

THE MECHANIC'S LIEN IN THE DISTRICT OF COLUMBIA

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THE MECHANIC'S LIEN IN THE DISTRICT OF COLUMBIA

I. THE MECHANIC'S LIEN LAW.

A. General Purpose.

In the District of Columbia, as in other jurisdictions, the mechanic's lien is founded upon statute. Its purpose is to protect a party who has contributed labor and materials to enhance the value of a property.

The mechanic's lien law is remedial in nature. This means that a court will liberally construe the law to give the benefit of the doubt to the parties for whom the statute was enacted, provided that the lien is properly perfected. E.g., Fidelity Storage Corp. v. Trussed Concrete Steel Co. 35 App. D.C. 1 (1910), appeal dismissed, 225 U.S. 716 (1912).

The mechanic's lien law in the District of Columbia appears at D.C. Code, Title 38, Chapter 1. The law exists today in virtually the same form as when Chapter 1 was first enacted in 1901. Of the three Washington metropolitan jurisdictions, the D.C. lien law is the least developed and least litigated, perhaps due to the large amount of public construction performed in the District to which no lien may attach.

As in Virginia, the D.C. mechanic's lien is an inchoate or subsisting lien. The lien attaches at the commencement of the work, although enforcement of the lien and monetary recovery depend on subsequent steps taken in compliance with the D.C. Code. E.g., Moore v. Axelrod, 443 A.2d 40 (D.C. 1982).

Section 38-101 of the D.C. Code provides that a lien is good against the owner of the property to the extent of the owner's right, title and interest in the property at the time. Hence, the mechanic's lien in the District of Columbia, like everywhere else, is a remedy that affects interests in real estate. It does not preclude or exclude a law suit based on a construction contract (or payment bond)

against the owner or other maker of a contract personally.

Despite frequent attacks on the constitutionality of D.C.'s lien law (almost a routine defense to any suit filed to enforce a mechanic's lien in the District), the D.C. lien law remains constitutional. E.g., Jenkins v. Parker, 428 A.2d 367 (D.C. 1981).

B. Who Has Lien Rights?

Prime contractors, general contractors and subcontractors have the right to file liens, however, their rights are subject to limitations and constraints.

1. General Contractor/Prime Contractor.

A contractor has the right to file liens against an owner's property, whether he contracted directly with the owner or the owner's duly authorized agent. D.C. Code Ann. § 38-101 (Repl. Vol. 1990). However, the contractor's lien amount is limited to the express contract price agreed upon between the parties or the implied contract price based on the reasonable value of the work and/or materials furnished. Of course, the "ceiling" of the lien amount may increase due to disputed changes, extras or claims.

Occasionally, a dispute will arise over whether the contractor who files a mechanic's lien is, as a matter of law, a "contractor" as understood by the D.C. lien law. In the case of Moore v. Axelrod, 443 A.2d 40 (D.C. 1982) the plaintiff entered into an agreement with Axelrod whereby Moore would manage and broker certain residential property. At the same time, under the agreement, Moore would furnish labor and materials to improve and repair the property. A dispute arose concerning the value of improvements and repairs performed by Moore. Moore then filed a mechanic's lien against Axelrod. Axelrod defended against the lien on the basis that Moore was not a contractor under D.C. lien law, and therefore,

could not maintain a lien. Axelrod contended that there was an "incompatibility" between the role of Moore as a property manager and Moore as a contractor which, as a matter of public policy, should prevent Moore from filing a lien. The D.C. Court of Appeals concluded that the roles of a property manager and a contractor were not mutually exclusive so as to prevent Moore from filing a lien. The court noted that the status of the parties with respect to the lien statute is determined by their status at the time of contract. Id.

The particular work performed by a contractor may determine whether or not the contractor qualifies to file a lien. The reason this constraint occurs is that generally lien statutes, while remedial in nature, are strictly construed, such that if a statute does not appear to cover the type of work performed, no lien may be filed. In Virginia, for example, this problem of coverage has been dealt with by a continuing series of revisions to the Virginia Code which specifically identifies many types of construction work which may give rise to a lien, e.g., Va. Code Ann. § 43-2 (Repl. Vol. 1990). The D.C. Code does not contain a similar provision. Therefore, contractors are more likely to resort to the D.C. courts for an answer as to whether or not the work they performed will give rise to a lien.

The D.C. Code, however, does specify a few examples of work that can give rise to a lien. A contract, express or implied, for the placing of any engine, machinery or other thing such as might become a fixture in a building, can be the basis for a mechanic's lien between a contractor and an owner. D.C. Code Ann. § 38-101 (Repl. Vol. 1990). The D.C. Code further provides that a contractor furnishing materials or labor for land-filling a lot, constructing a wharf, or dredging a channel in a river in front

of a wharf, shall be entitled to a lien enforceable in the same fashion as liens against buildings. D.C. Code Ann. § 38-123 (Repl. Vol. 1990).

Also, under the D.C. mechanic's lien law, an electric elevator has been subject to a lien. In Lefler v. Forsberg, 1 App. D.C. 36 (D.C. 1893), the Supreme Court of the District of Columbia held that an electric passenger elevator installed in a building was both an "engine" and a "machine" and, therefore, subject to the D.C. mechanic's lien law. However, unlike the lien law in Virginia, the D.C. statute itself does not indicate whether sewers, streets, sidewalks, or other off-site improvements can be the basis for liens. Because the mechanic's lien remedy is a statutory one, courts in most jurisdictions appear to be cautious about expanding the lien remedy to things not expressly included in the statute. For these reasons the extent of lien coverage for off-site work is uncertain and contractors who perform such work should be especially cautious regarding payment.

However, general language in § 38-101 of the D.C. Code suggests that a lien may extend to improvements on ground used or intended to be used in connection with a building on which the purported lien might attach. On the basis of this statute, the argument can certainly be made that persons providing labor and materials for the installation of streets, sewers or water lines which provide service to individual lots in a subdivision should be entitled to liens on those lots. Nevertheless, the statute is not as clear as it could be. D.C. Code Ann. § 38-101 (Repl. Vol. 1990).

A general constraint is that the underlying contract, for which the work was performed, must be legal and not unenforceable as against public policy. For example, in Highpoint Townhouses, Inc. v. Rapp, 423

A.2d 932 (D.C. 1980), a subcontractor sought to enforce a mechanic's lien for the value of plumbing services provided to a general contractor. The owner defended against the lien on the basis that the subcontractor did not hold a master plumber's license as required by § 2-2107 of the D.C. Code. In view of this statute the subcontractor was not able to maintain his lien. "A contract made in violation of a licensing statute that is designed to protect the public will usually be considered void and unenforceable ... Accordingly, if the underlying contract [for] plumbing services is unenforceable, a mechanic's lien is also unenforceable." Id. at 935.

