

# Real Estate Title Insurance & Construction Law

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## Home Improvement Contractors: Make Sure You Get Paid

A brief primer on contracts, construction liens and obtaining prompt payment

By Brian J. Cullen

**T**he main concern for small home improvement contractors is how to get paid. This article addresses that concern but just as importantly addresses the concern of how to avoid the pitfalls that come with performing home improvements and complying with the residential construction lien process. Frequently, a home improvement contractor will be lax, oblivious or sloppy when it comes to contracts and complying with the Consumer Fraud Act (CFA) (N.J.S.A. 56:8-1 to 195) and the corresponding Home Improvement Practices Regulations (N.J.A.C. 13:45A-16.2) (“the Regulations”) and the Contractors Registration Act (CRA) (N.J.S.A. 56:8-136 to 152). Failure to comply with these requirements not only exposes the contractor to the remedies afforded by the CFA but also may impact its right to enforce its contract even if the contractor acted in good faith.

### Home Improvement Contract Requirements

Contractors who perform home improvements to residential properties are subject to the requirements of the CFA, the Regulations and the CRA. These requirements apply even if the owner acts as his own general contractor. *Murname v. Finch Landscaping*, 420 N.J. Super. 331 (App. Div. 2011). The Regulations broadly define “home improvement” to include virtually any work to a residential property other than new construction. N.J.A.C. 13:45A-16.1A.

To fully appreciate the CFA, the contractor must understand the background. The CFA was enacted to protect consumers against predatory contractors by imposing various prohibitions and requirements on contractors. The CFA has three main purposes: to compensate the victims for their actual loss; to punish the wrongdoer through the award of treble damages; and to encourage counsel to take a case involving a minor loss to the individual. *Lettenmaier v. Lube Connection*, 162 N.J. 134, 139 (1999).

Under the CFA, unlawful practices fall into three general categories: (i) affirmative acts; (ii) knowing omissions; and (iii) regulatory violations based on regulations enacted under N.J.S.A. 56:8-4.

The Regulations were adopted to provide some objective assurances of the terms and requirements upon which home improvement work should be done. The Regulations and CRA require that contractors be licensed and include the license number on its contract and advertisements. Further, under N.J.A.C. 13:45A-16.2, all contracts in excess of \$500 and all changes to the contract should be in writing, and should include, at a minimum, the following terms:

- (1) The legal name, business address and registration number of the contractor and the individual who negotiated the contract for the contractor;
- (2) A description of the work and the principal products and materials to be used;
- (3) The total price to be paid by the buyer, including all finance charges. If the contract is one for time and materials, it should list the hourly rate for labor and all other terms and conditions of the contract affecting price;
- (4) The dates or time period within which the work is to begin and be completed;
- (5) A description of any mortgage or security interest to be taken in the financing or sale of the home improvement;
- (6) A statement of any guarantee or warranty with respect to any products, materials, labor or services made by the contractor;
- (7) A conspicuous notice to the buyer that the contract may be cancelled at any time before midnight on the third business day after receiving the contract in the form provided by the act; and
- (8) Includes a copy of its general liability certificate and the toll-free number for the Department of Community Affairs.

Intent to violate the CFA has no bearing on liability with respect to per se regulatory violations. However, even if a contractor technically violates the Regulations, the inquiry does not end there. The CFA requires a private plaintiff to demonstrate that the CFA violation resulted in an ascertainable loss. N.J.S.A. 56:8-19. *Perez v. Professionally Green*, 215 N.J. 388 (2013). This requirement is the check and balance struck by the legislature between the consuming pub-

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lic and contractors. Once a plaintiff demonstrates a CFA violation and a resulting ascertainable loss, the CFA provides broad relief. That relief may include treble damages, a refund of moneys acquired by means of a violation and recovery of reasonable attorney fees, filing fees and costs. If a plaintiff cannot show an ascertainable loss, the plaintiff may still obtain attorney fees if he can prove that the defendant committed an unlawful practice. *Cox v. Sears & Roebuck & Co.*, 138 N.J. 2, 24 (1994); N.J.S.A. 56:8-2.11. In addition, failure to comply with the regulations may prevent a contractor from pursuing the buyer for his breach or failure to pay contract amounts. *Czmyr v. Avalanche Heating and Air Conditioning*, 2011 N.J. Super. LEXIS 351 (App. Div. 2011). Lastly, violations of the CFA may impose personal liability on the contractor. *Allen v. V&A Bros.*, 208 N.J. 114, 131-33 (2011). However, personal liability involves more direct action in the violation than just operating as a limited liability com-

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pany or corporation.

