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RECENT LEGISLATION

MARYLAND'S MECHANICS' LIEN LAW

The Maryland General Assembly recently enacted a new mechanics' lien statute in response to a Maryland Court of Appeals decision which held that portions of the former mechanics' lien were incompatible with the due process clauses of the Maryland Declaration of Rights and the fourteenth amendment to the Constitution. The author discusses the defects in the old law noted by the court and the attempt to remedy those defects in the new law.

On May 4, 1976, Governor Marvin Mandel signed emergency legislation¹ amending Maryland's mechanics' lien statute. The new law attempts to remedy defects in Maryland's former mechanics' lien statute noted by the Maryland Court of Appeals in *Barry Properties, Inc. v. Fick Bros. Roofing Co.*² In that case, decided on February 10, 1976, the court of appeals found portions of Maryland's mechanics' lien law "incompatible with the due process clauses of Article 23 [of the Maryland Declaration of Rights] and the Fourteenth Amendment [to the U.S. Constitution]."³

In reaching its decision in *Barry*, the court of appeals considered four recent Supreme Court decisions which dealt with the constitutionality of certain state statutory prejudgment creditor remedies under the due process clause of the fourteenth amendment.

In *Sniadach v. Family Finance Corp.*,⁴ the Supreme Court overturned a Wisconsin prejudgment garnishment statute⁵ which permitted a creditor to garnish the wages of an alleged debtor in the interim before trial although the creditor had no prior interest in the wages. The court concluded that in the absence of extraordinary circumstances justifying the procedure,⁶ the statute violated the fundamental principles of due process because it failed to provide for notice and a prior hearing.⁷

1. Law of May 4, 1976, ch. 349, [1976] Laws of Md. 938 (codified at MD. ANN. CODE, Real Prop. Art., §§ 9-101 to 9-113 (Supp. 1976)). Introduced by Senators Levitan, Connell, Hoyer and Cade as Senate Bill 998, the measure repealed former MD. ANN. CODE, Real Prop. Art., §§ 9-101 to 9-108, 9-111 and 9-113 (1974), as amended, § 9-105(e) (Supp. 1975); enacted new §§ 9-101 to 9-110; and renumbered former §§ 9-109, 9-110 and 9-112 (1974), respectively, as §§ 9-111, 9-112 and 9-113.

2. 277 Md. 15, 353 A.2d 222 (1976).

3. *Id.* at 33, 353 A.2d at 233.

4. 395 U.S. 337 (1969).

5. WIS. STAT. ANN. §§ 267.04(1), 267.07(1), 267.18(2)(a) (1965).

6. 395 U.S. at 339.

7. *Id.* at 342.

In *Fuentes v. Shevin*,⁸ it was held that the prejudgment replevin statutes of Florida⁹ and Pennsylvania¹⁰ were not in keeping with the due process clause of the fourteenth amendment. The statutes allowed a private party to obtain a prejudgment writ of replevin on *ex parte* application to a court clerk, without notice to the alleged debtor or a prior hearing, upon the posting of a bond in an amount double the value of the property to be seized.¹¹ The Supreme Court announced in *Fuentes* that due process requires, except in extraordinary situations, notice and an opportunity for an adversary-type hearing before a person can be even temporarily deprived of any possessory interest in personalty.¹²

In *Mitchell v. W. T. Grant Co.*,¹³ the Supreme Court upheld a Louisiana statute¹⁴ under which a state court ordered the sequestration of personal property purchased under an installment contract and subject to a vendor's lien. The Louisiana statute provided for sequestration when one claimed the ownership or right to possession of property or an interest in property when it was within the power of the defendant to conceal, waste, remove or dispose of the property or revenues therefrom. A writ could be obtained on the creditor's *ex parte* application without notice to the debtor or an opportunity for a hearing, but it would issue only when the nature and amount of the claim and the grounds relied upon for issuance of the writ (existence of a debt, the lien, and a delinquency) clearly appeared from specific facts shown by a verified petition or affidavit. The writ would not issue merely on conclusory allegations of ownership or property rights. A judge, rather than a court functionary, determined the sufficiency of the averments, and the creditor was required to file a bond which would compensate the debtor for any damages he might suffer as a result of an improvident sequestration. The debtor received a citation notifying him of the writ, and the Louisiana statute entitled him to immediate dissolution of the sequestration unless the creditor proved the grounds upon which the writ was issued. If the creditor failed in his proof, the court ordered the property returned to the debtor and awarded damages, including attorney's fees. The debtor, even without moving to dissolve the writ, could regain possession by filing a bond to protect the creditor against interim damage to

8. 407 U.S. 67 (1972).