2. Subcontractors v. Sub-Subcontractors, Materialmen and Suppliers.

The D.C. Code notes that "Any person directly employed by the original contractor, whether as subcontractor, materialman or laborer, to furnish work or materials for the completion of the work contracted for as aforesaid, shall be entitled to a similar lien to that of the original contractor" D.C. Code Ann. § 38-103 (Repl. Vol. 1990)

The exact language of the above-quoted provision is important. The section confines the right to file a mechanic's lien to subcontractors or those "directly employed" by the original contractor. It is established law in the District of Columbia that they right to file a lien does not extend to a sub-subcontractor, i.e., one in privity with the subcontractor but not with the prime contractor. This would include materialmen and suppliers who sell to a subcontractor and not to the prime contractor. This argument was judicially upheld in the case of Battista v. Horton, Myers & Raymond, 128 F.2d 29 (D.C. Cir. 1942). In Battista, a general contractor subcontracted with Battista for masonry work on a building for the Carmelite Fathers. Battista, in turn, contracted with Horton for a part of the work. The

general contractor ultimately went bankrupt and Horton sued Battista to recover final payment. A defense asserted against Horton's claim was that Horton had failed to release the liens prior to the general contractor's bankruptcy. In dismissing the defense, the court noted "[I]t is established law in this jurisdiction that Horton [the sub-subcontractor] had no legal right to file a mechanic's lien and a release of a right which did not exist would have been bootless. The mechanic's lien law in the District of Columbia confines the right to file a lien to the original contractor and to persons 'directly employed' by the original contractor [citation omitted]. This carries the right only to the subcontractor, and Horton, in the position of a sub-subcontractor, is outside the scope of the law." *Id.* at 31. There are no reported cases in the District of Columbia that have overruled this decision.

These substantial limitations on sub-subcontractors and those contracting with subcontractors, do not exist under the laws of Maryland or Virginia.

Section § 38-103 of the D.C. Code refers to persons employed by the original contractor. It must be assumed that there can be more than one original contractor and that the meaning of the term "contractor" is to denote any contractor who is in direct privity with the owner or the owner's agent.

3. Architects.

The District of Columbia courts have not reported a case in which an architect has asserted a mechanic's lien for the value of design or construction administration work. The statute does not expressly state anything that would confirm or deny such a right, but the absence of use of this statute by architects over a long period of time suggests that

architects should rely on other remedies. Compare Cain v. Rea, 159 Va. 446, 166 S.E. 478 (1932); Caton Ridge, Inc. v. Bonnett, 245 M.D. 268, 225 A.2d 853 (1967). Both Maryland and Virginia recognize the right of an architect to file a mechanic's lien.

C. Who is the Owner?

The D.C. Code does not specifically define "owner" or "ownership," but merely refers to the "owner in fee or of a lessee estate, or a lessee for a term of years, or a vendee in possession under a contract of sale." D.C. Code Ann. § 38-101 (Repl. Vol. 1990). Therefore, the Code anticipates that a lien may attach to a variety of land interests. As such, the various categories of "ownership" should be carefully considered.

One such category is land owned by a husband and wife through a tenancy by the entirety. It has been held in several jurisdictions that a contract with one spouse does not create a lien against property held under such a tenancy. One spouse will not automatically be assumed to be acting as the agent of the other. Contractors must take care to see that their contracts are signed by both parties or to make sure that the absent spouse has given consent to the other to be its agent, or else lien rights may be lost.

Another category of "ownership" is where the land is held by an individual partner. Under D.C. law a mechanic's lien for materials furnished on a contract with a partnership will bind the land even though title of the land is only held by one of the partners.

Leased property is another category. Improvements to leased properties (e.g., office buildings) make up a major portion of the construction occurring in the District of Columbia. Contractors who perform work on leased properties should be careful in filing liens to name the proper owner of the property, that is, the lessee or lessor, as appropriate. If the work is done and materials furnished at

the instance of a lessee, or tenant for life, or years, or a person having an equitable interest therein, the lien can only extend to the interest of the lessee, tenant, or equitable owner. Lipscomb v. Hough, 286 F. 775 (1923). A builder contracting with the lessee to furnish labor and materials to improve the premises, who is aware that he is dealing with the lessee and not the owner, is estopped (prevented at law) from complaining of ignorance of the terms of the lease, where the lease is a matter of public record.

Even where a covenant in the lease vests the lessor (owner) with title to the building and to any improvements made during the lease period, the lessor is free from a lien. There is no relationship of principal and agent between the lessor and lessee created so as to enable a contractor furnishing improvements at the lessee's request, to record a lien against the lessor-owner.

When, however, improvements are made to the leased property with the knowledge and at the request of the owner, possibly as an inducement to obtain a tenant, the contractor may properly name the owner of the property in his notice of mechanic's lien.

D. Property and Interests Subject to a Lien.

1. Private, Not Public.

A mechanic's lien in the District of Columbia attaches only to privately owned property and does not attach to public buildings or other public property devoted to public use. United States for Use of the Vermont Marble Co. v. Burgdorf, 13 App. D.C. 506 (D.C. 1898).

2. Equitable Estate.

Ordinarily, a mechanic's lien may attach to an equitable estate or an interest in land. D.C. Code Encyc. § 38-101, ¶ 5 (1968). A contractor, however, must be aware that the holder of an equitable interest has less than the full rights of disposition and use of the land for which he

contracts. Alfred Richards Brick Co. v. Atkinson, 16 App. D.C. 462 (D.C. 1900). Therefore, the lien rights acquired by a potential lienor of an equitable interest may be quite limited.

In the case of Alfred Richards Brick Co. v. Atkinson, 16 App. D.C. 462 (D.C. 1900), a trustee wrongfully purchased property, with his ward's money, which was conveyed to him in trust for the ward. The trustee thereupon used his own money to construct improvements on the property. Those improvements which were paid for with the trustee's own money were considered to be equitable interests in the property which could be subjected to the materialman's lien claim. But the greater property interest of the ward could not be attached. Id.

3. Leases.

A mechanic's lien may be asserted against a lessee for a term of years. The lien, however, attaches subject to all of the terms and conditions of the lease. The reversionary interest of the lessor is not impaired. So long as the lessee is not the agent of the owner there is no basis for asserting a right of lien against the owner. Lipscomb v. Hough, 286 F. 775 (1923).

It has been held that a provision in a lease giving the lessee the right to make improvements in a leased building, and providing that a portion of the costs, not to exceed a certain sum may be deducted from the rent, does not convert the lease into a building contract so as to make the lessee the agent of the lessor and the property liable under a lien. D.C. Code Encyc. § 38-101, ¶ 8 (1968) citing Langley v. D'Audigne, 31 App. D.C. 409 (D.C. 1908).

Also, the interest of a vendee in possession under a contract of sale is lienable.

II. NOTICE REQUIRED TO PRESERVE LIEN.

A. Generally .

Section 38-102 of the D.C. Code states that any contractor wishing to avail himself of a lien, whether his claim is due or not, shall file in the Office of Recorder of Deeds during construction, or within three months after the completion of construction, a "Notice of Intention" to hold the lien on the property. A copy of the Notice of Intention is set forth in the appendix.

Enforcement of the lien depends on proper compliance with this required preliminary notice. The recording of the notice in the Office of the Recorder of Deeds allows the claim on the property to be discovered by anyone searching the title to the real estate on which the lien is claimed.

B. Form of Notice .

For a notice to be in proper form it must specifically set forth: (1) the amount due or the amount to become due to the claimant; (2) the name of the party against whose interest the lien is claimed; and (3) a description of the property to be attached. Without these essential averments, the notice is invalid. Fidelity Storage Corp. v. Trussed Concrete Steel Co., 35 App. D.C. 1 (D.C. 1910), appeal denied., 225 U.S. 716 (1912).

1. Amount Claimed.

Under the decision in Emack v. Campbell, 14 App. D.C. 186 (D.C. 1899), it was held that the notice of lien should set forth specifically the exact amount of the claim, but it is not necessary that the notice include an itemized account of the costs included in the claim.

