

# Preserving Mechanic's Lien Rights During a Construction Arbitration

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If you represent a contractor involved in an arbitration relating to payment issues, don't forget to take the appropriate steps to perfect your lien. Such perfection steps can include the filing of a foreclosure suit within the statute of limitations. While an arbitration will address contract issues, a mechanic's lien is a creature of statute. Failure to comply with statutory requirements for the preservation of lien rights may result in a waiver of the lien. Similarly, if you are seeking to have your dispute arbitrated, be careful about the manner in which you participate in court proceedings so as to avoid waiving your arbitration rights.

## The Mechanic's Lien Act

In Illinois, there is a two-year statute of limitations for a contractor or subcontractor to bring suit to enforce a mechanic's lien. According to 770 ILCS 60/9, "Such suit shall be commenced or counterclaim filed within two years after the completion of the contract, or completion of the extra or additional work, or furnishing of extra or additional material thereunder."

We all know how important the word "shall" is in the context of legislative verbiage. One does not mess with a "shall". There is no exception in the statute providing for an extension of the limitations period if an arbitration of the underlying contract is the subject of a separate arbitration proceeding. Therefore, regardless of whether your construction dispute is being arbitrated, best practice dictates that a separate lawsuit be filed to enforce the mechanic's lien within the appropriate statutory limitations period. Motions to stay such proceedings pending the outcome of an arbitration are routinely granted.

## Illinois Arbitration Act

Section 710 ILCS 5/2 of the Illinois Arbitration Act provides the legal predicate for the interplay of arbitration with state

court proceedings. Under that section, the court must defer to the arbitration process. Specifically, under Section 710 ILCS 5/2(d):

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

The above provision empowers counsel for the contractor to file suit to preserve lien rights and then file a motion to stay the court proceedings so that arbitration can proceed on the matters which are subject to a mandatory arbitration provision.

Care should be taken to determine exactly what facts or issues are encompassed by the mandatory arbitration provision. To accomplish this, take a close look at the actual language of the arbitration provision of the contract. The parties to a contract, "are only bound to submit to arbitration those issues which by clear language they have agreed to arbitrate and that such agreements will not be extended by construction or implication." *Kelso-Burnett Co. v. Zeus Development Corp.*, 437 N.E.2d 26, at 30 (2<sup>nd</sup> Dist. 1982) Don't just assume the lawsuit must be stayed. There may be a basis to proceed with both the state court proceedings and the arbitration in tandem.

## Arbitration Rules

The rules of the various providers of arbitration services also address the matter of bifurcated proceedings. For example, under Rule R-54(a) of the AAA, Construction Industry Arbitration Rules (July 1, 2015), "No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate."

## Underlying Policy

As a very basic proposition, one reason for allowing bifurcation of the arbitration of the contractual dispute from the litigation and enforcement of the mechanic's lien is that the proceedings will involve different parties. In order to sue to enforce a mechanic's lien, there must be a proper joinder of all necessary parties. Section 770 ILCS 60/11 of the Mechanic's Lien Act identifies a variety of "necessary parties" who must be included in a lawsuit to enforce a lien. These parties include the owner of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, etc. This list would include mortgage lenders. However, only those parties to a contract which has a mandatory arbitration provision will generally be participating in the arbitration.

It has been explained by courts that, "The purpose of arbitration is to resolve disputes arising out of or relating to the contract between the parties, whereas the purpose of a lien foreclosure is for the contractor to obtain a legal hold on the owner's property as security for a debt. *JK Cement Construction, Inc. v. Montalbano Builders, Inc.* (1983), 119 Ill. App.3d 663, 678." *Delaney Elec. Co., Inc. v. Schiessle*, 601 N.E.2d 978, 235 Ill.App.3d 258, 176 Ill.Dec. 280 (Ill. App. 1985) at 983

