INSIDE THE LAW

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WHAT YOU NEED TO KNOW ABOUT MASSACHUSETTS MECHANIC'S LIENS

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A "mechanic's lien" is not a lien that your car mechanic may record. Rather, it is a form of encumbrance on real property that may secure payment for labor or materials furnished to construction projects. The history behind the use of the word "mechanic" is not the topic of this article, but we should take the time to thank (or criticize, depending on who you are) Thomas Jefferson for the institution of mechanic's lien laws, as he lobbied for them during the construction of our nation's capital, to protect builders.[1]

Mechanic's liens have proven to be a useful tool to help general contractors, subcontractors or suppliers get paid on private construction projects. If you are a contractor or project owner, or are otherwise involved in real estate development and construction, you need to know the rules surrounding the mechanic's lien law, M.G.L. c. 254. A basic understanding of the law could prove crucial from all angles on a project, whether you are a contractor pursing nonpayment against a project owner or you are the owner, defending against a contractor's lien on the property.

I. MECHANIC'S LIENS GENERALLY

Controlled by statute, a mechanic's lien, once properly recorded and perfected, essentially operates as if it were a mortgage on the subject property. It could afford the contractor or supplier the ability to foreclose to collect amounts due and, importantly, makes it difficult for the project owner to obtain financing from traditional lenders, as they would decline to lend money until such lien was satisfied or bonded.

Mechanic's liens may be asserted only on private construction projects (residential or commercial). They are unavailable on public construction jobs. Any general contractor, subcontractor, vendor, or supplier that has furnished labor or materials to a private construction project can potentially record a mechanic's lien. The party asserting the mechanic's lien *must* have a written contract in connection with the labor and/or materials furnished to the project. Importantly, the monetary amount of the lien on the subject property may only be for the amount due the contractor on the date that the lien is recorded.

[1]*See* Chas. E. Davidson, *The Mechanic's Lien Law of Illinois: A Lawyer's Brief Upon the Topic*, p. 6 (1922).

By way of example, if the total contract price was $1,000,000, and $800,000 had been paid to the contractor (including change orders), the enforceable lien amount would be $200,000.

As described in detail below, to initiate a mechanic's lien, a general contractor, subcontractor or supplier must record a Notice of Contract with the applicable Registry of Deeds (located in the county where the project is situated). The where, when and how in connection with recording this Notice of Contract is crucial. Subsequent to this recording, the party asserting the lien must follow specific steps and guidelines to *perfect* the lien so that it is enforceable in any proceeding, including state court litigation. See M.G.L. c. 254, §§ 2, 4.

If you are a sub-subcontractor on a project, which is an entity that does not have a contract with an entity directly contracted with the owner, you must serve a Notice of Identification on the project general contractor within 30 days of starting work on the project. This notice must be served by certified mail, return receipt requested, and, if this notice is not timely served, the sub-subcontractor receives *no* mechanic's lien protection until *after* the Notice of Contract is recorded. See M.G.L. c. 254, § 4.

By way of example, if: (1) a sub-subcontractor (second-tier subcontractor) has a claim for $200,000, but never provided any Notice of Identification to the general contractor; and (2) the subcontractor (first-tier subcontractor) that the sub-subcontractor contracted with already had been paid $180,000 on the project, then the sub-subcontractor's lien only could be enforceable up to $20,000. This misstep could ultimately bankrupt a sub-subcontractor.

It is, therefore, critical to pay attention to the rules surrounding the mechanic's lien process.

II. THE PROCESS: TIMING IS EVERYTHING

General contractors seeking a mechanic's lien must follow the process outlined under M.G.L. c. 254, § 2. Subcontractors or suppliers and sub-subcontractors or vendors that lack direct contracts with the general contractor must follow the process outlined under M.G.L. c. 254, § 4.

It is imperative that any contractor or vendor seeking payment satisfy the timing requirements under the mechanic's lien law. One *minor* timing mistake could be the difference between getting paid and having no security interest at all. Likewise, a project owner's knowledge of the lien law could prove crucial in properly defending against unperfected liens or invalid payment claims.

