

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1991

CHAPTER 1010
SENATE BILL 597

AN ACT TO CLARIFY SUBCONTRACTORS' LIENS AND DIRECT THE GENERAL STATUTES COMMISSION TO CONDUCT A STUDY OF STATUTORY LIENS OF MECHANICS, LABORERS AND MATERIALMEN AND MODEL PAYMENT AND PERFORMANCE BONDS AS SET FORTH IN ARTICLES 2 AND 3 OF CHAPTER 44A OF THE GENERAL STATUTES AND TO PROVIDE ATTORNEYS' FEES TO PREVAILING PARTIES IN ACTIONS RELATING TO STATUTORY LIENS ON REAL PROPERTY AND PAYMENT AND PERFORMANCE BONDS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 44A-23 reads as rewritten:

"§ 44A-23. **Contractor's lien; perfection of subrogation rights of subcontractor.**

(a) First tier subcontractor -- ~~A first, second or third~~ tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. --

(1) A second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of the Chapter except when:

- i. The contractor, within 30 days following the date of the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the Clerk of Superior Court in each county wherein the real property to be improved is located, a completed and signed Notice of Contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed Notice of Subcontract form by the same means of service as described in G.S. 44A-19(d); or
- ii. After the posting and filing of a signed Notice of Contract and the service of a signed Notice of Subcontract, the contractor

serves upon the second or third tier subcontractor, within 5 days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the Notice of Subcontract form set forth herein.

- (2) The form of the Notice of Contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the Clerk of Superior Court shall be the same as charged for filing a Claim of Lien:

'NOTICE OF CONTRACT

'(1) Name and address of the Contractor:

'(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

'(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

'(4) Name and address of the person, firm or corporation filing this Notice of Contract:

'Dated: _____

'Contractor

'Filed this the — day of —, 19—.

Clerk of Superior Court'

- (3) The form of the Notice of Subcontract to be so utilized under this section shall be substantially as follows:

'NOTICE OF SUBCONTRACT

'(1) Name and address of the subcontractor:

'(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

'(3)

'(i) General description of the subcontractor's contract, including the names of the parties thereto:

'(ii) General description of the labor and material performed and furnished thereunder:

'(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within 5 days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

'Dated: _____

Subcontractor'

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a Claim of Lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent."

Sec. 2. The General Statutes Commission shall conduct a study of statutory lien rights of contractors and subcontractors and payment and performance bonds under Articles 2 and 3 of Chapter 44A of the General Statutes and recommend to the General Assembly changes, modifications and revisions to those statutes as deemed appropriate, including, but not limited to, the matters addressed in the Third Edition to Senate Bill 597 (House Committee Substitute, adopted July 4, 1991), of the 1991 Session of the General Assembly and the interpretation of the law as set forth by the North Carolina Supreme Court in Electric Supply Co. v. Swain Electrical Co., 328 NC 651 (1991), and to report its recommendations to the 1993 General Assembly.

Sec. 3. Chapter 44A of the General Statutes is amended by adding a new section to read:

"§ 44A-35. Attorneys' fees.

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, 'prevailing party' is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant

against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a 'prevailing party' is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer."

Sec. 4. Section 1 of this act is effective upon ratification and applies to actions filed on or after the date of ratification. Section 2 of this act is effective upon ratification. Section 3 of this act is effective upon ratification and applies to actions filed on or after the date of ratification but before July 1, 1994.

In the General Assembly read three times and ratified this the 22nd day of July, 1992.

James C. Gardner
President of the Senate

Daniel Blue, Jr.
Speaker of the House of Representatives