



**STATE OF NEW MEXICO
COMPENDIUM OF
CONSTRUCTION LAW
(Mechanics' and Materialmen's Lien Laws)**

Prepared by
James P. Houghton
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 Fourth Street, NW
Suite 1000
Albuquerque, New Mexico 87102
(505) 848-1800
www.modrall.com
March 14, 2016

Revised 2016

New Mexico Mechanics' and Materialmen's Lien Laws

The lien laws in New Mexico applicable to construction projects are found at two basic areas: Section 48-2-1 et. seq. NMSA 1978 sets out the statutory authority for mechanics' and materialmen's liens on private commercial construction projects in New Mexico and establishes the rights obligations and liabilities of owners, contractors, subcontractors and suppliers. In addition, for projects with four dwelling units or less there are stop notice provisions under the New Mexico Stop Notice Act (see §48-2A-1, et. seq. NMSA 1978).

New Mexico authority allows design professionals such as architects to file a mechanic's lien for preparing and furnishing plans that are used in construction of the improvement. *Gaastra, Gladding & Johnson v. Bishop's Lodge Co.*, 35 N.M. 396, 299 P. 347 (1931). A subsequent case extended the protection to the situation where an architect provided services for a project that was abandoned by the owner and the improvement was never built. Using the concept of "constructive completion," the New Mexico Supreme Court allowed the architect to foreclose a claim of lien where the improvement was never built, holding that the project being abandoned by the property owner without fault of the architect constituted constructive completion to allow the lien to attach and be foreclosed. *Cubit Corporation v. Hausler*, 114 N.M. 602, 845 P.2d 125, 1992 N.M. LEXIS 243, 31 N.M. St. B. Bull. 929, 5 A.L.4. 2211, 31 A.L.R.5th 878 (1992).

Contractors who have direct contracts with the owner on a private commercial project are excused from the notice obligations under §48-2-2.1 NMSA 1978 to perfect their liens and are also given a different time period within which to file claims of lien (see §48-2-6 NMSA 1978 which provides that every original contractor (meaning contractor in direct privity with the owner) has 120 days after completion of his contract within which to file a claim of lien).

Subcontractors and suppliers are entitled to file mechanics' or materialmen's liens under §48-2-2 NMSA 1978. If they do not have direct contract privity with the owner, they must file their claim of lien 90 days after completion of the building, improvement, or structure, or after completion of the alteration or repair thereof, or after performance of any labor on a mining claim. §48-2-6 NMSA 1978. New Mexico courts have interpreted the term "completion" under §48-2-6 NMSA 1978 to mean "substantial completion." Substantial completion is a question of fact. See *Lumber Company v. Baughman*, 79 NM 57, 439 P.2d 706 (1968) (held building is substantially completed for the purpose of determining the timeliness of a mechanics' or materialsmen's lien when all the essentials necessary to the full accomplishment of the purpose for which the building has been constructed are performed. A building is substantially complete notwithstanding trivial imperfections or omissions).

Certain notice provisions required under §48-2-2.1 NMSA 1978 are inapplicable for claims of lien made on residential property containing four or fewer dwelling units. (See §48-2-2.1(a) NMSA 1978.) Otherwise, liens against residential properties are generally subject to the same rules as private commercial properties.

New Mexico has special provisions dealing with residential property (properties containing not more than four dwelling units) which have special procedures and stop notice claims and affidavit

requirements by the prime contractor when residential construction is completed. See §48-2-2.1 et. seq NMSA 1978. (N.M. Stop Notice Act)

In addition, under the Stop Notice Act, a residential homeowner who pays the balance owed to the general contractor who executes a lien affidavit stating that all liens were paid and who makes final payment to the contractor without knowledge or notice of any outstanding unpaid lien claimants takes the property free and clear of any subsequently filed claims of lien under §48-2A-11 NMSA 1978. The New Mexico Supreme Court held that this protection continues even where the homeowner sets up a separate escrow account with a title company to satisfy minor punch list items that the general contractor had not retired by the time of final payment. *Tabet Lumber Company, Inc. v. Romero, et al.*, 117 N.M. 429, 872 P.2d 847, 1994 N.M. LEXIS 133, 33 N.M. St. B. Bull. 512 (1994).