The need to bifurcate contractual disputes involving a mandatory arbitration provision from issues relating to enforcement of the mechanic's lien might at first blush appear inefficient. However, according to the Illinois Supreme Court, "Illinois courts have repeatedly held that judicial economy is an insufficient basis for denying arbitration. See *J & K Cement Construction, Inc.*, 119 Ill. App.3d at 676, 75 Ill.Dec. 68, 456 N.E.2d 889; *Kostakos*, 142 Ill.App.3d at 538, 96 Ill.Dec. 862, 491 N.E.2d 1322; *TDE Ltd. v. Israel*, 185 Ill.App.3d 1059 1068, 133 Ill.Dec. 843, 541 N.E.2d 1281 (1989). Moreover, where

the issues and relationships are sufficiently interrelated and the result of arbitration may be to eliminate the need for court proceedings, then the goals of judicial economy and of resolving disputes outside of the judicial forum are met. Kostakos, 142 Ill.App.3d at 538, 96 Ill.Dec. 862, 491 N.E.2d 1322.” *Board of Managers of Courtyards at Woodlands Condominium Ass’n v. IKO Chicago, Inc.*, 697 N.E.2d 727, at 732. (Ill. 1998).

## Waiver Issue

On the flip side, if you are representing an owner or contractor who wants to arbitrate the dispute in accordance with the contract, be wary of the manner in which you participate in any pending litigation. Arbitration rights can be waived or abandoned.

In *Illinois Concrete I.C.I. Inc. v. Storefitters, Inc.* a homeowner made a Section 34 demand on a contractor demanding that that contractor file suit within 30 days after notice to foreclose its lien. After the contractor filed suit to foreclose, the owner then requested that the judge send the dispute to arbitration. The court determined that the arbitration provision was waived by the owner. *Illinois Concrete-I.C.I. v. Storefitters*, 922 N.E.2d 542 (2<sup>nd</sup> Dist. 2010)

According to Illinois courts, ¶ 29 A contractual right to compel arbitration may be waived like any other contractual right. *LaHood v. Central Illinois Construction, Inc.*, 335 Ill. App. 3d 363, 364 (2002). Waiver occurs when a party acts in manner inconsistent with the arbitration clause in an agreement and indicates an abandonment of that right. *Id.* at 364-65. Waiver can also occur when a party submits an arbitrable issue to a court for a decision. *Id.* at 365.

¶ 30 Illinois courts have held a party waives its contractual right to arbitrate under the following circumstances: (1) by filing a motion for summary judgment (*Applicolor, Inc. v. Surface Combustion Corp.*, 77 Ill. App. 2d 260, 267 (1966)); (2) by answering a complaint, participating in discovery for two years, and asserting arbitration in response to a motion for

summary judgment (*Epstein v. Yoder*, 72 Ill. App. 3d 966, 972 (1979)); (3) by answering a complaint with claims of setoffs against the plaintiff, participating in discovery, and waiting 13 months and 22 months from when plaintiff filed complaints against the two separate defendants before asserting a right to arbitration (*Gateway Drywall & Decorating, Inc. v. Village Construction Co.*, 76 Ill. App. 3d 812, 817 (1979)); (4) by filing an answer claiming additional credits, filing a bill of particulars listing the additional credits, and waiting 9.5 months before asserting the arbitration right (*Cencula v. Keller*, 152 Ill. App. 3d 754, 758 (1987)); (5) by engaging in discovery, opposing an earlier attempt to compel arbitration, and failing to file for arbitration when given the opportunity (*Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1098 (2001)); and (6) by filing a complaint seeking complete relief without mentioning arbitration and requesting arbitration only after the trial court and appellate court denied its request for a temporary restraining order and the other party had filed a motion to dismiss the complaint (*Glazer’s Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 441, 426 (2007)). *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174-75 (2008). Waiver of an arbitration agreement has not been found where a defendant did not file pleadings or filings in the trial court other than in response to plaintiff’s claims.” *Messmore v. Silvis Operations, LLC*, 2017 IL App (3d) 160740-U (Ill. App. 2017) pars 29-30.

## Order of Operations

In terms of order of operations, if time permits, and if you have a choice, it might be prudent to file an arbitration demand before filing your suit to enforce the mechanic’s lien. In the arbitration demand, include an allegation that a lawsuit may be filed to preserve lien rights but that said suit is not intended as a waiver of any rights to arbitrate. Then, the mechanic’s lien suit should be filed with a similar allegation that the filing of same is not intended to be viewed as a waiver of any rights to arbitrate the claim. If necessary, a motion should

then be filed in the mechanic’s lien litigation seeking to stay the litigation pending the outcome of the arbitration. ■