9. FLA. STAT. ANN. §§ 78.01, 78.07, 78.08, 78.10, 78.13 (Supp. 1972-73).

10. PA. STAT. ANN. tit. 12, § 1821 (1967); PA. R. CIV. P. Rules 1073(a)-(b), 1076, 1077 (1972).

11. 407 U.S. at 73-78.

12. *Id.* at 80-87.

13. 416 U.S. 600 (1974).

14. LA. STAT. ANN. C. CIV. P. Art. 281-83, 325, 2373, 3501, 3504, 3506-08, 3510, 3571, 3574, 3576 (1961).

the property.¹⁵ The Supreme Court pointed out that because the creditor, as seller and holder of a vendor's lien, had a prior interest in the personalty until the purchase price was paid in full, the statute did not allow sequestration of property belonging exclusively to the debtor.¹⁶ The Supreme Court concluded that the Louisiana statutory procedure was sufficient to meet due process requirements and effected "a constitutional accommodation of the respective interests of buyer and seller."¹⁷

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,¹⁸ the Supreme Court overturned a Georgia statute¹⁹ which authorized, without notice or a hearing, prejudgment garnishment of a bank account. Under the Georgia law, the creditor merely had to (1) execute an affidavit before an officer or court clerk authorized to issue an attachment stating the amount claimed to be due and that he had reason to apprehend the loss of all or some of the debt unless the writ was issued and (2) file a bond equal to twice the amount claimed. The debtor could dissolve the garnishment by filing a bond.²⁰ The Supreme Court found the Georgia statute violative of due process because it allowed the impoundment of property "by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."²¹ The Court noted that, unlike the Louisiana statute in question in *Mitchell*, the Georgia law

[had] none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. The affidavit . . . need contain only conclusory allegations. The writ is issuable . . . by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee . . . There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.²²

Maryland's former mechanics' lien law provided:

Every building erected and every building repaired, rebuilt, or improved, to the extent of one fourth of its value, is subject to a lien for the payment of all debts without regard

15. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 605-07 (1974).

16. *Id.* at 604.

17. *Id.* at 610.

18. 419 U.S. 601 (1975).

19. GA. CODE tit. 46-101 to -04 (1972).

20. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 602-03 (1975).

21. *Id.* at 606.

22. *Id.* at 607.

to the amount contracted for work done for or about the building, and for materials furnished for or about the building, including the drilling and installation of wells for the purpose of supplying water, the construction or installation of any swimming pool, the sodding, seeding or planting in or about the premises of any shrubs, trees, plants, flowers, or nursery products of any kind or description and the grading, filling, landscaping, and paving of the premises.²³

The lien also attached to "the land covered by the building and to as much other land, immediately adjacent and belonging in like manner to the owner of the building, as may be necessary for the ordinary and useful purposes of the building."²⁴

Under this statute, the lien was created and attached to the property as soon as work was performed or materials were supplied.²⁵ The lien existed for 180 days after the work was finished or the materials furnished. Although it was not necessary to file a claim to establish the lien, the claimant had to file a claim within the 180 day period with the clerk of the circuit court of the county in order to retain it.²⁶ The clerk would record the claim in a Mechanics' Lien Docket.²⁷ The lien existed for one year from the date of filing unless the claimant commenced proceedings to enforce it or the property owner brought proceedings to compel the claimant to prove the validity of the lien.²⁸ The lien was enforceable by foreclosure on the property.²⁹ Under the former law, no notice to the property owner was required until a suit was commenced to enforce the claim, at which time all interested parties were entitled to notice as in other equity actions.³⁰ When the claimant was a subcontractor under a contract with a person other than the owner of the land, the statute required that he provide the owner with notice in writing of his intention to claim a lien within ninety days of furnishing the work or material.³¹