The following chart identifies the critical requirements and deadlines for perfecting a mechanic's lien:

General Contractor	Subcontractor	Sub-subcontractor
1. Must have a written contract in connection with the project work.[2]	1. Must have a written contract in connection with the project work.	1. Must have a written contract in connection with the project work.
2. Must record the Notice of Contract at the applicable Registry of Deeds within 90 days of last furnishing labor or materials to the project.	2. Must record the Notice of Contract at the applicable Registry of Deeds within 90 days of last furnishing labor or materials to the project, potentially calculated from the last date the general contractor performed services.	2. Should serve a Notice of Identification on the general contractor by certified mail, return receipt requested, within 30 days of commencing work on the project.
3. Must record the Statement of Account within 120 days of last furnishing labor or materials to the project.	3. Must forthwith serve a copy of the Notice of Contract upon the project owner by certified mail, return receipt requested.	3. Must record the Notice of Contract at the applicable Registry of Deeds within 90 days of last furnishing labor or materials to the project, potentially calculated from the last date the general contractor performed services.
4. Must file the lawsuit to enforce the lien within 90 days of recording the Statement of Account.	4. Must record the Statement of Account within 120 days of last furnishing labor or materials to the project, potentially calculated from the last date the general contractor performed services.	4. Must forthwith serve a copy of the Notice of Contract upon the project owner by certified mail, return receipt requested.
5. Must record a certified copy of the Complaint at the Registry of Deeds within 30 days of filing suit.	5. Must file the lawsuit to enforce the lien within 90 days of recording the Statement of Account.	5. Must record the Statement of Account within 120 days of last furnishing labor or materials to the project, potentially calculated from the last date the general contractor performed services.
	6. Must record a certified copy of the Complaint at the Registry of Deeds within 30 days of filing suit.	6. Must file the lawsuit to enforce the lien within 90 days of recording the Statement of Account.
		7. Must record a certified copy of the Complaint at the Registry of Deeds within 30 days of filing suit.

[2] *The deadline to record the Notice of Contract or Statement of Account (for general contractors, subcontractors or sub-subcontractors) could be accelerated if a Notice of Substantial Completion or Notice of Termination is recorded. For example, if a Notice of Substantial Completion is recorded, the Notice of Contract must be recorded within 60 days of the substantial completion recording.*

III. CONCLUSION

After a contractor perfects its mechanic's lien, its ultimate goal – of course – is to get paid. The existence of a properly asserted lien could compel settlement. Otherwise, if the contractor must proceed to litigation in superior or district court, to pursue payment, it must ultimately establish that it: (1) satisfied all of the filing and recording requirements under the mechanic's lien law; and (2) indeed is due monies from the owner for labor or supplies furnished to the project. The owner certainly must investigate these claims and, among other things, confirm that the contractor actually perfected its mechanic's lien rights.

If you are an owner, general contractor, subcontractor, vendor or sub-subcontractor, and there are any payment issues on your private construction project, you should consult with a construction lawyer to fully understand the mechanic's lien process and evaluate the potential for problems down the road. FT

Mechanic's liens have proven to be a useful tool to help general contractors, subcontractors or suppliers get paid on private construction projects.

HOW TO PROPERLY ACCEPT AND MAINTAIN A SECURITY DEPOSIT FROM A RESIDENTIAL TENANT

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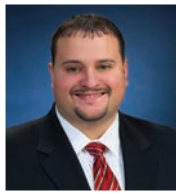


Being a residential landlord in Massachusetts is not easy. There are many pitfalls for the inexperienced and even most experienced landlords. The problem that causes issues for most landlords, which typically comes up when they are trying to evict a tenant for nonpayment of rent or other lease breach, is G.L. c. 186, § 15B, which sets out the Massachusetts Security Deposit Law (hereinafter "the Security Deposit Law").

The Security Deposit Law governs what monies a landlord may accept at the inception of the tenancy, which sounds simple. But when applying it in practice, most landlords fall short of doing it correctly. The consequence of not knowing the Security Deposit Law can cost most landlords more than it helps. "The legislative history of G.L. c. 186, § 15B, conclusively shows that the Legislature intends any violation of G.L. c. 186, §§ 15B(6)(a), (d), and (e), to result in the imposition of treble damages." *Mellor v. Berman*, 390 Mass. 275, 283 (1983). Therefore, even for the most minor mistake by the landlord, mishandling the security deposit may automatically result in penalties, including potentially an award of three times the amount of the security deposit plus attorney's fees and costs incurred by the tenant.

"The Security Deposit Statute is intended to afford protection to both the landlord and the tenant. It protects the landlord by allowing it to charge certain advances of money prior to the commencement of the tenancy; the statute also limits the up-front charges that the landlord legally can collect from the tenant in order to prevent unfair or deceptive charges. *Jinwala v. Bizzaro*, 24 Mass. App.Ct. 1, 7, 505 N.E.2d 904 (1987)." *Hermida v. Archstone*, 826 F. Supp.2d 380, 386 (2011).