2. Name of the Parties.

The statute requires that the notice name the party against whose interest the lien is claimed.

- a. As mentioned before, a lien may be filed against the interest of a person having a fee inferior to a fee simple in the estate. See, D.C. Code Encyc. § 38-102, ¶ 7 (1968). It is possible to sell the interest of persons other than the owner. Therefore to prevent confusion it becomes necessary that the particular party against whom the lien is claimed should be named in the notice so that person's interest will be identified. This requirement is unlike Maryland law, which requires that the notice state the name of the owner of the property. The District of Columbia seeks to discover the name of the person who holds the interest against which the lien is based. Where a lien might run against any one of several distinct interests, a notice merely naming the lienor/owner without reference to the other interests sought to be held under the lien, would be insufficient. See D.C. Code Encyc. § 38-102, ¶ 7 (1968); Fidelity Storage Corporation v. Trussed Concrete Steel Co., 35 App. D.C. 1 (D.C. 1910), appeal denied., 225 U.S. 716 (1912).
- b. It has been held that a notice of mechanic's lien made out against a party who is the owner of the property at the time the right is claimed is adequate even if such owner is not the one with whom a contract was made. Lefler v. Forsberg, 1 App. D.C. 36 (1893). But notice of a mechanic's lien naming as owner a person who had ceased to be the owner was held invalid for not stating the current name of the party against whose interest the lien could be claimed. Chamberlin Metal Weather Strip Co. v. Karrick, 53 F.2d 928, (D.C. Cir. 1931). In Chamberlin Metal, the contractor named in his lien the party with whom he contracted for the installation of weather stripping. However, this party, while the owner of the

property at the time of the contract, was not owner of the property at the time the notice of intention to hold a mechanic's lien was filed. The court concluded that the notice of lien was defective insofar as it did not name the party who had acquired the property as of the time the lien was filed. Id. The same rule prevails in Virginia. See, Wallace v. Brumback, 177 Va. 36, 12 S.E. 801 (1941).

3. Description of Property.

The statute requires that the property must be adequately described, yet does not establish any clear and precise guidelines concerning what an adequate description entails. Claimants are advised to be precise and complete, just to be on the safe side. In describing the property a claimant should not merely identify the lot or parcel where the work was done, but should also state the character of the work which was performed. This may be valuable in distinguishing a claimant's lien from those of other claimants later. There are no reported D.C. cases that discuss the adequacy of the property description which the notice must contain. In Virginia, the courts have adopted a liberal attitude toward property description and have held that slight defects in the description do not invalidate the lien. "If the property can be reasonably identified by the description given, it is all that the law requires." Taylor v. Netherwood, 91 Va. 88, 20 S.E. 888 (1895). Presumably, if the same question came up in the District of Columbia, a D.C. court would look favorably upon how the courts of surrounding jurisdictions treat this issue.

C. Time for Filing Notice .

Under § 38-102 of the D.C. Code, notice of the mechanic's lien must be filed by an original contractor during the construction of the building or improvements, or within

three months after its completion. Section 38-103 of the D.C. Code applies the same limitation to a subcontractor's lien. It has been held that completion of the building, and not completion of the work, is the point from which the time for the filing of notice is to be reckoned. Phoenix Iron Co. v. The Richmond, 17 D.C. 180 (Mackey 1887); Harper v. Galliher & Hugueley, Inc., 29 F.2d 452 (D.C. Cir. 1928), cert. denied, 278 U.S. 657 (1929). The term "completion" of the building refers to substantial completion. Therefore, very minor changes and additions will not affect the date from which the proper time for filing of notice will be measured. Id.

The mechanic's lien law in Virginia is substantially different from that of D.C. as to when the notice must be filed. Unlike the District, where the courts use completion of the building as the accrual point for the filing of notice, the courts in Virginia use the completion of the claimant's work, which usually occurs at an earlier date. This is a critical difference which should not be overlooked by contractors who perform work in both Virginia and the District.

1. Minor Repairs.

The courts for the District of Columbia have rejected liens where notice is based on a few slight repairs made necessary by lack of upkeep to the structure. In National Brick and Supply Company, Inc. v. Baylor, 299 F.2d 454 (D.C.Cir. 1962), Judge John Sirica ruled that a mechanical subcontractor failed to file his lien in a timely manner where installation of the plumbing and heating system was completed in the fall of 1959, and "minor repairs," "checking" and inspection of the system was conducted in the spring of 1960 and was the "work" upon which the subcontractor relied in filing his mechanic's lien. The court ruled that the work performed in 1960 would not extend the time within which the lien should have been filed. Id. As noted elsewhere, the same result is likely to be obtained in Virginia and Maryland when contractors attempt to renew

stale claims by performing warranty work. Such additional work usually does not restart the clock for the time for filing of notice.

On the other hand, a case was reported in which certain fixtures were to be installed in a newly constructed building. These fixtures were apparently an essential part of the building. For purposes of the filing requirements, the time for filing commenced upon installation of the fixtures. See, Riggs Fire Insurance Co. v. Shedd, 16 App. D.C. 150 (D.C. 1900); D.C. Code Encyc. ¶ 38-102, ¶ 10 (1968).

2. Abandonment.

As in Virginia, the abandonment of work on a building is deemed to be the date of completion for the purpose of fixing the time for filing a notice. Subcontractors, materialmen and laborers are to be guided by the date of abandonment by the original contractor. They may not use the time during which the owner by himself or under contract with a new contractor or the original contractor's surety completes the work. Harper v. Galligher & Huguely, 29 F.2d 452 (D.C. Cir. 1928), cert. denied, 278 U.S. 657 (1929).

D. Subcontractor's Notice .

The D.C. Code establishes that a subcontractor has the same responsibilities for filing notice as an original contractor does under § 38-102 of the D.C. Code. The triggering dates for filing for subcontractors, materialmen or laborers are the same ones that apply to the original contractor with whom those subcontractors have a contract. D.C. Code Ann. § 38-103 (Repl. Vol. 1990).

Section 38-105 of the D.C. Code, however, gives the subcontractor an additional responsibility that the general contractor does not have. Besides filing a notice with the Recorder of Deeds, the subcontractor must serve the same notice upon the owner of the property upon which the lien is claimed. A copy of a

suggested form for the Notice of Intention to be submitted by a subcontractor is set forth below.

[Date]
_____ (subcontractor), did work or furnished materials for or about the building generally designated or briefly described as _____.
Said subcontractor intends to hold a lien on the property for _____ Dollars (\$_____), an amount currently due and owing and, in addition _____ Dollars (\$_____), an amount due become due.
The party against whose interest in the property this lien is claimed is _____.
Said subcontractor was employed by _____ to perform work or furnish materials for this property.
The nature of this work or materials was (describe the work) _____.
The performance of the work or the furnishing of materials last took place on _____ (or is currently taking place).
I do solemnly declare and affirm that the contents of the foregoing notice are true to the best of my knowledge, information and belief.
Individual on behalf of
Subcontractor

Such notice can be served personally upon the owner or the owner's agent if the owner or agent is a resident of the District of Columbia. If neither the owner nor the agent can be found within the District of Columbia, the subcontractor's notice can be posted on the premises. D.C. Code Ann. § 38-105 (Repl. Vol. 1990). Remarkably, the D.C. Code does not provide for service of notice upon the owner or its agent by registered or certified mail - return receipt requested, as is permissible in Virginia or Maryland. However, it would seem that any reasonable means of affording notice to the owner would be acceptable to

the court, provided that the owner, in fact, receives notice as required by § 38-105 of the D.C. Code. Certainly, actual receipt of notice, as evidenced by return receipt, should be as acceptable to a court as posting notice on the premises. In fact, in Hartford Accident and Indemnity Company v. A.B.C. Cleaning Contractors, Inc., 350 F.2d 430 (D.C. Cir. 1965), the court noted in passing, that notice of the lien in question had been given by registered mail. Apparently, this was not objectionable.