§48-2-6 NMSA 1978 sets out the procedure for filing claims of lien and the time requirements which generally is the process by which liens are perfected. There is no statutory form with respect to a claim of lien but what must be contained in the claim of lien is generally identified in §48-2-6 NMSA 1978. There is also a limited notice/perfection procedure set out in §48-2-2.1 NMSA 1978. If the lien claimant does not fall within the exclusions identified in §48-2-2.1(a) NMSA 1978, then no lien of that claimant in an amount in excess of \$5,000.00 may be enforced unless the lien claimant is given notice in writing of his right to his claim of lien in the event of non-payment and that notice was given not more than 60 days after initially furnishing work of materials or both, by either certified mail, return receipt requested, fax with acknowledgment, or personal delivery to (1) the owner or reputed owner of the property upon which the improvements are being constructed or (2) the original contractor, if any. See §48-2-2.1(b) NMSA 1978. §48-2-2.1(d) NMSA 1978 sets out the requirements for what must be contained in the notice. §48-2-2.1(e) NMSA 1978 provides some partial relief to a lien claimant to recover part of his debt, if he fails to give the notice within 60 days of first providing labor and materials.

See also the New Mexico Stop Notice Act with respect to notice requirements in residential construction that must be given to allow lien claims to survive “final payment” from the homeowner to the general contractor. *Tabet Lumber, supra*.

§48-2-10 NMSA 1978 requires that a claim of lien be foreclosed in a foreclosure action filed within two years after the claim of lien is filed. §48-2-14 NMSA 1978 allows that any number of parties may join in the same action, and where separate actions are commenced, the court may consolidate them. §48-2-14 NMSA 1978 also provides that a district court may allow, as part of the costs, the money paid for filing and recording the lien, and reasonable attorney fees in both the district and appellate court. Look at §48-2-12 NMSA 1978 as far as what a prime contractor is entitled to collect in foreclosure proceedings where his claim also involves claims of persons who furnish materials or labor to the prime contractor.

There is no statutory form for lien waivers or releases. Lien waivers and releases are commonly part of the payment process in which owners or prime contractors require claims of lien be released. Acknowledged lien waivers are generally a condition of payment to protect against future claims of lien being filed.

The New Mexico courts have enforced lien waivers, even under circumstances where the lien claimants argued they never in fact received any funds; that they received no consideration for their lien waiver; and that they had to sign the waivers to get their paycheck. The New Mexico Supreme Court held that the general rule is that a party executing a lien waiver will not be heard to assert its invalidity against an owner who has paid out money or otherwise changed its position to his detriment in reliance upon an executed lien waiver. *George M. Morris Construction Company v. Four Seasons Motor Inn, Inc.*, 90 N.M. 654, 567 P.2d 965, 1977 N.M. LEXIS 1071 (1977).

The New Mexico Mechanics' and Materialmen's Lien statute has a statutory procedure for petitioning the district court for the county in which the property is located for an order cancelling the lien. See Section 48-2-9. The general principle is that security (either a surety bond or a cash bond) is deposited with the court to be substitute security for the property covered by the claim of lien. Once deposited, the judge in the district court shall issue an order cancelling the lien which then is filed with the County Clerk. When such an order is issued under Section 48-2-9, the claimant's lien transfers to the security deposit with the district court.

As a final note, New Mexico has somewhat harsh statutory bars and court decisions if the lien claimant (or any subcontractor claim included within the overall Contractor's lien claim) are unlicensed. See Section 60-13-30. See *Reule Sun Corp. v. Valles, et al.*, 147 N.M. 512, 210 NMSC 4, 226 P.3d 611, 2009-NM LEXIS-728 (NM Sup. Ct.); see also *Little v. Jacobs*, Op. No. 2014-NMCA-105, 336 P.3d 398 (July 1, 2014).

Disclaimer: This paper is designed to give the reader a general overview of New Mexico Mechanics' and Materialmen's Lien Laws. It does not constitute legal advice. Before acting on any of the matters herein, consultation should be had with a licensed New Mexico attorney experienced in construction law.