

**Enforcing a Claim of Lien Under Georgia's Mechanics' and
Materialmen's Lien Statute**

**The Lien Claimant's Action on the Underlying Debt and
Foreclosure Action**

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I. Introduction

Once a lien claimant has navigated its way through properly filing its claim of lien, it must bring actions to collect the debt due and to foreclose its lien. This paper provides an overview of the requirements of Georgia law and touches upon several of the common issues that confront practitioners in bringing such actions.

II. The Lien Claimant's Action on the Underlying Debt

A. Time Requirements

To make good its lien, a lien claimant must commence an action for recovery of its claim within twelve (12) months from the time the debt becomes due.¹ It is critical to recognize that the triggering event for the running of time against this deadline is the due date for the underlying debt *not* the filing of the claim of lien. A lien claimant's claim for labor or materials furnished becomes due when the last service was furnished, the last material was supplied, or, in the case of an open account, after the last item of work or material is entered on the account.²

Great care should be taken in computing the deadline for bringing this action. Because Georgia's lien statute is in derogation of the common law, Georgia's courts have found that O.C.G.A. § 1-3-1(d)(3) does not govern the measurement of time in relation to Georgia's mechanics' lien statute.³ In the context of a lien claimant's action to make good its lien, the courts strictly construe the time requirements of O.C.G.A. § 44-14-361.1(a)(3). Specifically, the last day in which materials or labor were furnished falls

¹ O.C.G.A. § 44-14-361.1(a)(3).

² Bryant v. Jones, 90 Ga. App. 314, 83 S.E.2d 46 (1954); Womack Ind., Inc. v. B&A Equip. Co., 199 Ga. App. 660, 405 S.E.2d 880 (1991).

³ U.S. Filter Dist. Group, Inc. v. Barnett, 273 Ga. 254, 538 S.E.2d 739 (2000).

within the one-year period for bringing the lien claimant's action.⁴ Likewise, Saturdays, Sundays and recognized legal holidays are counted even if they fall on the last day of the period. Thus, in such a circumstance, the period for filing an action is not expanded to the next business day.⁵

B. Parties and Claims

This action must be brought against the entity that is primarily liable for the debt that is the subject of the claimant's claim of lien whether owner, contractor or subcontractor.⁶ The action will usually take the form of a breach of contract claim or an action on an open account. When a lien claimant's debt arises from a contract with a contractor or subcontractor, this action is a prerequisite to its action against the owner to foreclose its lien.⁷

C. Effect of an Arbitration Clause

When a lien claimant's contract contains a valid and enforceable arbitration clause, the claimant will likely be forced to seek recovery on its underlying debt in arbitration. The issue of whether an arbitration is an "action" for the purposes of O.C.G.A. § 44-14-361.1(a)(3) has not been decided by Georgia's courts. However, because the statutory definition of an "action" is "the judicial means of enforcing a right,"⁸ it is plausible that the courts would find that the bringing of an arbitration does not satisfy the claimant's obligation to bring an action for recovery of its claim within twelve (12) months from the time the debt becomes due.

⁴ Id.

⁵ Id.

⁶ Bryant v. Jones, 90 Ga. App. 314, 83 S.E.2d 46 (1954).

⁷ Athens Elec. Supply Co. v. Delta Oil, Inc., 101 Ga. App. 515, 114 S.E.2d 289 (1960).

⁸ O.C.G.A. § 9-2-1(1).

Georgia's courts, however, have held that the operation of Georgia's Arbitration Code⁹ and the materialmen's lien law are interdependent and compatible, permitting a lien claimant to file a petition to foreclose a claim of lien while at the same time pursuing its arbitration rights under its contract.¹⁰ Thus, when confronted with an arbitration clause, to preserve its lien, a lien claimant may make both an arbitration demand and file a parallel lawsuit.¹¹ With its complaint, the claimant may file a motion to stay pending the outcome of the arbitration. Filing such a lawsuit and motion satisfies the lien claimant's obligation to bring an action and provides the court jurisdiction for enforcement of any arbitration award against the entity primarily liable for the underlying debt or by means of the lien foreclosure.¹²

D. The Lien Claimant's Notice of Commencement of Action

Within fourteen (14) days of filing its action, the lien claimant must file a notice of commencement of action with the clerk of the superior court of the county where its lien is filed.¹³ This notice must:

1. Contain a caption referring to the then owner of the property against which the lien was filed;
2. Refer to a deed or other instrument in the chain of title of the property against which the lien claimant has filed its lien;
3. Be executed under oath by the lien claimant or its attorney of record;
4. Identify the court in which the action is brought;

⁹ O.C.G.A. § 9-9-60 *et seq.*

¹⁰ See H.R.H. Prince LTC. Faisal M. Saud v. Batson-Cook Co., 161 Ga. App. 219, 291 S.E.2d 249 (1982).