Until notice is provided to the owner, the owner is in no way obligated to reserve funds for the interest of the subcontractor and may continue to make payments to the principal contractor, "and to the extent of such payments, the lien of the principal contractor shall be discharged and the amount for which the property shall be chargeable in favor of the

parties so employed by him reduced." D.C. Code Ann. § 38-105 (Repl. Vol. 1990).

But upon proper service of notice to the owner, the D.C. Code establishes that it is the owner's duty to retain out of subsequent payments that are due to the principal contractor, sufficient amounts to satisfy all debts due from the principal contractor to the subcontractor who has filed notice. D.C. Code Ann. § 38-106 (Repl. Vol. 1990). The D.C. lien law is unique among the three jurisdictions in this respect insofar as it appears to envision a "hold" placed upon money due the principal contractor as of the date the owner receives notice from the subcontractor. As the court noted in Winter v. Hazen-Latimer, Co., 42 App. D.C. 469 (D.C. 1914), "The statute creates the right of a subcontractor to a lien upon money due the contractor from the owner at the time notice is given the owner." (Emphasis added).

The owner's failure to follow the terms of § 38-106 of the D.C. Code will make the lien enforceable to the extent of any payments which are wrongfully made to the principal contractor after the subcontractor makes proper notice. If an owner chooses to rely on the principal contractor to see to it that progress payments are used to pay the claimant and the contractor disappoints him in this expectation, then a second payment for the same materials may be the consequence. Obviously, this approach encourages claimants to file liens early in the job while substantial funds are still being held by the owner. See D.C. Code Encyc. § 38-106, ¶ 1 (1968); Ritzenberg v. Noland Co., 364 F.2d 667 (D.C. Cir. 1966).

The D.C. statute requiring payment to be held is easily distinguishable from the system that exists across the border in Maryland. Under the D.C. Code, subcontractors who have filed liens are derivatively entitled to the benefit of the contract between the owner and the contractor. Only if the owner fails to live up

to certain statutory responsibilities, is the subcontractor entitled to direct satisfaction from the owner.

In Maryland, on the contrary, a subcontractor enjoys a direct claim against the owner regardless of whether the owner retains or does not retain funds payable to the principal contractor for the subcontractors protection. 57 CJS Mechanic's Liens, § 105 (1948).

It is only the owner's breach of its duty to withhold payments from the principal contractor after notice from the subcontractor, as reviewed in Ritzenberg, that can extend the owner's liability beyond the contract amount with the principal contractor in D.C. Otherwise, the conditions of § 38-104 of the D.C. Code prevail. These state:

All liens in favor of parties employed by the contractor shall be subject to the terms and conditions of the original contract except such as shall relate to the waiver of liens and shall be limited to the amount to become due to the original contractor and be satisfied in whole or in part, out of said amount only; and if said original contractor, by reason of any breach of the contract on his part, shall be entitled to recover less than the amount agreed upon by his contract, the liens of said party so employed by him shall be enforceable only for said reduced amount, and if said original contractor shall be entitled to recover nothing said liens shall not be enforceable at all. D.C. Code Ann § 38-104 (Repl. Vol. 1990).

Hence, in the District of Columbia, as in Virginia, an owner may get credit for the cost of completion due to inadequate work by a principal contractor such that the subcontractor shall be left with nothing against which to enforce its lien. This is a risk that attends a subcontractor's business in any state or jurisdiction that follows the indirect theory of mechanic's liens (as opposed to Maryland which has a direct lien statute).

In the case of National Brick & Supply Co., Inc. v. Baylor, 324 F.2d 892 (D.C. Cir. 1963), the court held that § 38-104 of the D.C. Code permitted the enforcement of the mechanic's lien upon the balance of the contract price remaining unexpended after an owner had completed the work. See, also Washington Concrete Sales Corp., Inc. v. Morrissette, 377 F.2d 137 (D.C. Cir. 1966).

E. Additional Protection for Subcontractors .

Because of the limitations on the amount from which a subcontractor can be reimbursed under an indirect lien theory statute, the District of Columbia has created some additional statutory protections for the subcontractor. First, a subcontractor is entitled to know the terms of the principal contract between the owner and the person who has employed him. D.C. Code Ann. § 38-107 (Repl. Vol. 1990). That section provides that any subcontractor shall be entitled to demand from the owner or his agent a statement of the terms under which the work contracted for is being done and the amount due or to become due. If the owner or agent fails or refuses to furnish the information or willfully states false terms, then the property of the owner shall be liable to the lien "in the same manner as if no payments had been made to the contractor before notice was served on the owner." Id. Neither Maryland nor Virginia has a comparable law.

By the terms of this statute, the subcontractor is able to learn when payments will be made to the contractor, and when, in turn, the subcontractor may reasonably expect to be paid for its work. By these terms, as well, the subcontractor has a means of determining the extent of continuing liability that an owner has to the general contractor if he should wish to file notice of a lien.

A second means of protection is afforded the subcontractor by § 38-108 of the D.C. Code. According to this section, possible collusion between a principal contractor and the owner is heavily penalized. The statute provides that if an owner, for the purpose of avoiding or defeating a subcontractor's lien, makes

payment to a contractor in advance of the time agreed upon in its contract, then any insufficiency in funds to satisfy the liens of subcontractors may be restored as if those improper advance payments had not been made. D.C. Code Ann. § 38-108 (Repl. Vol. 1990). Therefore, even an unregistered or unrecorded lien of a subcontractor will prevail when an improper advance has been made, since the subcontractor's entitlement to know the terms of a contract does not depend on intent to file a lien.

It should be noted that the provision requires that the advance be made for the purpose of defeating the subcontractor's lien. Hence, to take advantage of this provision, a subcontractor will have to make some showing of bad faith in connection with the advance payment. If an owner has made advances in order to accelerate the work, then under the terms of the statute, there has not been an improper advance, even though the advance contravenes the terms of the contract. Merrill v. B.R. Acker Co., 142 F.2d 102 (D.C. Cir. 1944).

F. Multiple Unit and Multiple Lot Situations .

The D.C. mechanic's lien law, § 38-101, seems to require that a separate lien should be filed to cover each separate single lot or building in most cases.

The notable exception to this appears in § 38-114 of the D.C. Code. There it states that "In the case of labor done or materials furnished for the erection or repair of two or more buildings joined together and owned by the same person or persons, it shall not be necessary to determine the amount of work done or materials furnished for each separate building, but only the aggregate amount upon all the buildings so joined and the decree may be for the sale of all the buildings and the land on which they are erected as one building, or they may be sold separately if it shall seem best to the court." D.C. Code Ann. § 38-114 (Repl. Vol. 1990).

Hence, in order to properly file a single blanket lien, a claimant must make

sure that all of the units are (1) contiguous (joined together) and (2) owned by the same individual or individuals. Id.

