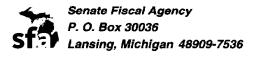
PUBLIC ACT 367 of 2018





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Senate Bill 465 (as enacted)

Sponsor: Senator Darwin L. Booher

Senate Committee: Banking and Financial Institutions

House Committee: Financial Services

Date Completed: 3-22-19

CONTENT

The bill amended the Construction Lien Act to establish procedures under which liens may be recorded by a design professional (a licensed or registered architect, professional engineer, or professional surveyor, or a legal entity authorized to practice any of those professions). The bill does the following:

- -- Allows a design professional who enters into a written contract to provide professional services relating to the improvement of real property, to record a notice with the register of deeds at any time after the contract is executed.
- -- Allows a notice to be recorded regardless of whether the professional services or property improvement has been commenced or completed.
- -- Allows a person that furnishes professional services under a written subcontract with a design professional who has recorded a notice, and whose engagement has been approved by a property owner, to record a notice for recording at any time after the subcontract is executed.
- -- Provides that if an actual physical improvement is made to the property after a notice is recorded, the notice is effective only from the date of the first actual physical improvement.
- -- Requires a register of deeds to endorse on the instrument the date of its recording and properly index the instrument, if a notice of professional services contract or subcontract is recorded.
- -- Specifies that construction liens have equal priority regardless of whether the lien arose at the time of first actual physical improvement or at the time a notice is recorded.
- -- Refers to when a "construction lien arises", instead of the "first actual physical improvement", in provisions that determine whether a construction lien has priority over other recorded interests.

The bill also repealed Section 301 of the Act, which specified whether the Act or Public Act 179 of 1891 was the controlling law for a construction lien. Section 301 also permitted a contractor, subcontractor, supplier, or laborer to request a written statement as to the date of a property owner's first contract with a contractor on a project.

The bill took effect on December 12, 2018.

Contract for Professional Services; Notice

The bill allows a design professional who enters into a written contract with an owner, or with a person acting as an agent of the owner, to provide professional services relating to the

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The bill defines "design professional" as an individual who is licensed or registered as an architect, professional engineer, or professional surveyor under Article 20 (Architects, Professional Engineers, and Land Surveyors) of the Occupational Code, or a corporation, partnership, limited liability company, or other legal entity that is authorized under Article 20 to engage in the practice of any of these professions. The bill specifies that the term "supplier" does not include a design professional or a person that has a subcontract with a design professional.

"Professional services" means services that are customarily and legally performed by or under the supervision or responsible control of design professionals in the course of their professional practice, including programming, planning, surveying, site investigation, analysis, assessment, design, preparation of drawings and specifications, and construction administration services.

A design professional may record a notice of professional services contract at any time after a written contract is executed regardless of whether the professional services under the contract have been commenced or completed, and regardless of whether the erection, alteration, repair, or removal of the structure or the other improvement to which the professional services related has been, or is ever, commenced or completed. However, a design professional may not file a notice later than 90 days after he or she, or another person acting by, through, or under the design professional, last performed professional services.

A notice is valid for one year after the date it is recorded. The design professional may record a subsequent notice with respect to a written contract. All of the above requirements, including the time limitation, apply to a subsequent notice.

If an actual physical improvement is made to the property after a notice was recorded, the notice is effective only from the date of the first actual physical improvement.

These provisions, or the recording of a notice, do not affect the Act's requirements regarding the creation of a construction lien, including the requirements of Section 107, the steps necessary to claim a lien, or the manner of enforcing a lien. (Section 107 generally governs construction liens created when a contractor, subcontractor, supplier, or laborer provides an improvement to real property.)

Subcontract for Professional Services; Notice

The bill allows a person that furnishes professional services under a written subcontract with a design professional who has recorded a notice of professional services contract, and whose engagement has been approved in writing by or on behalf of the owner of the property, to record with the register of deeds for the county in which the property is located a notice of the subcontract in substantially the form set forth in the bill for a Notice of Professional Services Subcontract.

A person entitled to record a notice of contract may record the notice at any time after the execution of a written subcontract regardless of whether the professional services under the written subcontract have been commenced or completed, and regardless of whether the construction, alteration, repair, or removal of the structure or the other improvement to which the professional services related has been, or is ever, commenced or completed. However, the person may not record the notice later than 90 days after the last day a design

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professional who is entitled to record a notice, or any person claiming by, through, or under the design professional, performed professional services for the project.

