# Subcontractors (Mechanics' Liens) Still Standing

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In G Builders, IV v. Madison Park Owner, LLC, the Supreme Court dismissed the General Contractor's Multi-Million Dollar Mechanics' Lien Foreclosure Action due to its Criminal Activity, yet holds that Subcontractors' Liens Remain Unaffected

*"…criminal behavior cannot and should not lead to financial gain."*

*G Builders, IV v. Madison Park Owner, LLC* (2011 NY Slip Op 33102 [U] [2011]) is a recently decided case that may have significant implications for subcontractors. The New York County Supreme Court relied almost exclusively on the above principle when it discharged and vacated a general contractor's multimillion dollar mechanics' lien, while leaving all underlying and related subcontractors' mechanics' liens unaffected.

Madison Park Owner, LLC, the Owner of the subject property, and G Builders, IV LLC ("G Builders") , who was nominally the construction manager/general contractor, entered into a contract for the development of a large scale luxury condominium project in Manhattan. On January 27, 2010, the New York County District Attorney announced an indictment charging three of the officers of G Builders, and The Builders Group itself, with Grand Larceny in the First and Second Degrees, and with a Scheme to Defraud in the First Degree, to which each pleaded guilty.

Subsequently, the Owner brought a motion which the Court characterized as seeking "extraordinary relief" to: 1) dismiss G Builders' foreclosure action; and 2) discharge and vacate G Builders' $10,586,527.73 mechanic's lien. Several subcontractors on the project vehemently opposed the motion arguing that the dismissal of G Builders' claims would jeopardize their own claims, which flow from a *lien fund* established on the Project. The concern, of course, was that if the Court dismissed G Builders' lien, then the *lien fund* would also be depleted, which would eliminate the subcontractors' recourse against Project monies not yet distributed. Nonetheless, the Court dismissed the complaint, discharging and vacating the mechanic's lien. However, the Court held that the subcontractors' liens were not affected whatsoever by this dismissal and discharge of G Builders' mechanics' lien.

The Court explained that G Builders was either a shell set up solely for the purpose of entering into the contract with the Owner, or The Builder's Group was G Builders' agent who performed all obligations under the contract. The Court found that G Builders, an entity owned and controlled by one of the indicted G Builders' officers, could not be shielded from criminal wrongdoing by either theoretical relationship. The Court found that the criminal behavior that The Builder's Group and its officers admitted to by pleading guilty went "to the very core of the work done pursuant to" the contract. Therefore, the Court refused to allow G Builders to avoid the repercussions of its criminal conduct because it, and not The Builder's Group of its officers, was the entity that physically executed the contract when in fact, G Builders did not perform any actual activity on the project. The Court held that while the contract was

[1] *There was some significant background with respect to G Builders, IV LLC being a shell for an entity known as "The Builders Group". For the purposes of this article, G Builders, IV LLC and The Builders Group are deemed to be the same.*

otherwise legal, it was tainted by corruption and as such "the perpetrator of such behavior cannot be allowed to reap any further profits from its unlawful activities."

Applying this policy principle to *G Builder's* is seemingly at odds with the current law in New York, which establishes that a court has *no* inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19 (6). *See Northside Tower Realty, LLC v Klin Constr. Group, Inc.,* 3 AD3d 1072 [2d Dept 2010]; *Dember Constr. Corp. v P & R Elec. Corp.,* 76 AD2d 540, 546 [2d Dept 1980]). Moreover, the statute does not expressly authorize a court to vacate or discharge a mechanics' lien based upon the interests of justice. *See Coppola Gen. Contr. Corp. v Noble House Constr. of NY, 224 AD2d 856, 857 [1996].* To the contrary, "in the absence of a defect upon the face of the notice of lien, any . . . [challenge to] the lien must await trial of the foreclosure action" *(Care Sys. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989]; *Matter of Lowe*, 4 AD3d 476 [2d Dept 2004]).

The Court buttressed its reliance on public policy by analogizing to *McConnell v. Commonwealth Pictures Corp.* (7 NY2d 465), a 1960 decision of the New York Court of Appeals. There, the plaintiff was prevented from enforcing a contract, which "started out honest but turned bad." The *McConnell* Court, "applying fundamental concepts of morality and fair dealing" concluded that "long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption" *(Id. at 469)*. The Lien Law, however, played no role in *McConnell*. In addition, McConnell appears factually distinct from *G. Builders*. It involved motion picture contracts and distribution rights, not construction contracts. Nevertheless, the Court ignored the Lien Law and rendered a decision to discharge and vacate G Builders' mechanics' lien, which is unique in its juxtaposition to the law.

The Court's explanation for its decision to preserve the subcontractors' mechanics' liens after discharging and vacating G Builders' mechanics' lien was sparse: a single paragraph that lacked statutory or case law-based support. This should raise the collective eyebrow of subcontractors, especially when the applicable law is considered. It is well-settled that a subcontractor's lien may only be satisfied out of whatever amount, if any, is due and owing from the owner to the general contractor. A subcontractor's rights are only derivative of the general contractor's rights. Lien Law § 4; *see also, C.B. Strain & Son, Inc. v J. Baranello & Sons,* 90 AD2d 924, 925 (3d Dept 1982). Yet in this case, after eradicating all of the general contractor's rights, the Court nonetheless held that the subcontractors still retained theirs.

Assuming this case is not overturned on appeal, it gives rise to questions that affect the rights of subcontractors. First, does the case empower activist judges to dismiss liens for reasons beyond the Lien Law? Further, does it allow subcontractors to maintain lien claims, notwithstanding their generally derivative nature, after the general contractor's claim is dismissed? For now, subcontractors are left to wait for the true implications of this case.

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