¹¹ Id.

¹² Id.

¹³ O.C.G.A. § 44-14-361.1(a)(3),(4).

5. Identify the style and number of the action, including all parties to the action;
6. Identify the date of filing the action; and
7. Identify the book and page number of the records of the county wherein the lien claimant's lien is recorded.¹⁴

The filing of a notice of commencement of action is a prerequisite to the enforceability of the claimant's lien.¹⁵ A lien claimant's failure to timely file the notice results in loss of its lien.¹⁶ When the lien claimant's action on the underlying debt takes the form of a counterclaim or a cross-claim, the filing of a notice of commencement is still required.¹⁷

E. Effect of a Lien Discharge Bond

Sometimes, in response to the filing of a claim of lien, the owner of the improved property or the contractor will file a lien discharge bond in accordance with O.C.G.A. § 44-14-364. Upon the filing of such a bond, the affected real estate is discharged from the lien.¹⁸

The bond serves as replacement for the lien and neither creates a new cause of action nor establishes a new or different procedure limited to the bond.¹⁹ Thus, with one exception, the lien claimant must comply with the statutory requirements for

¹⁴ Id.

¹⁵ Statham Mach. & Equip., Co. v. Howard Constr. Co., 160 Ga. App. 466, 287 S.E.2d 249 (1981).

¹⁶ Metromont Materials Corp. v. Cargill, Inc., 221 Ga. App. 853, 473 S.E. 2d 498 (1996).

¹⁷ Id.

¹⁸ O.C.G.A. § 44-14-364.

¹⁹ See Few v. Capital Materials, Inc., 274 Ga. 784, 559 S.E.2d 429 (2002); M. Shapiro & Son, Inc. v. Yates Constr. Co. of Southeast, 140 Ga. App. 675, 231 S.E.2d 497 (1976).

perfecting a lien.²⁰ Likewise, the principal and surety on the bond are entitled to assert any defense that would have been available as a defense to the lien foreclosure action.²¹

The one procedural exception that exists in this context involves the lien claimant's notice of commencement of action required by O.C.G.A. § 44-14-361.1(a)(3). Once a lien discharge bond has been filed, the lien claimant is excused from filing this notice.²²

III. When Lien Claimant is Excused From Bringing an Action on the Underlying Debt

In the event that the person or entity with which the lien claimant has a contract absconds, dies or leaves the state within twelve (12) months from the date the lien claimant provides its materials or services, such that personal jurisdiction cannot be obtained, the lien claimant is excused from bringing its action against such person or entity and may enforce its lien directly against the improved property in an action against the owner.²³

This exception also applies in situations when the person or entity with which the lien claimant has a contract is adjudicated a bankrupt, or if after the filing of the lien claimant's action, no final judgment can be obtained because such person's death or entity's adjudication in bankruptcy²⁴ or if lien claimant's contract with such person or entity contains a provision preventing payment to the claimant until such person or

²⁰ Few, 274 Ga. at 786.

²¹ Id.

²² Id.; see also Burgess v. Travelers Indem. Co., 185 Ga. App. 82, 363 S.E.2d 308 (1987).

²³ O.C.G.A. § 44-14-361.1(a)(4).

²⁴ Id.; see e.g., Galbreath v. Vondenkamp, 197 Ga. App. 284, 398 S.E.2d 278 (1990).

entity receives payment from the owner.²⁵ Within the context of these exceptions, an entity is “adjudicated a bankrupt” once it has filed bankruptcy.²⁶

An owner named in such a direct action is not subject to personal liability.²⁷ Any judgment rendered is limited to a judgment *in rem* against the property improved.²⁸

IV. The Lien Claimant’s Action Against the Owner

After obtaining a judgment against the debtor, to foreclose its lien, the lien claimant must file an action against the owner of the real property improved.