A notice is valid for one year after the date it is recorded. The person furnishing professional services under a written contract with a design professional may record a subsequent notice with respect to the written contract. All of the requirements, including the time limitation, apply to a subsequent notice.

If an actual physical improvement is made to the property after a notice is recorded, the notice is effective only from the date of the first actual physical improvement.

These provisions, or the recording of a notice, do not affect the requirements of the Act regarding the creation of a construction lien, including the requirements of Section 107, the steps necessary to claim a lien, or the manner of enforcing a lien.

Notice of Commencement

Previously, under the Act, before the commencement of any actual physical improvements to real property, an owner or lessee contracting for the improvements had to record a notice of commencement in the office of the register of deeds for each county in which the real property to be improved is located. The bill retains this provision, but refers to "improvement to real property", instead of "actual physical improvements to real property".

Within 10 days after the date a subcontractor, supplier, or laborer mailed a written request by certified mail, an owner, lessee, or designee had to provide a copy of a notice of commencement to the subcontractor, supplier, or laborer.

An owner, lessee, or designee had to post and keep posted a copy of a notice of commencement in a conspicuous place on the real property described in the notice during the course of the actual physical improvement to real property.

An owner, lessee, or designee also had to provide a copy of a notice of commencement to a general contractor, if any.

The bill refers to an owner, lessee, or designee required to record a notice of commencement. Additionally, under the bill, an owner, lessee, or designee must provide a copy of a notice of commencement to a subcontractor, supplier, or laborer regardless of whether the subcontractor, supplier, or laborer has requested one.

Constructive Notice

Under the Act, if a notice of commencement, claim of lien, certificate of discharge of lien, or certificate of a county clerk that no proceedings to enforce a statement or claim of construction lien have been commenced within the period provided by law, is recorded in the office of a register of deeds, the register must endorse on the instrument the date of its recording and must properly index the instrument.

The recording of a notice of commencement or a claim of lien operates as constructive notice to subsequent purchasers or encumbrancers in the same manner as the recording of a real estate mortgage.

Under the bill, both of these provisions also apply to the recording of a notice of professional services contract and a notice of professional services subcontract. Additionally, the bill refers to a construction lien instead of a statement or claim of lien.

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Priority

Previously, the Act stated that, except as otherwise provided, as between parties entitled to claim construction liens under the Act, their claims of lien had been treated as having equal priority. Under the bill, the liens have equal priority. The bill also specifies that this provision applies, and the construction liens have equal priority, regardless of whether the lien arises at the time of the first actual physical improvement or at the time a notice is recorded.

Formerly, a construction lien under Act also had priority over all over all garnishments for the contract debt made after commencement of the first actual physical improvement, without regard to the date to recording of the claim of lien. Under the bill, a construction lien has priority over all garnishments made after the lien arises, without regard to the date the claim of lien is recorded.

Previously, a construction lien arising under the Act had priority over all other interests, liens, or encumbrances that could attach to a building, structure, or improvement, or on the real property on which the building, structure, or improvement was erected, if the other interests, liens, or encumbrances were recorded subsequent to the first actual physical improvement. Under the bill, a construction lien has priority over all other interests that are recorded after the construction lien arises.

Previously, under the Act, a mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property had priority over a construction lien arising under the Act. The priority of the mortgage existed as to all obligations secured by the mortgage except for the indebtedness arising out of advances made after the first actual physical improvement. An advance made pursuant to the mortgage, but after the first actual physical improvement had priority over a construction lien under certain circumstances. The bill retains these provisions, but refers to when a "construction lien arises", instead of the "first actual physical improvement".

Additionally, the bill specifies that, for purposes of determining priority, a construction lien arises as follows:

- -- At the time of the first actual physical improvement, except as provided below.
- -- At the time a notice is recorded, if the lien is claimed by a person after the person has recorded a notice, but if an actual physical improvement is made after a notice is recorded, the notice is effective only from the date of the first actual physical improvement.

MCL 570.1104 et al. Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill will have no fiscal impact on State or local government. The cost to record any additional instruments will be offset by the additional recording fees charged by a register of deeds.

Fiscal Analyst: Ryan Bergan

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.