The ability of a claimant to file a lien without having to apportion the claim as to the individual liened units is shown in the case of Roth v. Eisinger Mill & Lumber Co., 70 F.2d 294 (D.C. Cir. 1934). Eisinger, a materialman for lumber, furnished materials to be used in the construction of two semi-detached dwellings. The materialman was left a balance of \$1,800.00 and filed separate notices of lien against each of the two lots for the full amount of the balance due. Later the materialman released the lien as to one of the lots. Nevertheless, the court upheld the enforcement of the lien as to the total balance due on the basis of the fact that a lien on one of the lots was still being asserted. The court reasoned that the statute gave a court of equity the right to decree the sale of all the buildings on the land or as many of them separately as may be necessary in the judgment of the court to satisfy a lien. Since the judge was endowed with this kind of discretion to begin with, the court did not have to worry about the impact of a release on one of the lots. Neither the failure to apportion nor the release of one of the two lots in this situation diminished the lien. Id.

Would this result hold in every case? In the Roth case cited above, the successor-in-interest to the owner at the time of filing owned both properties at the time of enforcement. The court noted that this fact indicated that there was no particular prejudice to the succeeding owners. But what if separate succeeding owners owned each of the two lots at the time of the enforcement of the lien? Because this decision takes note that no others were interested in the property except for the successor to the owner who still held both lots, it is possible that had ownership of the two lots been split the court might have ruled differently. There are no cases in the District of Columbia that comment on this possibility.

In Virginia, as noted elsewhere, blanket liens are often difficult to enforce

and the release of one lot from such a lien may void the lien as to the remaining lots, unless the release is performed pursuant to the requirements of Title 43 of the Virginia Code. Courts in the District of Columbia may assert a similar position when they encounter the problem of blanket liens and differing succeeding owners.

III. ENFORCEMENT OF THE LIEN.

A. How the Lien is Enforced .

The D.C. Code at § 38-100 provides enforcement procedures in short, concise statements.

1. A proceeding to enforce a lien is begun by the filing of a bill in equity in the D.C. Courts.
2. The bill in equity should set forth:
 - a. A brief statement of the contract on which the claim is founded;
 - b. The amount due on the contract;
 - c. The time when the notice of lien was filed with the Recorder of Deeds;
 - d. A copy of the notice if one was served on the owner or his agent in the case of a subcontractor;
 - e. The time when the building or work on the building was completed;
 - f. A description of the premises and material facts concerning the work provided; and,
 - g. A request that the premises be sold and that the proceeds of the sale be applied to the satisfaction of the lien. D.C. Code Ann. § 38-110 (Repl. Vol. 1990).

B. Joining of Claims .

1. When a bill in equity is brought by a subcontractor, the principal contractor, as well as any other persons who have filed notices of liens, should be made parties to the case, in order to place all claims under the jurisdiction of the court. Id.
2. In the alternative to filing separate suits, all or any number of the persons having filed notices of liens on the same property may join together in one suit with their respective claims distinctly stated in separate paragraphs. Id.
3. If several suits are brought by different claimants and are pending at the same time, the court on its own initiative may order those suits to be consolidated into one. Id.

C. Procedural Rules .

The forms for pleading and introducing the bill in equity are the ones that are established generally for the courts of the District of Columbia. In other words, the Federal Rules of Civil Procedure apply.

D. Arbitration .

Arbitration proceedings may cause a postponement of proceedings to enforce a mechanic's lien. In the case of John W. Johnson, Inc. v. 2500 Wisconsin Ave., Inc., 231 F.2d 761 (D.C. Cir. 1956), an action to enforce a mechanic's lien was commenced and was ready for trial, but a continuance was granted when it was shown that arbitration proceedings in accordance with the contract between the parties were in progress. The court determined that the arbitration was equivalent to a "stipulation" and would be enforced as a rule of the court. Id.

E. Burden of Proof .

The burden of proof is on the plaintiff to establish his right to a lien. The

basic burden is to show by clear proof when the building or work on the building commenced, the nature and character of the work, materials furnished and the time when the building was completed. Hartford Accident & Indemnity Co. v. A.B.C. Cleaning Contractors, Inc., 350 F.2d 430 (D.C. Cir. 1965). In A.B.C. Cleaning Contractors, Inc., a surety bond was substituted for a mechanic's lien and the lienor pursued his claim on the bond. However, the notice of lien filed by the lienor named as the alleged owner one who had no interest in the property. The notice was fatally insufficient and could not support a mechanic's lien; thus, the contractor had no claim on the bond given as a substitute for the lien. This case emphasizes the importance of naming the proper party in the notice of mechanic's lien.

F. Enforcement

The D.C. Code provides for a decree of sale if the right of the complainant (or the rights of the complainants where there are consolidated cases) has been established to the satisfaction of the court. D.C. Code § 38-111 (Repl. Vol. 1990).

G. Time Limitations .

The D.C. Code at § 38-115 requires that suit be filed to enforce the mechanic's lien:

- a. either within a year from and after the filing of a notice; or
- b. within six months from the completion of the building or the repairs and improvements thereon.

Unless a suit to enforce is commenced within these time limits, the lien ceases to exist and the property is no longer encumbered. D.C. Code Ann. § 38-115 (Repl. Vol. 1990).

There is one proviso to the above. A lien may be filed or perfected before a claim is actually due. Conceivably a construction contract may provide for payment more than six months after completion of the building or repairs thereon.

If this is the case, the lien will not go out of existence at the end of the six-month period. Instead, the statute allows an action to be commenced within three months after the claim shall have become due.

IV. LIEN WAIVERS.

As in Virginia, contractors, subcontractors and suppliers may agree voluntarily to waive their lien rights and forego the opportunity to place a lien on the property that is improved by their efforts. The validity of a lien waiver will be tested by the normal principles of law which are applicable to any waiver, that is, whether the waiver was made voluntarily and knowingly without duress, fraud or coercion. Subcontractors, in particular, should be careful in signing contracts with the prime contractor to determine whether or not, by accepting the provisions of the prime contractor's contract with the owner, the subcontractor has, inadvertently, accepted a waiver of liens provision. Cases in Virginia have upheld such waivers which occur through incorporation by reference of the prime contract into the subcontract, though there are Virginia cases to the contrary.

In Kidwell & Kidwell, Inc. v. W.T. Galliher & Bro., Inc., 282 A.2d 575 (D.C. 1971), a subcontractor brought suit to recover against the owner of the building and a supplier for breach of contract. The subcontractor alleged that representations made by the defendants had induced the subcontractor to give up and forego its right to file a mechanic's lien against the property. It appears that the subcontractor had completed its work on the project and had been told that, if the subcontractor would not file a lien, payment would be made. This representation was confirmed in writing by the owner and supplier. The court found that the owner and supplier had intended to benefit from the subcontractor's forbearance to file a mechanic's lien and upheld the defendants' promise to withhold final approval of disbursement of the construction funds without protecting the subcontractor's interest. Significantly, the "waiver" of the right to file a lien that occurred in the Kidwell case involved a waiver made after the work was completed,

versus the more typical waiver made prior to construction for which there was no additional consideration.