23. Law of July 1, 1974, ch. 12, § 9-101(a), [1974] Laws of Md. 356-57 (repealed 1976).

24. *Id.* § 9-102(a), at 357. Under the old and new mechanics' lien laws, any machine, wharf or bridge erected, constructed or repaired within the state may also be subject to a mechanic's lien. *Id.* § 9-111, at 363; MD. ANN. CODE, Real Prop. Art., § 9-102(b) (Supp. 1976).

25. *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 19, 353 A.2d 222, 225-26 (1976); Law of July 1, 1974, ch. 12, §§ 9-101(a), 9-105(e), [1974] Laws of Md. 356-57, 360 (repealed 1976).

26. Law of July 1, 1974, ch. 12, § 9-105(e), [1974] Laws of Md. 360 (repealed 1976).

27. *Id.* § 9-105(b), at 359-60.

28. *Id.* § 9-106, at 361.

29. Md. Rule BG 73 (1975).

30. *See Grinnell Co. v. City of Crisfield*, 264 Md. 552, 287 A.2d 486 (1972).

31. Law of July 1, 1974, ch. 12, § 9-103(a), [1974] Laws of Md. 358 (repealed 1976); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 30, 353 A.2d 222, 231 (1976).

The subcontractor could, however, file his claim with the clerk of the court before he gave the notice of intent to claim a lien.³²

The Maryland Court of Appeals held in *Barry* that the former mechanics' lien law violated due process because it allowed prejudgment seizures without notice, a prior hearing, or other sufficient safeguards.³³ The court stated that, in light of *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia Finishing, Inc.*,

[l]acking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a probable-cause-type hearing are . . . unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then . . . the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized.³⁴

The court found that the filing of a lien claim, although it was recorded, did not give the property owner constructive notice of the lien and that the subcontractor's notice of intent to claim a lien was inadequate. The court held that under the former statute there could be "no existing lien on property until and unless the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding providing notice and a hearing"³⁵ The court also determined that former § 9-107(b),³⁶ "to the extent that it grants mechanics' liens 'priority over any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building' but prior to the time the lien is established by a judicial determination, is also null and void"³⁷

The defective portions of the law were found to be severable. The court decided that the remainder of the statute could stand "by excising that portion of the statute which purport[ed] to create a lien from the time work [was] performed or materials

32. *Accrocco v. Fort Washington Lumber Co.*, 255 Md. 682, 684, 259 A.2d 60, 61 (1969).

33. 277 Md. at 33, 353 A.2d at 233.

34. *Id.* at 30, 353 A.2d at 231.

35. *Id.* at 37, 353 A.2d at 235. The court then held, to the amazement of dissenting Judge L. Levine, that the appellant was not deprived of its property without due process and upheld the mechanics' lien on the property. *Id.* at 38, 353 A.2d at 237. *See id.* at 39-41, 353 A.2d at 236-37 (Levine, J., dissenting). *See also* *Caplan Bros., Inc. v. Village of Cross Keys, Inc.*, 277 Md. 41, 353 A.2d 239 (1976).

36. Law of July 1, 1974, ch. 12, § 9-107(b), [1974] Laws of Md. 361-62 (repealed 1976).

37. 277 Md. at 37, 353 A.2d at 235.

furnished to the time a lien [was] established by judicial determination in a proceeding sufficient with respect to due process."³⁸ The court did not suggest that the legislature was prohibited from enacting a mechanics' lien law permitting general contractors and subcontractors to obtain liens prior to owners being given notice and a hearing, if the statute included safeguards such as those enumerated in *Mitchell and North Georgia Finishing*.³⁹