Jurisdiction for this action is in the county or superior courts and venue lies in the county of the owner’s residence.²⁹

A. Time Requirements

O.C.G.A. § 44-14-361.1(a)(3), which requires the commencement of an action for the recovery of the amount of the lien claimant’s claim within twelve (12) months from the time the debt becomes due, relates to the lien claimant’s action against the entity primarily liable for its debt, not its action against the owner to foreclose its lien.³⁰

However, if a lien claimant has furnished materials or labor directly to the owner, then the claimant’s action against the owner must be commenced within the time limits set forth in O.C.G.A. § 44-14-361.1(a)(3). Likewise, if the lien claimant is excused under O.C.G.A. § 44-14-361.1(a)(4) from bringing an action against the entity primarily liable

²⁵ O.C.G.A. § 44-14-361.1(a)(4).

²⁶ SAKS Assoc., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799 (2006).

²⁷ O.C.G.A. § 44-14-361.1(a)(4).

²⁸ Id.

²⁹ See Wheatley v. Blalock, 82 Ga. 406, 9 S.E. 168 (1889).

³⁰ Adair Mort. Co. v. Allied Concrete Enter., Inc., 144 Ga. App. 241 S.E.2d 267 (1977) *affirmed* Adair Mort. Co. v. Allied Concrete Enter., Inc., 241 Ga. 121, 243 S.E.2d 888 (1978).

for the underlying debt, its action directly against the owner must be commenced within the twelve (12) month period stated in O.C.G.A. § 44-14-361.1(a)(3).³¹

B. Identifying the Owner and the Property Interest to be Foreclosed

A critical consideration in a lien claimant's action against the owner is correctly identifying the owner and the property interest against which it is attempting to foreclose.³² This issue comes up in the context of tenant improvements, when a contractor has contracted with a lessee for improvements to a tenant space. As a predicate to its foreclosure action, the lien claimant must file claims of lien against the property interest(s) against which it has a claim and that are lienable. In the context of tenant improvements, if the lessee's lease creates an estate for years,³³ and if it can be shown that tenant improvements were performed at the instance of the fee owner,³⁴ the claimant may have viable claims of lien, and therefore foreclosure actions, against both the tenant's estate for years and the owner's reversionary interest.³⁵

C. Concurrent Actions

A lien claimant may combine its action against the entity primarily liable for its debt with its action against the owner to foreclose its lien, if venue is proper for all parties.³⁶ When combining these actions, the lien claimant's complaint in effect brings

³¹ Id.

³² O.C.G.A. § 44-14-361.1(a)(2); Meco of Atlanta, Inc. v. Super Valu Stores, Inc., 215 Ga. App. 146, 449 S.E.2d 687 (1994).

³³ James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co., 140 Ga. 593, 79 S.E. 465 (1913); D&N Elec. Inc. v. Underground Festival, Inc., 202 Ga. App. 435, 414 S.E.2d 891 (1991).

³⁴ See Meco of Atlanta, Inc. v. Super Valu Stores, Inc., 215 Ga. App. 146, 449 S.E.2d 687 (1994); F.S. Assoc., Ltd v. McMichael's Constr. Co., 197 Ga. App. 705, 399 S.E.2d 479 (1990).

³⁵ See Id.

³⁶ See Logan Paving Co. v. Liles Constr. Co., Inc., 141 Ga. App. 81, 232 S.E.2d 575 (1977).

two actions, one seeking a general judgment against the entity primarily liable for its debt and another seeking to foreclose its lien against the owner's property.³⁷ Though combined, the actions are no more joint than if they were filed separately.³⁸

D. Pleading Requirements

The lien claimant and owner of the improved property are indispensable parties to the claimant's foreclosure action.³⁹ Subsequent purchasers with notice of the claimant's claim of lien are not necessary parties to the foreclosure action and will be bound by any judgment received.⁴⁰

The lien claimant's complaint must affirmatively show that all conditions precedent to its action have been met or that the action falls within a recognized exception.⁴¹ Thus, the claimant's complaint must show:

1. The lien claimant falls within the class of persons entitled to a lien under the statute;⁴²
2. The lien claimant is seeking payment for labor, services or materials provided for the improvement of the owner's property;⁴³
3. If applicable, the lien claimant provided the owner and contractor a Notice to Contractor within thirty (30) days from the filing of the owner's Notice of Commencement or within thirty (30) days

³⁷ West Lumber Co. v. Aderhold, 90 Ga. App. 255, 82 S.E.2d 670 (1954).

