

## **CHAPTER 35-27 CONSTRUCTION LIEN**

**35-27-01. Definitions.** In this chapter, unless the context or subject matter otherwise requires:

1. "Contract" means any agreement for improving real property, written or unwritten, express or implied.
2. "Improve" means to build, erect, place, make, alter, remove, repair, or demolish any improvement upon, connected with, or beneath the surface of any land, or excavate any land, or furnish materials for any of such purposes, or dig or construct any fences, wells, or drains upon such improvement, or perform any labor or services upon such improvement; or perform any architectural services, construction staking, engineering, land surveying, mapping, or soil testing upon or in connection with the improvement; or perform any labor or services or furnish any materials in laying upon the real estate or in the adjoining street or alley any pipes, wires, fences, curbs, gutters, paving, sewer pipes or conduit, or sidewalks, or in grading, seeding, sodding, or planting for landscaping purposes, or in equipping any such improvement with fixtures or permanent apparatus.
3. "Improvement" means any building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for its permanent benefit.
4. "Materials" means materials or fixtures which are incorporated in the improvement and those which become normal wastage in construction operations, custom or specially fabricated materials for incorporation in the improvement, building materials used for construction, but not remaining in the improvement, subject to diminution by the salvage value of such materials, tools, appliances, or machinery, excluding hand tools, used in the construction of the improvement to the extent of the reasonable value for the period of actual use. The rental value shall not be determinable by the contract for rental unless the owner is a party thereto.
5. "Owner" means the legal or equitable owner and also every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, and including any agent, trustee, contractor, or subcontractor of such owner.
6. "Person" means every natural person, fiduciary, association, corporation, or limited liability company.
7. "Subcontractor" means all persons contributing any skill, labor, or materials to the improvement except such as have contracts therefor directly with the owner; and, includes any person who enters into a contract with a subcontractor as above defined, for the performance of any part of such subcontractor's contract.

**35-27-02. Persons entitled to construction lien - Notice.** Any person that improves real estate, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner, has a lien upon the improvement and upon the land on which the improvement is situated or to which the improvement may be removed for the price or value of such contribution. Provided, however, that the amount of the lien is only for the difference between the price paid by the owner or agent and the price or value of the contribution. If the owner or agent has paid the full price or value of the contribution, no lien is allowed. Provided further that if the owner or an agent of the owner has received a waiver of lien signed by the person that improves the real estate, a lien is not allowed.

Any person that extends credit or makes a contract with any agent, trustee, contractor, or subcontractor of the owner for the improvement of real estate, upon demand, has the right to request and secure evidence of the legal description of the real estate upon which the improvement is located, including the name of the title owner of the real estate. Written notice that a lien will be claimed must be given to the owner of the real estate by certified mail at least ten days before the recording of the construction lien.

**35-27-03. When lien attaches.** As against the owner of the land, subject to section 35-27-02, such liens attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement. As against a bona fide purchaser, mortgagee, or encumbrancer without notice, no lien may attach prior to the actual and visible beginning of the improvement on the ground. Subject to the exception set forth in section 35-27-04, all such liens are preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof.

**35-27-04. When lien attaches - Exception - Filing.** As against a mortgage given in good faith for the purpose of providing funds for the payment of materials or labor for the improvement, a lien may not be preferred even though such mortgage is recorded after the time the first item of material or labor is furnished upon the premises, or after the actual visible beginning of the improvement unless the person furnishing such labor, skill, or material for such improvement, before the recording of such mortgage, files for record a construction lien.

**35-27-05. Notice of intention to claim lien - Recordation.** Repealed by S.L. 2009, ch. 293, § 16.

**35-27-06. Extent and amount of lien.** If the contribution is made under a contract with the owner and for an agreed price, the lien as against the owner must be for the sum so agreed upon, otherwise, and in all cases as against others than the owner, it must be for the reasonable value of the work done and of the skill and material furnished.

**35-27-07. Title of vendor or consenting owner - Subject to liens.** When land is sold under an executory contract requiring the vendee to improve the same and such contract is forfeited or surrendered after liens have attached by reason of such improvements, the title of the vendor is subject thereto, but the vendor is not personally liable if the contract was made in good faith. When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior encumbrancers or lienors are deemed to have authorized such improvements, insofar as to subject their interests to liens therefor. Any person who has not authorized the same may protect the person's interest from such liens by serving upon the person doing work or otherwise contributing to such improvement within five days after knowledge thereof, written notice that the improvement is not being made at the person's instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises. As against a lessor no lien is given for repairs made by or at the instance of the lessor's lessee, unless the lessor has actual or constructive notice thereof and does not object thereto.