Under Maryland's new mechanics' lien law, a lien does not automatically attach as soon as work is performed or materials are furnished; instead, "[e]very building erected and every building repaired, rebuilt, or improved to the extent of 25 percent of its value is subject to *establishment* of a lien"⁴⁰

In order to establish a lien under the new mechanics' lien law, a person claiming a lien must institute proceedings in the circuit court for the county where the land or any part of the land is located within 180 days after the work is finished or materials furnished.⁴¹ The proceedings are commenced by filing a petition in equity with the clerk of the court setting forth the following:

- (i) The name and address of the petitioner;
- (ii) The name and address of the owner;
- (iii) The nature or kind of work done or the kind and amount of materials furnished, the time when the work was done or the materials furnished, the name of the person for whom the work was done or to whom the materials were furnished and the amount or sum claimed to be due, less any credit recognized by the petitioner;
- (iv) A description of the land, including a statement whether part of the land is located in another county, and a description adequate to identify the building⁴²

An affidavit must also be filed setting forth the facts upon which the petitioner claims he is entitled to a lien in the amount specified. Original or sworn, certified or photostatic copies of all material papers which constitute the basis of the claim must also be filed unless their absence is explained in the affidavit.⁴³

If the petitioner is a subcontractor, he is not entitled to a lien unless, within ninety days after doing the work or furnishing the materials, he gives notice to the owner in writing of his intention

38. *Id.*

39. *Id.*, n.12.

40. MD. ANN. CODE, Real Prop. Art., § 9-102(a) (Supp. 1976) (emphasis added).

41. *Id.* § 9-105(a).

42. *Id.* § 9-105(a) (1) (i)-(iv).

43. *Id.* § 9-105(a) (2)-(3).

to claim a lien.⁴⁴ The new law directs that the notice be substantially in the following form:

Notice to Owner or Owner's Agent of Intention to Claim
a Lien

Subcontractor

did work or furnished material for or about the building generally designated or briefly described as _____

The total amount earned under the subcontractor's undertaking to the date hereof is \$_____ of which \$_____ is due and unpaid as of the date hereof. The work done or materials provided under the subcontract were as follows: (insert brief description of the work done and materials furnished, the time when the work was done or the materials furnished, and the name of the person for whom the work was done or to whom the materials were furnished).

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing notice are true to the best of the affiant's knowledge, information and belief.

on behalf of

(Individual)

(Subcontractor)

(Insert if subcontractor is not an individual)⁴⁵

To be effective, the notice must be given by registered or certified mail, return receipt requested, or personally delivered to the owner by the claimant or his agent.⁴⁶ If notice cannot be given due to absence of the owner or other causes, the subcontractor, or his agent, in the presence of a competent witness and within 90 days, may place the notice on the door or other front part of the building.⁴⁷ Facts showing that notice of intent to claim a lien was properly mailed or served upon the owner, or if so authorized, posted, must be set forth in the petition.⁴⁸

44. *Id.* § 9-104(a).

45. *Id.* § 9-104(b).

46. *Id.* § 9-104(c).

47. *Id.* § 9-104(e). Notice by posting is sufficient in all cases where the owner of the property has died and his successors in title do not appear on the public records of the county. *Id.*

48. *Id.* § 9-105(a) (1) (v).

After the petition to establish a mechanics' lien is filed by a general contractor or subcontractor, the court reviews the pleadings and documents on file and may require the petitioner to supplement or explain any matters contained in them. If the court determines from the pleadings, documents and any supplements and explanations that a lien should attach, the court issues an order directing the owner, within fifteen days from the date of service of copies of the order, pleadings and documents on file, to show cause why a lien upon the property and for the amount claimed should not attach.⁴⁹ The order informs the owner that he may appear at the time stated in the order and present evidence in his behalf or file a counteraffidavit at or before that time, and that if he does not appear or file a counteraffidavit, the facts in the petitioner's claim are deemed admitted and a lien attaches to the property.⁵⁰ If the owner desires to controvert any facts in the petitioner's claim he must file an affidavit in support of his answer showing cause. Failure to file such affidavit constitutes an admission of the facts in petitioner's affidavit but not an admission that his petition or affidavit is legally sufficient.⁵¹ If the owner's answer shows cause why a lien in the amount claimed should not be established, the matter is set down for a hearing at the "earliest possible time."⁵²