V. PRIORITIES AND DISTRIBUTIONS OF PROCEEDS UPON SALE.

The priorities among various lien claimants are governed primarily by § 38-109 of the D.C. Code. Under this section, the lien attaches at the time of the commencement of work upon the property, provided notice is seasonably filed according to § 38-102. The lien is declared by § 38-109 to be superior to "all judgments, mortgages, deeds of trust, liens and encumbrances which attach upon the building or ground affected by such lien subsequent to the commencement of work..." D.C. Code Ann. § 38-109 (Repl. Vol. 1990). In turn, the lien is subordinate to any lien created before the work commences. Clearly, a conveyance of the property after the work has commenced, when there has been proper notice of lien, does not affect the validity or priority of the lien. Moreover, the grantee or the vendor of the property does not become personally liable on the debt represented by the lien merely because of the conveyance. D.C. Code Encyc. § 38-101, ¶ 3 (1968).

In the case of Deland v. Wagner, 64 F.2d 552 (D.C. 1933), mechanic's liens were subordinated to two deeds of trust executed prior to the commencement of work as is permitted by § 38-109 of the D.C. Code cited above.

The District of Columbia stands in sharp contrast to the current lien law in Maryland in that the District of Columbia has a strong "relation back" provision, i.e., the lien relates back to commencement of the work.

A. Distributions and Priorities Among Mechanic's Lien Claimants .

Since all claimants under the mechanic's lien statute have liens that date from the same date, that is, commencement of construction for a given building, what is the order of distribution among concurrent lien claimants? All lienors are not quite equal.

The D.C. Code provides that claimant subcontractors shall be satisfied out of the proceeds of the sale before those who have original contracts directly with the owner. Hence, the D.C. law, as is the case in Virginia, favors subcontractors over the general contractor. D.C. Code Ann. § 38-112 (Repl. Vol. 1990).

As noted before, the priority of distribution, however, is limited so that the subcontractors cannot collect in excess of the amount owed to the original contractor. Id.

In the case where there are several valid mechanic's liens on the same property, the D.C. Code at § 38-113 provides that if the aggregate of claims for which mechanic's liens are filed against a piece of property exceeds the balance in the owner's hands, such a balance should be distributed pro-rata among the claimants, subject to the above-mentioned subcontractor preference. D.C. Code Encyc. § 38-113 ¶ 1 (1968).

VI. EXCLUSIVITY OF THE MECHANIC'S LIEN REMEDY.

Section 38-121 of the D.C. Code states that "[n]o subcontractor, materialman or workman employed under the original contractor shall be entitled to a personal judgement or decree against the owner of the premises for amounts due to him from said original contractor," unless the owner has made in writing for sufficient consideration a special contract with the subcontractor to be answerable for those amounts due. D.C. Code Ann. § 38-121 (Repl. Vol. 1990).

Hence, while a subcontractor may have his action in rem (that is, to foreclose the mechanic's lien on the property itself) and may also have a personal remedy on the contract with the prime contractor, the subcontractor is prevented from seeking personal judgment against the owner unless it is directly in privity with the owner by virtue of a special separate agreement. In the case of Thomas v. Ehrmantraut, 111 A.2d 623 (D.C. 1955), evidence supported a finding that a homeowner had given an electrical

subcontractor a direct and personal promise to pay in consideration of that subcontractor's agreement to proceed with the work at a time when the electrical subcontractor could have quit because of the general contractor's default. In this exceptional case a personal remedy was allowed to the subcontractor.

While the D.C. Code at § 38-121 creates a limitation for subcontractor remedies (except for the special circumstances described above), another section of the D.C. Code § 38-122 softens that limitation to a degree. Section 38-122 says that in any suit brought to enforce a lien, if the proceeds of the property are insufficient to satisfy such a lien, a personal judgment for the deficiency may be given in favor of the lienor against the owner or the original contractor, whichever of them may have contracted for the labor or materials furnished by the subcontractor. D.C. Code Ann § 38-122 (Repl. Vol. 1990).

Such a deficiency judgment will be granted only where the party to be charged has been personally served with process in the suit. Id. Normally, a mechanic's lien remedy runs only to the land affected and therefore is a judgment in rem which can be afforded absent personal service of process. The extension of the remedy to a deficiency judgment, however, is conditioned on achieving personal service of process. In the case of Emack v. Rushenberger, 8 App. D.C. 249 (D.C. 1896), it was held that a personal decree by subcontractors against the owner of the property and the original contractor was proper because after the contractor failed and abandoned the work, the record showed an unexpended balance of the contract price remaining in the hands of the owner which was sufficient to pay the claims of the subcontractors after the proceeds of sale were found to be inadequate. Id.

It is also held in the case of Davidson v. E.F. Brooks Co., 46 App. D.C. 457, cert. denied, 245 U.S. 665 (1917), that if land sought by a bill in equity to be subjected to a mechanic's lien is sold under a deed of trust, an award for any deficiency against the owners of the property could be properly made, if those owners were the ones that ordered the labor and material. Hence, while a personal remedy is denied to a

subcontractor before sale of the property under a mechanic's lien, a form of personal remedy becomes available to the same subcontractor when the proceeds of such a sale are proven to be insufficient.

VII. OTHER REMEDIES.

As noted above, the availability of a mechanic's lien does not preclude a subcontractor from other remedies. Suing the prime contractor on the subcontract, making a claim on the prime contractor's payment bond, if one has been provided, or proceeding against the owner if the circumstances warrant are all valid.

Often, however, these remedies are of little use to a subcontractor. In such circumstances, the subcontractor will attempt to obtain his own remedy, for example, by retrieving equipment installed in the project. This type of "self-help" can be dangerous. In National Brick and Supply Co., Inc. v. Baylor, 299 F.2d 454 (D.C. Cir. 1962), the court held that a property owner's right to the immediate possession of equipment installed by a subcontractor who had filed a lien for the value of the equipment was superior to the possessory right of the subcontractor. The court noted that a contract for making alterations and additions to a church building did not authorize the subcontractor to remove materials when progress payments had been made by the owner in reliance on the presence of such equipment. Id. Contractors, therefore, should proceed very carefully before attempting to take the law into their own hands.

DISTRICT OF COLUMBIA CODE

§ 38-101. Mechanic's lien

Every building erected, improved, added to, or repaired by the owner or his agent, and the lot of ground on which the same is erected, being all the ground used or intended to be used in connection therewith, or necessary to the use and enjoyment thereof, to the extent of the right, title, and interest, at that time existing, of such owner, whether owner in fee or of a less estate, or lessee for a term of years, or vendee in possession under a contract of sale, shall be subject to a lien in favor of the contractor with such owner or his duly authorized agent for the contract price agreed upon between them, or, in the absence of an express contract, for the reasonable value of the work and materials furnished for and about the erection, construction, improvement, or repair of or addition to such building, or the placing of any engine, machinery, or other thing therein or in connection therewith so as to become a fixture, though capable of being detached: Provided, that the person claiming the lien shall file the notice herein prescribed.

§ 38-102. Notice

Any such contractor wishing to avail himself of the provision aforesaid, whether his claim be due or not, shall file in the Office of the Recorder of Deeds of the District of Columbia during the construction or within 3 months after the completion of such building, improvement, repairs, or addition, or the placing therein or in connection therewith of any engine, machinery, or other thing so as to become a fixture, a notice of his intention to hold a lien on the property hereby declared liable to such lien for the amount due or to become due to him, specifically setting forth the amount claimed, the name of the party against whose interest a lien is claimed, and a description of the property to be charged, and the said Recorder of Deeds shall file said notice and record the same in a book to be kept for the purpose.