In essence, the whole purpose of collecting a security deposit is to have a mechanism for landlords to have funds to make repairs for unreasonable damages, not normal wear and tear, caused by tenants when they leave or vacate. The security deposit can also be used to reimburse the landlord for unpaid rent at the end of a tenancy. Therefore, the Security Deposit Law's purpose is to help the landlord and protect the tenant, but in so many cases, due to the landlord's mistakes, it becomes a vessel for tenants to get big rewards.

WHAT MONIES CAN A RESIDENTIAL LANDLORD ACCEPT FROM A TENANT AT THE START OF THE TENANCY?

Under the Security Deposit Law at the start of the tenancy, a landlord can only request and accept the following: (1) first month's rent, (2) last month's rent, (3) a security deposit, and (4) the cost of a new lock. See G.L. c. 186, § 15B(1)(b)(i)-(iv).

Sounds simple, but it is not. The value of each of the first month's rent, last month's rent, and the security deposit must equal only the value of the first month's rent, and the cost of a new lock must be reasonable.

The only exception to the above is that a landlord may require a tenant to pay a broker's fee if a licensed broker was used in the transaction. However, a licensed broker means just that. A landlord cannot accept a broker fee if there is no broker working on the deal or if the person assisting the landlord is not a licensed broker.

In my own practice in representing landlords, from those who own one rental property to those who own apartment complexes of 300 units, most landlords fail to properly follow the procedure set forth in the Security Deposit Law when accepting, depositing, and maintaining the money for the security deposit.

HOW TO PROPERLY ACCEPT A SECURITY DEPOSIT FROM A TENANT

By breaking down the Security Deposit Law in a checklist format, the landlord can use it for its actual purpose and benefit, rather than failing to comply with the Security Deposit Law and having tenants use it as windfall for money damages.

STEP 1: When the landlord accepts the value of one month's rent (and no more!) as security deposit, the landlord MUST:

- Give the tenant a "receipt" signed by him or her, which must state
  - the amount of the deposit and what it is for;
  - the name of the person receiving it (if an agent receives, then also the name of the landlord or owner);
  - the date on which it was received; and
  - a description of the premises.

Once the landlord has accepted the money, it must be properly handled and deposited. Again, beware: you cannot just deposit a security deposit into any old bank account you may have. See G.L. c. 186, § 15B(2)(b).

STEP 2: The landlord must hold the security deposit in an account that is

- separate,
- interest-bearing,
- located in a bank in the Commonwealth of Massachusetts,
- not subject to claims by the landlord's creditors, and
- transferable to a subsequent owner.

See G.L. c. 186, § 15B(3)(a).

STEP 3: WITHIN 30 DAYS from accepting the security deposit, the landlord must give the tenant a receipt, typically referred to as the "Rent and Security Deposit Receipt," provided in conjunction with the written tenancy agreement, which includes

- the name and address of the bank where the money is located, and
- the amount held and account number.

Even if the landlord has done everything up to this point correctly, the Landlord is not in full compliance with the Security Deposit Law. Stopping at this point would subject the landlord to a requirement to return the security deposit, multiple damages, and costs and attorney's fees for violating the Security Deposit Law. See G.L. c. 186, § 15B(3)(a).

STEP 4: At either the time of receiving the money for the security deposit or within ten days after the tenancy begins, the landlord must give the tenant a "Statement of Conditions Form," signed by the landlord, which must contain

- a list of all damage then existing, and
- the following statement in twelve-point boldface type at the top of the first page:

> *"This is a statement of the condition of the premises you have leased or rented. You should read it carefully in order to see if it is correct. If it is correct you must sign it. This will show that you agree that the list is correct and complete. If it is not correct, you must attach a separate signed list of any damage which you believe exists in the premises. This statement must be returned to the lessor or his agent within fifteen days after you receive this list or within fifteen days after you move in, whichever is later. If you do not return this list, within the specified time period, a court may later view your failure to return the list as your agreement that the list is complete and correct in any suit which you may bring to recover the security deposit."*

At either the time of receiving the money for the security deposit or within ten days after the tenancy begins, the landlord must give the tenant a "Statement of Conditions Form," signed by the landlord.

The previous wording comes directly from the Security Deposit Law. So essentially, it is as easy as copy and paste. See G.L. c. 186, § 15B(2)(c).

STEP 5: Within fifteen days from the tenant moving in, the tenant must return a copy of the "Statement of Conditions Form" and any separate list of damages he or she has found, and then the Landlord has fifteen days to provide a signed agreement or disagreement with the list. See G.L. c. 186, § 15B(2)(c).