If the pleadings, affidavits, admissions on file, and the evidence show that there is no genuine dispute as to any material fact and that the lien should attach as a matter of law, a final order is entered establishing the lien.⁵³ If it is shown that there is no genuine dispute as to any material fact and that the petitioner has failed to establish his right to a lien as a matter of law, then a final order is entered denying the lien.⁵⁴ However, if the court determines that the lien as a matter of law should not attach or should not attach in the amount claimed, but that there is probable cause to believe that the petitioner is entitled to a lien, the court enters an interlocutory order which:

(I) Establishes the lien;

(II) Describes the boundaries of the land and the buildings to which the lien attaches;

49. *Id.* § 9-106(a) (1).

50. *Id.* § 9-106(a) (1) (i) (ii). See Md. Rule BG 73 (1976).

51. MD. ANN. CODE, Real Prop. Art., § 9-106(a) (2).

52. *Id.* § 9-106(a) (3).

53. *Id.* § 9-106(b) (1). If it appears that there is no genuine dispute as to a portion of the claim, then a lien will be established with respect to that portion and the action will proceed on the disputed amount. *Id.*

54. *Id.* § 9-106(b) (2).

(III) States the amount of the claim for which probable cause is found;

(IV) Specifies the amount of a bond that the owner may file to have the land and building released from the lien;

(V) May require the claimant to file a bond in an amount that the court believes sufficient for damages, including reasonable attorney's fees;

(VI) Assigns a date for the trial of all the matters at issue in the action, which shall be within a period of six months.⁵⁵

The owner or any other person who is interested in the property may at any time move to have the lien established by the interlocutory order modified or dissolved or apply to the court for an order requiring an additional bond.⁵⁶

The right to enforce any lien established lasts for one year from the day the petition to establish the lien was first filed. Petitioner may either file a petition to enforce the lien or execute on any bond given to obtain a release from the lien.⁵⁷

For purposes of priority, the former mechanics' lien statute differentiated between mechanics' liens⁵⁸ and other liens.⁵⁹ A mechanics' lien was given priority over "any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building."⁶⁰ However, a mortgage, judgment, lien or encumbrance that attached prior to the commencement of the building had priority over a mechanics' lien subsequently attaching if the mortgage, judgment, lien or encumbrance was required to be recorded and had been recorded prior to the commencement of the building.⁶¹

The new statute provides that if property against which a mechanics' lien has been established is sold under foreclosure or a judgment, execution or any other court order, all liens and encumbrances on the property are to be "satisfied in accordance with their priority."⁶² Since under the new law a mechanics' lien is no longer created and attached when work is performed or materials furnished, but rather only upon a judicial determination, a mechanics' lien no longer has automatic priority over all mortgages, judgments, liens or encumbrances that attached subsequent

55. *Id.* § 9-106(b) (3) (i)-(vi).

56. *Id.* § 9-106(b) (3) (vi).

57. *Id.* § 9-109.

58. Law of July 1, 1974, ch. 12, § 9-107(a), [1974] Laws of Md. 361 (repealed 1976).

59. *Id.* § 9-107(b).

60. *Id.*

61. *Id.*

62. MD. ANN. CODE, Real Prop. Art., § 9-108 (Supp. 1976).

to commencement of the building; instead, its priority is determined by the general rules of law governing priorities.

The former law dealt with priorities among mechanics' liens in the following vague manner:

If the proceeds of any building and ground are not sufficient to pay the full amount of all debts due as provided in this title for work done and material furnished, after deducting from the proceeds any prior lien on it, then the debts shall be paid in proportion to their respective amounts.⁶³

The new law places a limitation on the rule that all liens and encumbrances are to be "satisfied in accordance with their priority" as far as competing mechanics' liens are concerned.