§ 38-103. Subcontractor's lien --Generally

Any person directly employed by the original contractor, whether as subcontractor, materialman, or laborer, to furnish work or materials for the completion of the work contracted for as aforesaid, shall be entitled to a similar lien to that of the original contractor upon his filing a similar notice with the Recorder of Deeds of the District of Columbia to that above mentioned, subject, however, to the conditions set forth in §§ 38-104 to 38-122.

§ 38-104. Same --Conditions and limitations

All such liens in favor of parties so employed by the contractor shall be subject to the terms and conditions of the original contract except such as shall relate to the waiver of liens and shall be limited to the amount to become due to the original contractor and be satisfied, in whole or in part, out of said amount only; and if said original contractor, by reason of any breach of the contract on his part, shall be entitled to recover less than the amount agreed upon in his contract, the liens of said parties so employed by him shall be enforceable only for said reduced amount, and if said original contractor shall be entitled to recover nothing said liens shall not be enforceable at all.

§ 38-105. Same --Notice to owner

The said subcontractor or other person employed by the contractor as aforesaid, besides filing a notice with the Recorder of Deeds of the District of Columbia as aforesaid, shall serve the same upon the owner of the property upon which the lien is claimed, by leaving a copy thereof with said owner or his agent, if said owner or agent be a resident of the District, or if neither can be found, by posting the same on the premises; and on his failure to do so, or until he shall do so, the said owner may make payments to his contractor according to the terms of his contract, and to the extent of such payments the lien of the principal contractor shall be discharged and the amount for which the property shall be chargeable in favor of the parties so employed by him reduced.

§ 38-106. Same --Owner's duty

After notice shall be filed by said party employed under the original contractor and a copy thereof served upon the owner or his agent as aforesaid, the owner shall be bound to retain out of any subsequent payments becoming due to the contractor a sufficient amount to satisfy any indebtedness due from said contractor to the said subcontractor, or other person so employed by him, secured by lien as aforesaid, otherwise the said party shall be entitled to enforce his lien to the extent of the amount so accruing to the principal contractor.

§ 38-107. Same --Subcontractor entitled to know terms of contract

Any subcontractor or other person employed by the contractor as aforesaid shall be entitled to demand of the owner or his authorized agent a statement of the terms under which the work contracted for is being done and the amount due or to become due to the contractor executing the same, and if the owner or his agent shall fail or refuse to give the said information, or willfully state falsely the terms of the contract or the amounts due or unpaid thereunder, the said property shall be liable to the lien of the said party demanding said information, in the same manner as if no payments had been made to the contractor before notice served on the owner as aforesaid.

§ 38-108. Same --Advance payments

If the owner, for the purpose of avoiding the provisions hereof, and defeating the lien of the subcontractor or other person employed by the contractor, as aforesaid, shall make payments to the contractor in advance of the time agreed upon therefor in the contract, and the amount still due or to become due to the contractor shall be insufficient to satisfy the liens of the subcontractors or others so employed by the contractor, the property shall remain subject to said liens in the same manner as if such payments had not been made.

§ 38-109. Same --Priority of lien

The lien hereby given shall be preferred to all judgments, mortgages, deeds of trusts, liens, and incumbrances which attach upon the building or ground affected by said lien subsequently to the commencement of the work upon the building, as well as to conveyances executed, but not recorded, before that time, to which recording is necessary, as to 3rd persons; except that nothing herein shall affect the priority of a mortgage or deed of trust given to secure the purchase money for the land, if the same be recorded within 10 days from the date of the acknowledgment thereof. When a mortgage or deed of trust of real estate securing advances thereafter to be made for the purpose of erecting buildings and improvements thereon is given, or when an owner of lands contracts with a builder for the sale of lots and the erection of buildings thereon, and agrees to advance moneys toward the erection of such buildings, the lien hereinbefore authorized shall have priority to all advances made after the filing of said notices of lien, and the lien shall attach to the right, title, and interest of the owner in said building and land to the extent of all advances which shall have become due after the filing of such notice of such lien, and shall also attach to and be a lien on the right, title, and interest of the person so agreeing to purchase said land at the time of the filing of said notices of lien. When a building shall be erected or repaired by a lessee or tenant for life or years, or a person having an equitable estate or interest in such building or land on which it stands, the lien created by this chapter shall only extend to and cover the interest or estate of such lessee, tenant, or equitable owners.

§ 38-110. Same --How lien enforced

The proceeding to enforce the lien hereby given shall be a bill in equity, which shall contain a brief statement of the contract on which the claim is founded, the amount due thereon, the time when the notice was filed with the Recorder of Deeds, and a copy thereof served on the owner or his agent, if so served, and the time when the building or the work thereon was completed, with a description of the premises and other material facts; and shall pray that the premises be sold and the proceeds of sale applied to the satisfaction of the lien. If such suit be brought by any person entitled, other than the principal contractor, the latter shall be made a party defendant, as well as all other persons who may have filed notices of liens, as aforesaid. All or any number of persons having liens on the

same property may join in 1 suit, their respective claims being distinctly stated in separate paragraphs; and if several suits are brought by different claimants and are pending at the same time, the court may order them to be consolidated.

§ 38-111. Same --Decree of sale

If the right of the complainant, or of any of the parties to the suit, to the lien herein provided for shall be established, the court shall decree a sale of the land and premises or the estate and interest therein of the person who, as owner, contracted for the erection, repair, improvement of, or addition to the building, as aforesaid.

§ 38-112. Same --Subcontractor preferred to contractor

If the original contractor and the persons contracting or employed under him shall both have filed notices of liens, as aforesaid, the latter shall first be satisfied out of the proceeds of sale before the original contractor, but not in excess of the amount due him, and the balance, if any, of said amount shall be paid to him.

§ 38-113. Same --Distribution of sale proceeds

If one, or some only, of the persons employed under the original contractor shall have served notice on the owner, as aforesaid, before payments made by him to the original contractor, said party or parties shall be entitled to priority of satisfaction out of said proceeds to the amount of such payments; but, subject to this provision, if the proceeds of sale, after paying there out the costs of the suit, shall be insufficient to satisfy the liens of said parties employed under the original contractor the said proceeds shall be distributed ratably among them to the extent of the payments accruing to the original contractor subsequently to the service of notice on the owner by said parties, as aforesaid.

§ 38-114. Same --Several buildings

In case of labor done or materials furnished for the erection or repair of 2 or more buildings joined together and owned by the same person or persons, it shall not be necessary to determine the amount of work done or materials furnished for each separate building, but only the aggregate amount upon all the buildings so joined, and the decree may be for the sale of all the buildings and the land on which they are erected as 1 building, or they may be sold separately if it shall seem best to the court.

§ 38-115. Same --When suit to be commenced

Any person, entitled to a lien, as aforesaid, may commence his suit to enforce the same at any time within a year from and after the filing of the notice aforesaid or within 6 months from the completion of the building or repairs aforesaid, on his failure to do which the said lien shall cease to exist, unless his said claim be not due at the expiration of said periods, in which case the action must be commenced within 3 months after the said claim shall have become due.

§ 38-116. Same --Extent of ground bound by lien

If there be any contest as to the dimensions of the ground claimed to be subjected to the lien aforesaid, the court shall determine the same upon the evidence and describe the same in the decree of sale.