Now, getting to this point only gets the landlord a gold star for properly accepting and depositing the security deposit. The landlord must then properly monitor the security deposit for the remainder of the tenancy.

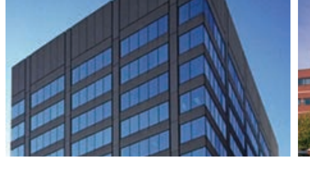
WHAT HAPPENS AT THE END OF ONE YEAR FROM ACCEPTANCE OF A SECURITY DEPOSIT?

If the deposit is held for more than one year, the landlord must pay the tenant interest on the deposit at either 5 percent or the same rate as that paid by the bank, if it is less than 5 percent, together with a receipt indicating the same. See G.L. c. 186, § 15B(3)(b).

WHAT IF THE TENANT IS A LONG-TERM TENANT? DOES THE LANDLORD NEED TO PAY INTEREST EVERY YEAR ON THE SECURITY DEPOSIT?

Yes. The interest is payable each year on the anniversary date of the tenancy.

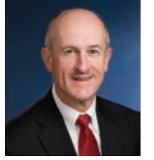
The above is only a review of accepting, depositing, and maintaining a security deposit. The Security Deposit Law also has specific procedures and requirements for returning the security deposit at the end of the tenancy, and the rules and procedures of accepting, maintaining, and returning a last month's rent that may also be collected at the inception of the tenancy. Reading G.L. c. 186, § 15B and getting qualified help from professionals is key for any landlord who does not want to suffer from the harsh consequences of the Security Deposit Law for failure to comply. Having a reputable broker, property manager, and attorney who can advise you on how to properly lease your residential property is necessary to be successful as a landlord. **FT**



FIRM **NEWS**

CONGRATULATIONS TO THE FIVE ATTORNEYS FROM FLETCHER TILTON PC WHO HAVE BEEN LISTED IN *THE BEST LAWYERS IN AMERICA*© 2016.

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer-review evaluation. Over 79,000 leading attorneys globally are eligible to vote, and the publication has received more than 12 million votes to date on the legal abilities of other lawyers based on their specific practice areas around the world. For the 2016 edition of *The Best Lawyers in America*, 6.7 million votes were analyzed, which resulted in more than 55,000 leading lawyers being included in the new edition. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."



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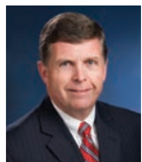

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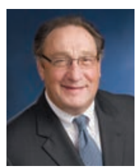

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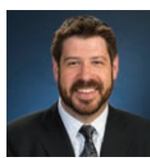

FLETCHER TILTON PC WELCOMES ATTORNEY NICHOLAS C. LIPRESTI TO THE FIRM

Nicholas Lipresti is an associate of the firm and concentrates his practice in tax, trusts & estates, and corporate matters. He is also a member of the firm's Investment Committee. Prior to joining Fletcher Tilton, Mr. Lipresti practiced for four years at a firm in Northern Virginia, where he focused on corporate and tax matters. Mr. Lipresti received his Master of Laws in Taxation at the Georgetown University Law Center (Washington, DC). He received his law degree from The Catholic University of America, The Columbus School of Law (Washington, DC), and his BA in Government and Classical Civilizations at the College of William & Mary (Williamsburg, VA). He is admitted to practice in the District of Columbia and the State of Maryland. Attorney Lipresti works primarily at our Worcester office and can be reached at 508.459.8057.

ATTORNEY SAMANTHA MCDONALD CHOSEN FOR LEADERSHIP WORCESTER 2016

The Worcester Regional Chamber of Commerce and the Greater Worcester Community Foundation announce the selection of 25 talented professionals who will make up the class of *Leadership Worcester 2016*.

Selected from a large pool of applicants, the class includes a diverse group of women and men from the Central Massachusetts area. The selection committee sought motivated individuals, through a rigorous application process, who aspire to take an active leadership role in Worcester and the surrounding towns and who want to learn and hone new leadership skills.

Monthly sessions will explore topics critical to the Worcester region, beginning with medicine and population health. Monthly daylong sessions will be held from October through April, culminating with a graduation in May 2016. Additional session topics include economic development; local government and politics; education; justice, law, and community safety; arts, culture, and quality of life; and urban environment and energy.

Congratulations, Samantha, well-deserved!

Congratulations to Attorney Phillips S. Davis, who was awarded a 50-year pin at the Worcester County Bar Association's annual meeting and dinner at Wachusett Country Club this summer. Attorney Davis has been a member of the Bar for 50 years and has been practicing law at Fletcher Tilton since 1965. Keep up the good work, Phil!

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