

Practice Update

Georgia Owners and Contractors: Time to Update Your Lien Waiver Forms and Other Contract Provisions

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Construction owners and contractors in Georgia rely heavily upon the statutory protections provided by Georgia’s mechanic’s lien waiver law, O.C.G.A § 44-14-366. Beginning January 1, 2021, these protections will be narrowed under a new law signed by Georgia Governor Brian Kemp on August 5, 2020. Owners and contractors in Georgia should update their lien and claim waiver forms and related contract provisions in order to continue receiving the same – or even higher – levels of protection from contractor, subcontractor, and supplier liens.

The amendments to Georgia’s mechanic’s lien waiver statute stem from a case decided by the Court of Appeals of Georgia in September 2019. In *ALA Construction Services, LLC v. Controlled Access Inc.*, 351 Ga. App. 841 (2019), a subcontractor signed two documents titled “Interim Waiver and Release Upon Payment” which tracked the form language required by O.C.G.A § 44-14-366. The Waiver and Release stated in relevant part:

When you execute and submit this document, you shall be *conclusively deemed to have been paid in full the amount stated above, even if you have not actually received such payment, 60 days after the date stated above* unless you file either

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an affidavit of nonpayment or a claim of lien prior to the expiration of such 60 day period.

ALA Construction Services, LLC, at 842.
(Emphasis in original).

The subcontractor did not receive payment as described in the Waiver and Release, and also failed to file an affidavit of nonpayment or a claim of lien within the required time period. Seemingly acknowledging that it had no valid lien rights, the subcontractor filed an action against the contractor solely for breach of contract.

The trial court awarded summary judgment to the subcontractor, but the Court of Appeals of Georgia reversed and held that the Waiver and Release waived *all claims* to payment, not just lien claims. The Court analyzed the language within the Waiver and Release, as well as additional language in § 44-14-366(f) which states:

1. When a waiver and release provided for in this Code section is executed by the claimant, it shall be binding against the claimant for all purposes, subject only to payment in full of the amount set forth in the waiver and release.
2. Such amounts shall conclusively be deemed paid in full upon the earliest to occur of:
 - (A) Actual receipt of funds;
 - (B) Execution by the claimant of a separate written acknowledgment of payment in full; or
 - (C) Sixty days after the date of the execution of the waiver and release, unless prior to the expiration of said 60 day period the claimant files a claim of lien or files in the county in which the property is located an affidavit of nonpayment,

The Court held that this plain language indicated that the General Assembly intended the Waiver and Release to be binding against the subcontractor for

“*all purposes*”, and not just for the purposes of waiving lien rights. The Court held that because the subcontractor failed to file an affidavit of nonpayment or a claim of lien within the required time period, the debt was extinguished.

In response, the Georgia legislature passed Senate Bill 315, which would amend § 44-14-366. On August 5, 2020, Governor Brian Kemp signed SB 315 into law, and the amendments will take effect on January 1, 2021. SB 315 includes the following edits to § 44-14-366:

- Expressly provides that the waivers and releases provided for under § 44-14-366 shall be limited to waivers and releases *of lien and labor or material bond rights* and shall not be deemed to affect any other rights or remedies of the claimant.
- Modified the statutorily-required forms of waivers and releases.
- Increased the time period for filing an affidavit of nonpayment from 60 to 90 days, and eliminated the filing of a claim of lien as a basis for invalidating the waiver and release.
- Modified the statutorily-required form of Affidavit of Nonpayment.

Owners and contractors in Georgia must modify their waiver and release forms in order for them to remain enforceable and effective after December 31, 2020. Project participants can also take further steps to continue receiving the same – or even higher – levels of protection from contractor, subcontractor, and supplier liens. Consider including a separate claim waiver form in your contracts that waives *all* payment rights upon execution. Also consider updating your contract provisions to ensure that they comply with the amendments to § 44-14-366, and otherwise protect your rights with respect to mechanic’s liens and other claims. Consult with your legal counsel on the best ways to effect these changes in your construction contracts.

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