³⁸ Id.

³⁹ Trust Co. of New Jersey v. Atlanta Aluminum Co., 149 Ga. App. 605, 255 S.E.2d 82 (1979).

⁴⁰ Id.

⁴¹ Jordan Co. v. E.P. Adkins, 105 Ga. App. 157, 123 S.E.2d 731 (1961).

⁴² O.C.G.A. § 44-14-361(a)(1)-(9).

⁴³ O.C.G.A. § 44-14-361(a).

following its first delivery of labor, services or materials to the project, which ever is later;⁴⁴

4. The labor, services or materials provided by the lien claimant were furnished at the “instance of the owner, contractor, or some other person action for the owner or contractor”;⁴⁵
5. The lien claimant substantially complied with its contract with the debtor;⁴⁶
6. The lien claimant filed for record its claim of lien within three (3) months after the completion of its work;⁴⁷
7. The lien claimant properly sent a copy of its claim of lien by registered or certified mail to the owner or the contractor at the time of filing its claim of lien;⁴⁸
8. The lien claimant commenced its action for recovery of its claim within twelve (12) months from the time the debt became due,⁴⁹ or, if applicable, any exception excusing the lien claimant from commencing such action;⁵⁰
9. If applicable, the lien claimant filed a notice of commencement of its action within fourteen (14) days after the filing of its action;⁵¹

⁴⁴ O.C.G.A. § 44-14-361.5(a), (c).

⁴⁵ O.C.G.A. § 44-14-361(b).

⁴⁶ O.C.G.A. § 44-14-361.1(a)(1).

⁴⁷ O.C.G.A. § 44-14-361.1(a)(2).

⁴⁸ Id.

⁴⁹ O.C.G.A. § 44-14-361.1(a)(3).

⁵⁰ O.C.G.A. § 44-14-361.1(a)(4).

⁵¹ O.C.G.A. § 44-14-361.1(a)(3).

10. The lien claimant has obtained a judgment against its debtor or is excused from acquiring a judgment.

E. The Owner's Defenses

In any action to foreclose, the owner may defend by introducing evidence refuting the lien claimant's evidence that it has fulfilled the conditions precedent to its foreclosure action.⁵² The owner will defeat the lien claimant's action if it is able to show that the lien claimant failed to fulfill, and is not otherwise excused from meeting, any of the conditions precedent.

Additionally, the owner may defeat the lien claimant's action by showing that the contract price for the improvements made or services performed has been properly paid.⁵³ To succeed on this defense, the owner must show that payments made to its contractor were "applied as provided by law."⁵⁴ The owner must show that payments made to the contractor were properly appropriated to subordinate entities having claims against the project.⁵⁵ Alternatively, the owner may show that an affidavit pursuant to O.C.G.A. § 44-14-361.2(a)(2) has been obtained from the contractor.⁵⁶

The owner may also defeat the lien claimant's action by showing that the lien claimant has waived its claim of lien by executing and delivering interim and final lien waivers meeting the requirements of Georgia's mechanics' and materialmen's lien statute.⁵⁷

⁵² See Section IV(D) above.

⁵³ O.C.G.A. § 44-14-361.1(e).

⁵⁴ O.C.G.A. § 44-14-361.1(a)(4).

⁵⁵ See Freeman v. Fulton Concrete Co., 204 Ga. App. 465, 419 S.E.2d 536 (1992); Mayer Elec. Supply Co., Inc. v. Federal Ins. Co., 195 Ga. App. 191, 393 S.E.2d 270 (1990).

⁵⁶ Id.

⁵⁷ O.C.G.A. § 44-14-366.

F. Foreclosure on the Owner's Property

If the lien claimant acquires a judgment establishing a special lien against the owner's property, the real estate may be foreclosed by sheriff's sale.⁵⁸

⁵⁸ O.C.G.A. § 9-13-140 *et seq.*