<sup>1</sup> the lien waivers signed by the subcontractor did not bar its pending claim for unpaid overtime. Because it was the contractor's practice to make payments to the subcontractor for certain work after lien waivers were given, the lien waivers the contractor required were held to be "mere receipts of the amounts stated in the waivers," not waivers or releases of any claims the subcontractor may have had on the dates the waivers were executed.

The rationale behind *Penava Mechanical*—that lien waivers stating that claims are waived for the work for which payment was received are limited to payments received—has a long history in New York courts.<sup>2</sup> These "receipt" lien waivers will not limit the contractor's right to seek and foreclose liens for any work done or monies owed that are outside the strict bounds of the lien waivers, effectively reducing these lien waivers to receipts for the precise payment made. This does not, of course, render such lien waivers worthless. Even if a court finds that a contractor or subcontractor has claims outside the bounds of the lien waiver, the lien waiver will reduce the amount of the mechanic's lien the contractor or subcontractor can file.<sup>3</sup>

While "receipt" lien waivers can reduce the ultimate amount a lienor could seek, if the lienor has other existing claims at the time of the waiver, such as claims for unpaid overtime, retainage, or amounts due under a separate contract, the "receipt" form of lien waiver would not prevent the lienor from seeking a lien for those amounts owed. Additionally, "receipt" lien waivers would

KENNETH M. BLOCK and JOHN-PATRICK CURRAN are partners at Tannenbaum Helpert Syracuse & Hirschtritt. AMY S. BEARD, an associate at the firm, assisted with the preparation of this article.

not limit a contractor's ability to recover amounts owed through a quantum meruit claim.<sup>4</sup>

Courts also have recognized that lien waivers present a problem for contractors because the timing of payment often lags well behind completion of work, but payment may not be made unless the lien waivers are executed. In *United States ex. rel. F&G Mech. Corp. v. Manshul Const. Corp.*,<sup>5</sup> the court found that where the contractor executed a lien waiver acknowledging that no other sums were due but that the parties' course of dealing demonstrated that the waivers functioned only as receipts for the payments made, the lien waiver did not release claims for other amounts owed for work the subcontractor had performed and was deemed a mere receipt.

### Crafting Effective Waivers

Owners and general contractors seeking to use lien waivers to limit mechanics' liens and other claims for payment have a fine line to walk. If the lien waiver is too broad, it will run afoul of Section 34, but if it is too narrow, it will protect the owner or contractor from mechanic's liens only as to the amount stated in the "receipt" lien waiver. Owners and general contractors can consider using lien waivers which are more comparable to releases than receipts. Owners and general contractors should carefully consider the language in a "release" lien waiver in order to ensure themselves the greatest protection from mechanic's liens while still avoiding vacatur of the waiver under Section 34.

In order for a lien waiver to function as a release rather than as a receipt for payment, the waiver must include specific language waiving or releasing claims and provide the lienor the opportunity to preserve pending and otherwise timely claims which may not have yet been the subject of an application for payment. The intent to waive a right, such as the right to enforce a mechanics' lien, must be unmistakably manifested on the face of the lien waiver before the waiver can be enforced against the potential lienor.<sup>6</sup>

To avoid these problems, a lien waiver and release should not be limited to a simple recital of amounts paid and should not contain boilerplate language, such as the party performing the work "represents that it has no claims against [the contractor or owner] to the date of this requisition and hereby waives and releases any and all claims, obligations, costs, expenses, causes of action and liens on the premises and/or the improvement thereon."<sup>7</sup> Courts tend to consider such language indicative of receipt lien waivers, especially if the parties' course of dealing provides evidence that

the parties, too, considered the waivers mere receipts.

To function as an effective release, the lien waiver must contain both unequivocal statements demonstrating relinquishment of claims and additional provisions addressing pending claims. Language that a recital of payments made "does not include material furnished, labor performed, or expense incurred for which written authorization has not been given," accompanied by space or schedule to be attached for the potential lienor to list the additional work or materials for which payment had not yet been rendered, has been found enforceable as a release against the potential lienor with regard to claims not listed.<sup>8</sup>

This kind of disclaimer, placed above the certification that the lien waiver is a true statement of account and releases "any claim or claims of whatever nature for materials furnished, labor performed, or expense incurred to date which is not included in the above amounts or noted in the space above as provided therefore" will manifest the potential lienor's unequivocal assent to releasing claims not specified.<sup>9</sup> Additionally, and in order to avoid the revival of stale claims, language should be included in the lien waiver that notice of the "listed claims" has been timely provided in accordance with the terms of the contract.

While not related to the issue of the waiver of claims, the waiver should also contain a representation from the contractor that it has paid for all labor, materials and equipment contained in its current application for payment or will do so upon receipt of the funds covered by the lien waiver.

### Conclusion

In order for a lien waiver to function as a waiver of pending claims and not a mere receipt of payment, owners and contractors must draft the lien waiver carefully by reciting payments made and listing work and materials for which payment has not yet been made, and releasing all claims for work and materials other than the items listed. Such language will demonstrate the intent to release claims and thus be enforced as a release and not a mere receipt for payment.

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1. 71 A.D.3d 493, 896 N.Y.S.2d 349 (1st Dept. 2010).

2. See *Tager v. Healy Avenue Realty Corp.*, 14 A.D.2d 584 (2d Dept. 1961) (reducing mechanic's lien by the amount owed under original contract because contractor had signed enforceable lien waiver for work performed under that

contract, but foreclosing mechanic's lien for amounts owed under supplemental contracts for which no lien waivers were executed).

3. See *Tager*, supra at n.2.

4. *MCK Bldg. Assocs. Inc. v. St. Lawrence Univ.*, 301 A.D.2d 726, 754 N.Y.S.2d 397 (3d Dept. 2003).

5. No. 94 CV 2436 CLP, 1998 WL 849327 (E.D.N.Y. Oct. 1, 1998).

6. See *Orange Steel Erectors Inc. v. Newburgh Steel Prods. Inc.*, 225 A.D.2d 1010, 1012 (3d Dept. 1996) (lien waivers manifested intent to relinquish claims on land and buildings, but did not waive right to bring an action for additional amounts owed).

7. *F&G Mech. Corp.*, 1998 WL 849327, at \*8.

8. *Kay-R Elec. Corp. v. Stone & Webster Const. Co.*, 23 F.3d 55, 57-58 (2d Cir.1994).

9. *Kay-R Elec.*, supra at n. 8.