## Residential Construction Liens

Provided a contractor can avoid the pitfalls of the CFA, the next issue is how to secure payment. One method is to file a construction lien claim under the Construction Lien Law (CLL). However, with residential liens, the legislature sought a balance between an owner's purchase of a home and the contractor's right to obtain payment. As such, the act establishes special procedures for residential lien claims in order to minimize delay and uncertainty in the resolution of residential lien claims. See, *Mansion Supply Co. v. Bapat*, 305 N.J. Super. 313, 317 (App. Div. 1997), cert. den, 153 N.J. 49 (1998). These unique requirements must be strictly complied with, within 120 days after the last work was completed. N.J.S.A. 2A:44A-5(c). *Marone Contrs. v. Colvin*, 2011 N.J. Super. LEXIS 1910, 8-9 (App. Div. 2011).

Contractors should be cognizant of the timing and specific requirements to file a lien involving residential property. A contractor must strictly comply with the requirements of N.J.S.A. 2A:44A-20 and -21 for Notice of Unpaid Balance, demand for CLL arbitration, and the filing of a lien upon residential property. First, the contractor is required to file a Notice of Unpaid Balance and to simul-

taneously serve a demand for arbitration with the AAA when the construction is residential. Second, the CLL arbitrator is to decide within 30 days of the demand for arbitration whether a lien may be filed. The arbitrator's sole function is to determine whether a lien may be filed and, if so, its amount. The arbitrator's decision "shall not be considered final in any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable."

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N.J.S.A. 2A:44A-21(b). As stated in *Seavey Constr. v. St. Peter*, 201 N.J. Super. LEXIS 2422, 1-2 (App. Div. Sept. 19, 2011), the arbitrator's determination establishes only a prejudgment lien that must be confirmed in litigation. The arbitrator's award does not entitle the contractor to a money judgment on the merits nor dismissal of the defendant's affirmative counterclaims. Filing a lien is just one remedy afforded a contractor. It is not exclusive. If the contractor fails to comply with the lien law, the contractor loses only the right to enforce the lien, itself a valuable right which may secure recovery of the sum owed. *Rinaldo v. Schaad*, 2010 N.J.

Super. LEXIS 2575, 21-22 (App. Div. 2010). The contractor does not, however, lose the right to pursue arbitration or litigation of the entire dispute as set forth in the contract.

## Prompt Payment Act

The Prompt Payment Act is another remedy to obtain payment. The act requires prompt payment of contractors within 30 days after receipt of an approved and certified invoice. An invoice is deemed "approved and certified" if the owner does not object in writing within 20 days after receipt of the bill. If the owner does object to an invoice, they must specify the amount and reasons for the objection. The owner should promptly pay any undisputed amount and try to resolve the issues in dispute in good faith with the contractor.

If an owner violates the Prompt Payment Act by failing to pay the contractor, there are significant consequences. First, interest is due to the contractor at the prime rate plus 1 percent. Second, if the contractor prevails on its claim, the contractor may obtain costs and attorney fees if litigation is instituted. Third, the unpaid contractor may stop work upon providing seven days' written notice. However, the Prompt Payment Act requires all construction contracts to include an alternate dispute resolution provision for such disputes.

In conclusion, contractors should register under the CRA, carefully review the requirements contained in the CFA, Regulations and CRA and consult with counsel. All contracts and change orders should be in writing and include the required terms and conditions such as a start and completion date. If the start date is dependent on certain conditions, the contract should state them. If the contractor seeks to obtain a lien for failure to pay the contract amount, the contractor should calendar the days for action under the CLL. Delay is not in the best interest for the contractor. Although a contractor may want to work with the owner, he should not delay starting the lien process. The best advice is to start the process and work with the owner while the process is continuing. ■

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