**35-27-08. Contractor or subcontractor improperly using proceeds of payment - Larceny.** Repealed by S.L. 1975, ch. 106, § 673.

**35-27-09. Payment to contractors withheld.** The owner may withhold from the owner's contractor so much of the contract price as may be necessary to meet the demands of all persons, other than such contractor, having a lien upon the premises for labor, skill, or material furnished for the improvement, and for which the contractor is liable, and the owner may pay and discharge all such liens and deduct the cost thereof from such contract price. Any such person having a lien under the contractor in accordance with section 35-27-02 may serve upon the owner at any time a notice of that person's claim. The owner, within fifteen days after the completion of the contract, may require any person having a lien hereunder, by written request therefor, to furnish to the owner an itemized and verified account of the person's claim, the amount thereof, and the person's name and address, and no action or other proceeding may be commenced for the enforcement of such lien until ten days after such statement is so furnished.

The word "owner", as used in this section, includes any person interested in the premises otherwise than as a lienor thereunder.

**35-27-10. Mingling of charges defeats right to lien.** The mingling of charges for materials to be used in the construction, alteration, repair, or improvement of the property of different persons, except in the cases of joint ownership or ownership in common, defeats the right to a lien against either or any of such persons.

**35-27-11. Itemized account and demand conditions precedent to obtaining lien for materials.** Repealed by S.L. 2009, ch. 293, § 16.

**35-27-12. Recorder to record notice.** Repealed by S.L. 2009, ch. 293, § 16.

**35-27-13. How lien perfected - Construction lien recorded.** Every person desiring to perfect the person's lien shall record with the recorder of the county in which the property to be charged with the lien is situated, within ninety days after all the person's contribution is done, and having complied with the provisions of this chapter, a lien describing the property and stating the amount due, the dates of the first and last contribution, and the person with which the claimant contracted.

**35-27-14. Lien not lost for failure to file within time - Exception.** A failure to file within ninety days does not defeat the lien except as against purchasers or encumbrancers in good faith and for value whose rights accrue before the lien is filed, and as against the owner to the extent of the amount paid to a contractor before the recording of the lien. A lien may not be filed more than three years after the date of the first item of material is furnished.

**35-27-15. Account - Duty of clerk of court.** Repealed by S.L. 1981, ch. 361, § 6.

**35-27-16. Inaccuracies in lien statement.** A lien given by this chapter is not affected by any inaccuracy in the particulars of the lien, but, as against all persons except the owner of the property, the lien claimant must be concluded by the dates therein given, showing the first and last items of the claimant's account. A lien may not exist for a greater amount than the sum claimed in the lien, nor for any amount, if it be made to appear that the claimant has knowingly demanded more than is justly due.

**35-27-17. Single contract for several buildings - Amount of claim apportioned.** If labor is done or materials furnished under a single contract for several buildings, structures, or improvements, the person furnishing the same is entitled to a lien therefor, subject to section 35-27-02, as follows:

1. If the improvements are upon a single farm, tract, or lot, upon all such buildings, structures, and improvements and the farm, tract, or lot upon which the same are situated.
2. If the improvements are upon separate farms, tracts, or lots, upon all the buildings, structures, and improvements and the farms, tracts, or lots upon which the same are situated, but upon the foreclosure of the lien the court, in the cases provided for in this subsection, may apportion the amount of the claim among the several farms, tracts, or lots in proportion to the enhanced value of the same produced by means of the labor or materials, if such apportionment is necessary to protect the rights of third persons.

**35-27-18. Construction lien on railway contracts obtainable.** Every person that furnishes any labor, skill, or material for constructing, altering, or repairing any line of railway, or any improvement or structure appertaining to any line of railway by virtue of any contract with the owner, or the owner's agent, contractor, or subcontractor authorized in writing to contract for the owner, has a lien upon such line of railway and the right of way of such railway, and upon all bridges, depots, offices, and other structures appertaining to the line of railway, and all franchises, privileges, and immunities granted to the owner of the line of railway for the

construction and operation thereof, to secure the payment for the labor, skill, and materials, upon recording a lien, within ninety days from the last day of the month in which the labor or material was furnished, but a failure to record within the ninety days does not defeat the lien except to the extent specified in section 35-27-14.

**35-27-19. Land subject to lien.** The entire land upon which any building, structure, or other improvement is situated, or to improve which labor is done or materials furnished, including that portion of the land not covered thereby, is subject to all liens created under this chapter to the extent of all the right, title, and interest of the owner for whose immediate use or benefit the labor was done or materials furnished.

