

CONSTRUCTION LAW

When a Release and Waiver of Lien Is Not a Release and Waiver of Lien



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Construction contracts—whether between owner and contractor or contractor and subcontractor—often require that the contractor provide to the owner (or the subcontractor provide to the contractor) a release and waiver of lien (lien waiver) during the course of the project. This document is designed to protect the owner as it is an affirmation by the contractor that it has received payment, releases the owner from claims, and waives any future right to record a mechanic's lien on the property. However, it is important to recognize that the most ironclad lien waiver may not afford the owner its intended protections.

Section 34 of New York's Lien Law provides that lien waivers for payments received at or after the contractor 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; the release is conditioned on the actual receipt and clearance of funds. Lien waivers are typically provided with each requisition during the course of the project and at final completion of the project.

There are many forms of lien waivers and owners should not merely agree to accept a form offered by

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the contractor. Instead, owners should contractually require the contractor to submit an effective lien waiver, the form of which should be attached as an exhibit to the construction contract. We offered drafting suggestions in a prior article and will not revisit those concepts here.¹ However, we are finding that courts are still voiding lien waivers as effective releases and again caution against the use of incomplete and ambiguous lien waivers.

There are cases standing for the proposition that an ambiguity must be found in the four corners of a release if a court is to resort to evidence of the parties' intent, conduct, course of dealing and the circumstances of the execution of the lien waiver. However, there are many clear exceptions to the parol evidence rule and the Court of Appeals has recognized that "special rules" govern whether the courts should resort to extrinsic evidence to interpret a release.² These rules are based on a recognition that releases contain standardized, ritualistic language and do not properly anticipate various circumstances. Lien waivers will not be enforced if the contractor's notations (or lack thereof) render the instrument ambiguous or if the parties' actions are inconsistent with the intent of the document.

Ambiguity by the Contractor

It is well decided that "[a]n unambiguous release that is knowingly and voluntarily entered into by the parties is binding absent illegality, fraud, mutual mistake, duress or coercion."³ However, when the lien waiver is open to interpretation and there is no clear evidence that the parties' intentions

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are reflected in the document, the lien waiver will not conclusively establish a defense to claims asserted by the contractor.⁴ This ambiguity can be found in the best-drafted lien waivers when the contractor submits a release that is not accurately or completely filled in.

For instance, in *William A. Gross Construction v. American Mfrs Mutual Insurance*, a contractor provided an owner with an executed lien waiver, but failed to fill in a set of blanks on the form that provided that the contractor releases the owner except for a “claim for damages in the amount of (___) dollars (\$___).”⁵ The owner argued that the lien waiver indicated that the contractor had no pending claims against the owner and the contractor argued that it merely had not provided a value for any pending claims. The court found that because there was more than one reasonable interpretation of the lien waiver, it was not conclusive evidence that the contractor intended to waive its right to lien. The court compared the case at bar to a prior case in which the contractor affirmatively released its claims by filling out an identical form with a “\$0” in the blank space. The \$0 notation clarified that no damages were excluded from the lien waiver; the blank spaces created uncertainty.

William A. Gross is a good example of the need for owners to not merely collect lien waivers and file away in a desk drawer. Owners should review the four corners of the lien waivers that are submitted by contractors to be certain that they are complete and accurate and that they unambiguously release the owner from all claims.

Actions Negating a Waiver

Even if the four corners of the lien waiver unambiguously provide the

owner with a release, the owner should consider that its actions, both during the course of the project and after, can still negate the efficacy of the release. A lien waiver will be found unenforceable when “the circumstances surrounding the release, as well as the parties’ course of dealings, evinces that the parties’ intentions were not reflected in the general terms of the release.”⁶

Case law has established that where a lien waiver purports to acknowledge that no further payments are owed, but the parties’ course of conduct indicates otherwise, the instrument will not be construed a release.⁷ For instance, in *Peter Scalandre v. FC 80 Dekalb Associates*, the court found that the contractor’s lien waiver did not waive the contractor’s right to additional payments because during the course of the project, the owner’s practice was to make payments to its contractor for work performed after receipt of the lien waiver. As a result, the court found the document to be merely a “receipt” that did not act to waive or release a claim the contractor may have against the owner, despite the language of the instrument.⁸

In cases where the parties act in a manner that is inconsistent with the lien waiver, courts will find that their course of conduct negates the release. In *Leonard E. Riedl Construction v. Homeyer*, the court found that a contractor’s final lien waiver was void because it was not submitted at the actual end of the project.⁹ At the time the contractor submitted the final lien waiver, the work was not entirely complete and the owner verbally agreed to pay the contractor for additional work. The court determined that, based on the parties’ subsequent actions, neither intended for

the final lien waiver to act as such, and the court deemed it unenforceable. Since the final lien waiver was found to be unenforceable, the contractor was not prohibited from filing a lien or seeking damages for the amount identified in that lien waiver.

Conclusion

Although a well-drafted lien waiver is critical for effectively releasing the owner from claims by the contractor, it is not enough to merely collect the documents for the file. The owner must review the instruments thoroughly to be certain that they do not create ambiguity and must conduct itself in a manner that is consistent with the intent of the document. Such measures will provide greater certainty that the lien waivers submitted by the contractor will be enforced.

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1. Kenneth M. Block, “Creating Effective Mechanics lien waivers,” *New York Law Journal*, Sept. 14, 2011.

2. *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (1969).

3. *Mascorp v. United States Fidelity & Guarantee Company*, 122 A.D.3d 1195, 1195 (2014) (referencing *Nelson v. Lattner Enters. of N.Y.*, 108 A.D.3d 970, 972 (2013)).

4. *Orangetown Home Improvements v. Kierman*, 84 A.D.3d 902, 903-904 (2011).

5. *William A. Gross Construction Associates v. American Mfrs Mutual Insurance*, 2010 WL 1767218, *2 (S.D.N.Y. May 4, 2010).

6. *Mikada Group v. T.G. Nickel & Associates*, 2014 WL 7323420, *15 (S.D.N.Y. Dec. 19, 2014) (quoting *Orangetown Home Improvements*, 84 A.D.3d 902 (2011)).

7. *E-J Elec. Installation Co. v. Brooklyn Historical Soc.*, 43 A.D.3d 642, 643-644 (2007).

8. *Peter Scalandre & Sons v. FC 80 Dekalb Associates*, 129 A.D.3d 807 (2015).

9. *Leonard E. Riedl Construction v. Homeyer*, 105 A.D.3d 1391, 1392 (2013).