If the proceeds of the sale are insufficient to satisfy all liens established pursuant to this subtitle, then all proceeds available to satisfy each such lien shall be stated by the court auditor as one fund, and the amount to be disbursed to satisfy each lien established pursuant to this subtitle shall bear the same proportion to that fund as the amount of such lien bears to the total amount secured by all such liens, without regard to priority among such liens.⁶⁴

Prior to the new statute, property could be sold from under the bona fide purchaser for value in order to satisfy a mechanics' lien which attached automatically as soon as work was performed or materials delivered, but which had not yet been recorded among the land records when the BFP bought the property.⁶⁵ The new law provides that a "building or the land on which the building is erected may not be subjected to a lien . . . if, prior to the establishment of a lien . . . legal title has been granted to a bona fide purchaser for value."⁶⁶ Once legal title to the property has passed to a BFP for value, a builder, subcontractor, materialman or the like cannot establish a lien against the property.

On July 12, 1976, the Maryland Court of Appeals issued an emergency order, to take effect on August 9, 1976, adopting changes in Subtitle BG⁶⁷ (Mechanics' Lien — Enforcement) of the Maryland Rules of Procedure to bring them into conformity with the new mechanics' lien legislation.⁶⁸

63. Law of July 1, 1974, ch. 12, § 9-107(a), [1974] Laws of Md. 361 (repealed 1976).

64. MD. ANN. CODE, Real Prop. Art., § 9-108 (Supp. 1976).

65. See *Clark Certified Concrete Co. v. Lindberg*, 216 Md. 576, 141 A.2d 645 (1958).

66. MD. ANN. CODE, Real Prop. Art., § 9-102(c) (Supp. 1976).

67. Md. Rules BG 70-76 (1975).

68. Md. Rules BG 70-77 (1976); 3 Md. Reg. 16, Aug. 4, 1976 at 839-45.

Rule BG 70 (Definitions), which formerly defined only "mechanics' lien,"⁶⁹ was amended by adding certain key definitions: contract, contractor, land, owner and subcontractor.⁷⁰

The court of appeals amended Rule BG 71 (Commencement of Action)⁷¹ by deleting the provisions for the enforcement of a mechanics' lien, and substituting provisions for the filing of a petition to establish a mechanics' lien.⁷²

Rule BG 72 (Amendment) now prohibits amendments which increase the amount of a claim or materially alter the description of the land after the expiration of the period within which notice of a lien claim must be given, or if notice is not required, after the period within which the petition to establish the lien must be filed.⁷³

Former Rule BG 73 (Sale) was rescinded.⁷⁴ New Rule BG 73 (Proceedings) states that if the court determines from the petition filed and from any supplements and explanations that there is reasonable ground for the lien to attach, the court shall order the defendant to show cause within fifteen days from date of service of copies of the order, the pleadings and documents on file, why a lien should not attach. The rule further provides for an affidavit or a verified answer to a show cause order and for a hearing. The hearing procedure is similar to the procedure for a hearing on a motion for summary judgment. If no final or interlocutory order is granted upon a hearing, the rule requires that a final order be entered dismissing the petition for a lien⁷⁵ unless petitioner files a written request within thirty days for a trial.

New Rule BG 74 (Enforcement of Lien)⁷⁶ expands the provisions of former Rule BG 71 (Commencement of Action)⁷⁷ and former Rule BG 73 (Sale)⁷⁸ for the enforcement of a mechanics' lien by stating that the petitioner cannot enforce a lien and cannot execute on a bond given to obtain a release of the lien until the lien is established by a final order. In order to enforce the lien or to execute on the bond the petitioner must file a petition in the original proceedings within one year after the date on which the petition to establish the lien was filed. It may be included in the

69. Md. Rule BG 70 (1975).

70. Md. Rule BG 70 (1976).

71. Md. Rule BG 71 (1975).

72. Md. Rule BG 71 (1976).

73. Md. Rule BG 72 (1976). The rule formerly used the language "after the expiration of the period within which notice must be given or the lien must be recorded if notice is not required . . ." and used the word "land" instead of "property". Md. Rule BG 72 (1975).