**35-27-20. Collateral security does not impair lien - Exception.** The taking of collateral or other security for an indebtedness for which a lien might be claimed under the provisions of this chapter in no way impairs the right to the lien unless the security, by express agreement, is given and received in lieu of the lien.

**35-27-21. Complete and independent building - Lien independent of land - Notice to owner.** In addition to the lien provided by this chapter, but subject to the conditions of section 35-27-02, when material is furnished or labor performed in the erection or construction of an original, complete, and independent building, structure, or improvement, whether the same is placed upon a foundation or not, the lien attaches to the building or improvement in preference to any prior title, claim, lien, encumbrance, or mortgage upon the land upon which the building, erection, or improvement is erected. Upon the foreclosure of the lien, the building or improvement may be sold separately from the land and may be removed from the land within thirty days after the sale. The sale and removal of a structure or improvement separately from the land operates as a full satisfaction and discharge of the lien upon the real estate. At the time the material is furnished for such improvement, the seller shall notify the purchaser by delivering to the purchaser a written notice stating that the seller claims the right to foreclose the lien under the laws of the state, and in the event that there is a default in payment for the improvement, to remove the building from the real estate upon which it is placed regardless of whether or not said building is placed upon a foundation.

**35-27-22. Order of priority of classes of construction liens.**

1. Liens perfected under this chapter have priority in the following order:
  - a. For manual labor.
  - b. For materials.
  - c. Subcontractors other than manual laborers.
  - d. Original contractors.
2. Liens for manual labor filed within the ninety-day period must share ratably in the security. Liens for manual labor filed after the ninety-day period have priority in the order of the filing of such liens. Liens for materials filed within the ninety-day period must share ratably in the security and liens filed after the ninety-day period have priority in the order of the filing of such liens.

**35-27-23. Improvements on leasehold interest - Extent of lien - Sale of building.** When the interest owned in land by the owner of the building, structure, or other improvement for which a lien is claimed, is only a leasehold interest, the forfeiture of the lease for nonpayment of rent or for noncompliance with any of the stipulations of the lease does not impair the lien so far as it applies to the building, structures, or improvements, but the improvements may be sold to satisfy the lien and may be removed by the purchaser within thirty days after the sale.

**35-27-24. Action to enforce construction lien - Notice of - Deficiency judgment.** Any person having a lien by virtue of this chapter may bring an action to enforce the lien in the

district court of the county in which the property is situated. Any number of persons claiming liens against the same property may join in the action and when separate actions are commenced the court may consolidate the actions. Before a lienholder may enforce a lien, the lienholder shall give written notice of the lienholder's intention so to do, which notice must be given by personal service upon the record owner of the property affected at least ten days before an action to enforce the lien is commenced, or by registered mail directed to the owner's last-known address at least twenty days before the action is commenced. The judgment may direct that in the event that a deficiency remains after the sale of the real property subject to the lien an execution may issue for such deficiency.

**35-27-24.1. Costs and attorney's fees.** Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorney's fees incurred by the owner.

**35-27-25. Requiring suit to be commenced - Demand - Limitations of action.** Upon written demand of the owner, that person's agent, or contractor, served on the person holding the lien, suit must be commenced and filed with the clerk of court within thirty days thereafter or the lien is forfeited. The demand must contain a provision informing the person holding the lien that if suit is not commenced within thirty days, the person holding the lien forfeits the lien. A lien is not valid or effective as such, nor may be enforced in any case, unless the holder of the lien asserts the same by complaint filed with the clerk of court within three years after the date of recording of the lien. If a summons and complaint asserting the validity of the lien is not filed in the office of the clerk of court of the county in which the lien is recorded within the limitations provided by this section, the lien is deemed satisfied and the clerk of court, upon request of any interested person, shall certify to the recorder that no summons and complaint has been filed and the lien is deemed satisfied under this section, who then shall record the verified certificate.

**35-27-26. Penalty for filing unlawful lien.** Repealed by S.L. 2009, ch. 293, § 16.

**35-27-27. Assignment of claims.** Any claim for which a lien may be or has been filed and the right to recover therefor under the provisions of this chapter may be assigned by an instrument in writing. Such assignment vests in the assignee all rights and remedies herein given, subject to all defenses that might have been interposed if such assignment had not been made.

**35-27-28. General provisions.** The general provisions of this title not in conflict with the provisions of this chapter are applicable to this chapter.