§ 38-117. Same --Entry of satisfaction

Whenever any person having a lien by virtue hereof shall have received satisfaction of his claim and cost,

he shall, on the demand, and at the cost of the person interested, enter said claim satisfied, in the clerk's office aforesaid, and on his failure or refusal so to do he shall forfeit \$ 50 to the party aggrieved, and all damages that the latter may have sustained by reason of such failure or refusal.

§ 38-118. Same --Payment into court and release

In any suit to enforce a lien hereunder, the owner of the building and premises to which such lien may have attached, as aforesaid, may be allowed to pay into court the amount claimed by the lienor, and such additional amount, to cover interest and costs, as the court may direct, or he may file a written undertaking, with 2 or more sureties, to be approved by the court, to the effect that he and they will pay the judgment that may be recovered and costs, which judgment shall be rendered against all the persons so undertaking. On the payment of said money into court, or the approval of such undertaking, the property shall be released from such lien, and any money so paid in shall be subject to the final decree of the court. No such undertaking shall be approved by the court until the complainant shall have had at least 2 days notice of the defendant's intention to apply to the court therefor, which notice shall give the names and residences of the persons intended to be offered as sureties and the time when the motion for such approval will be made, and such sureties shall make oath, if required, that they are worth, over and above all debts and liabilities, double the amount of said lien. The complainant may appear and object to such approval.

§ 38-119. Same --Undertaking to discharge liens before suit

Such an undertaking as above mentioned may be offered before any suit brought in order to discharge the property from existing liens, in which case notice shall be given as aforesaid to the parties whose liens it is sought to have discharged, and the same proceedings shall be had as above directed in relation to the undertaking to be given after the commencement of the suit, and said undertaking shall be to the effect that the owner and his said sureties will pay any judgment that may be rendered in any suit that may thereafter be brought for the enforcement of said lien.

§ 38-120. Same --Decree against sureties

If such undertaking be approved before any suit brought, such suit shall be a suit in equity against the owner, to which the sureties may be made parties; if the undertaking be approved after suit brought, the said sureties shall ipso facto become parties to the suit, and in either case the decree of the court shall be against the sureties as well as the owner.

§ 38-121. Same --No action by subcontractor against owner

No subcontractor, materialman, or workman employed under the original contractor shall be entitled to a personal judgment or decree against the owner of the premises for the amount due to him from said original contractor, except upon a special promise of such owner, in writing, for a sufficient consideration, to be answerable for the same.

§ 38-122. Same --Judgment for deficiency upon sale

In any suit brought to enforce a lien by virtue of the provisions aforesaid, if the proceeds of the property affected thereby shall be insufficient to satisfy such lien, a personal judgment for the deficiency may be given in favor of the lien or against the owner of the premises or the original contractor, as the case may be, whichever contracted with him for the labor or materials furnished by him, provided such person be a party to the suit and shall have been personally served with process therein.

§ 38-123. Wharves and lots

Any person who shall furnish materials or labor in filling up any lot or in constructing any wharf thereon, or dredging the channel of the river in front of any wharf, under any contract with the owner, shall be entitled to a lien for the value of such work or materials on said lot and wharf upon the same conditions and to be enforced in the same manner as in the case of work done in the erection of buildings, as provided in § 38-110.

§ 38-124. Artisan's lien --Generally

Any mechanic or artisan who shall make, alter, or repair any article of personal property at the request of the owner shall have a lien thereon for his just and reasonable charges for his work done and materials furnished, and may retain the same in his possession until said charges are paid; but if possession is parted with by his consent such lien shall cease.

§ 38-125. Same --Enforcement by sale

If the amount due and for which a lien is given by § 38-124 is not paid after the end of a month after the same is due, and the property bound by said lien does not exceed the sum of \$ 50, then the party entitled to such lien, after demand of payment upon the debtor, if he be within the District, may proceed to sell the property so subject to lien at the public auction, after giving notice once a week for 3 successive weeks in some daily newspaper published in the District, and the proceeds of such sale shall be applied, first, to the expenses of such sales and the discharge of such lien, and the remainder, if any, shall be paid over to the owner of the property.

§ 38-126. Same --Enforcement by bill in equity

If the value of the property so subject to lien shall exceed the sum of \$ 50, the proceeding to enforce such lien shall be by bill or petition in equity, and the decree, which shall be rendered according to the due course of proceedings in equity, besides subjecting the thing upon which the lien was attached to sale for the satisfaction of the plaintiff's demand, shall adjudge that the plaintiff recover his demand against the defendant from whom such claim is due, and may have execution therefor as at law.

§ 1-1104. Bonds required from public contractors; amount; waiver

(a) Before any contract, exceeding \$ 25,000 in amount, for the construction, alteration, or repair of any public building or public work of the District of Columbia is awarded to any person, such person shall furnish to the District of Columbia the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor": (1) A performance bond with a surety or sureties satisfactory to the Mayor of the District of Columbia, and in such amount as he shall deem adequate, for the protection of the District of Columbia; (2) a payment bond with a surety or sureties satisfactory to the Mayor for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$ 1,000,000, the payment bond shall be in a sum equal to one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$ 1,000,000 and not more than \$ 5,000,000, the said payment bond shall be in a sum equal to 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$ 5,000,000 the payment bond shall be in the sum of \$ 2,500,000.

(b) Nothing in this section shall be construed to limit the authority of the Mayor to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section, or he, through the District of Columbia Minority Business Opportunity Commission, may waive the requirement for performance and payment bonds in such cases as he shall determine.

§ 1-1105. Rights of laborers and materialmen to sue on payment bonds; prior notice of claim required in certain cases; time limitations; suit to be brought in name of District

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this subchapter and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final judgment and execution for the sum or sums justly due him: Provided, that any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal for the District of Columbia is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the District of Columbia for the use of the person suing, in the Superior Court of the District of Columbia, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of 1 year after the day on which the last of the labor was performed or material was supplied by him. The District of Columbia shall not be liable for the payment of any costs or expenses of any such suit.

§ 1-1106. Certified copy of bond and contract to be furnished on application of laborers and materialmen; copy prima facie evidence of original

The Mayor is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the Mayor fixes to cover the cost of preparation thereof.

§ 1-1107. Bond not required for contracts less than \$ 25,000

In all cases where the Mayor of the District of Columbia contracts for work or material involving a sum not exceeding \$ 25,000 it shall not be necessary for said Mayor to require a bond with said contract.

§ 1-1108. Formal contracts with bond not required for contracts less than \$ 2,000

Repealed. Feb. 21, 1986, D.C. Law 6-85, § 1103(e), 32 DCR 7396.

§ 1-1109. Retents

On all contracts made by the District of Columbia for construction work there shall be withheld, until completion and acceptance of the work, a retent of 10 per centum of the total amount of any payments made thereunder as a guaranty fund that the terms of such contracts shall be strictly and faithfully performed: Provided, however, that whenever 50 per centum of the work required under a contract for construction work has been completed and payments therefor have been made, the Mayor of the District of Columbia, in his sole discretion, may authorize subsequent payments to be made to the contractor without withholding from such subsequent payments 10

per centum thereof as required by this section, or the said Mayor may authorize retention from such subsequent payments of less than 10 per centum thereof, and whenever the work is substantially complete, the Mayor, if he considers the amount retained to be in excess of the amount adequate for the protection of the District of Columbia, at his discretion may release to the contractor all or a portion of such excess amount; and the said Mayor in his sole discretion, may further authorize payment in full, including retained percentages, for each separate building or public work on which the price is stated separately in the contract upon completion and acceptance of such building or work.