74. Md. Rule BG 73 (1975).

75. Md. Rule BG 73 (1976).

76. Md. Rule BG 74 (1976).

77. Md. Rule BG 71 (1975).

78. Md. Rule BG 73 (1975).

original petition to establish the lien.⁷⁹ Subtitle BR (Sales — Judicial) governs the conduct of the sale.⁸⁰

Rule BG 74 (Payment of Mechanics' Lien Claim — Sale Under Other Lien Court Order)⁸¹ is redesignated as Rule BG 75 (Referral to Auditor) which provides only that after a sale, the proceeding shall be referred by the court to an auditor for the purpose of stating an account.⁸²

Former Rule BG 75 (Release of Lien)⁸³ was redesignated and amended as Rule BG 76 (Release of Lien) which provides that at any time after a petition to establish a lien is filed, the owner of land or any person interested therein may file a petition to have the land released from a mechanics' lien or from a lien which may thereafter be established. The court shall enter an order releasing the land from the lien upon the filing of a bond approved by the court.⁸⁴

New Rule BG 77 (Designation of Boundaries),⁸⁵ formerly Rule BG 76,⁸⁶ provides that an owner may file a notice to establish boundaries before commencement of construction of any improvements to property which might become the subject of a claim for a mechanics' lien. The owner must file the notice in an *ex parte* proceeding in an equity court of the county in which the property is located. The provisions of the old rule for designation of boundaries after construction has commenced are retained, but if the petitioner is already a party to a proceeding to establish a lien, the petition to designate boundaries must be filed in the proceeding instituted to establish a lien.⁸⁷

79. Md. Rule BG 74 (1976).

80. See Md. Rules BR 1-6.

81. Md. Rule BG 74 (1975).

82. Md. Rule BG 75 (1976).

83. Md. Rule BG 75 (1975).

84. Md. Rule BG 76 (1976).

85. Md. Rule BG 77 (1976).

86. Md. Rule BG 76 (1975).

87. Md. Rule BG 77 (1976). The notice must contain:

(i) a reference to the conveyance or other means by which the owner acquired title to the land;

(ii) a description of the newly established boundaries sufficient to identify the land with reasonable certainty; and

(iii) a brief description of the construction for which the boundaries are established.

Id. The notice is captioned, filed and indexed as in any other proceeding in equity under the owner's name. *Id.*

CONCLUSION

The new statute and rules provide for establishment of a mechanics' lien by judicial determination. An action to establish a mechanics' lien against property is commenced by filing a petition to establish a lien. The owner is then summoned and given an opportunity to show cause why the lien should not be established. A lien may be established or denied on a summary basis or after a hearing and trial, but it does not attach until issuance of a final court order.

The mechanics' lien statute was originally enacted to encourage construction by ensuring that those who contributed work or materials to the construction of a project would be compensated.⁸⁸ The law is particularly important to the subcontractor who is not in privity with the owner and cannot sue him in contract. If the party with whom he contracted is insolvent or vanishes the subcontractor has a remedy against the property.⁸⁹

Under the new law, the owner may alienate or encumber the property after work is provided or materials furnished but before a mechanics' lien has been established. Recovery under the new mechanics' lien law is determined according to general rules of priority and it is possible that the claimant will not recover at all or will recover less than his claim.

The new law may appear to circumvent the original legislative intent to favor the contractor and subcontractor by favoring the owner of property, especially the BFP for value. Yet the new law is more fair and balanced than the old, which was weighted heavily against the property owner. It provides notice to the owner and an opportunity for a hearing and yet continues to provide security for those who have contributed work or materials to the construction of a project.

The Maryland Legislature is to be commended for responding so quickly to repair the defects in the old mechanics' lien statute pointed out by the court of appeals in *Barry*. The new law was enacted just eighty-four days after the court of appeals handed down its decision.

Gerald L. Everett

88. *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 36, 353 A.2d 222, 234 (1976).

89. See *Port City Constr. Co. v. Adams & Douglass, Inc.*, 260 Md. 585, 273 A.2d 121 (1971).