

## CPLR 7503: Filing of Notice of Lien in Violation of Contractual Lien Waiver Provision Does Not Constitute Waiver of Right to Arbitration

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## ARTICLE 75 — ARBITRATION

*CPLR 7503: Filing of notice of lien in violation of contractual lien waiver provision does not constitute waiver of right to arbitration.*

Prior to the enactment of section 35 of the Lien Law,<sup>152</sup> filing a notice of lien was held to constitute a waiver of the right to arbitration,<sup>153</sup> and the opposing party was entitled to a stay of arbitration under CPLR 7503.<sup>154</sup> Since this rule was overturned by statute,<sup>155</sup> filing a notice of lien and commencing an action to foreclose on the lien have been included within the protection of section 35.<sup>156</sup>

Difficulties have arisen where a contract contains a broad arbitration clause and a provision waiving the right to file a lien. In *Sommer v. Anthony J. Quarant Contracting, Inc.*,<sup>157</sup> a contractor who filed a notice of lien in violation of such an agreement later sought to enforce the arbitration provisions of the breached contract. Rejecting several prior holdings,<sup>158</sup> the Appellate Division, First Department, unanimously reversed a stay of arbitration and directed the parties to proceed to arbitration. The court reasoned that the intent of section 35 was to protect a party's lien rights while allowing him to pursue arbitration, and that "[t]o engraft an exception to the statute because

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perpetuation of this injustice until the Legislature reviews the manifest inequities resulting from this practice.

The court also suggested that CPLR 5236, which affords this enforcement remedy, be revised to prevent the "legal chicanery" and "unjust forfeitures" resulting from forced sales. *Id.* at 702, 324 N.Y.S.2d at 585.

<sup>152</sup> N.Y. LIEN LAW § 35 (McKinney 1966).

<sup>153</sup> *Young v. Crescent Dev. Co.*, 240 N.Y. 244, 148 N.E. 510 (1925).

<sup>154</sup> A different result is obtained where a notice of lien is filed after a demand for arbitration. *See In re Askovitz*, 229 App. Div. 258, 241 N.Y.S. 394 (2nd Dep't 1930).

<sup>155</sup> *Manitt Constr. Corp. v. J.S. Plumbing & Heating Corp.*, 50 Misc. 2d 502, 270 N.Y.S.2d 716 (Sup. Ct. Queens County 1966).

<sup>156</sup> *A. Burgart, Inc. v. Foster-Lipkins Corp.*, 63 Misc. 2d 930, 313 N.Y.S.2d 831 (Sup. Ct. Monroe County 1970), *aff'd mem.*, 38 App. Div. 2d 779, 328 N.Y.S.2d 856 (4th Dep't), *aff'd mem.*, 30 N.Y.2d 901, 287 N.E.2d 269, 335 N.Y.S.2d 562 (1972). "Implicit in the right to file a lien is the right to continue it until completion of the arbitration proceedings." *Id.* at 931, 313 N.Y.S.2d at 832. *Accord, In re Ozer*, 36 Misc. 2d 314, 316, 233 N.Y.S.2d 697, 699 (Sup. Ct. Nassau County 1962) (action to foreclose lien is necessary protective measure in addition to arbitration). *Sowalskie v. Cohoes Housing Authority, Inc.*, 69 Misc. 2d 665, 330 N.Y.S.2d 481 (Sup. Ct. Albany County 1968), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 178 (1972), has thus been discredited. Therein, the defendant successfully prevented a plaintiff who brought an action to foreclose a lien from pursuing any remedy by (1) obtaining a stay of foreclosure because their contract had provided for arbitration of all controversies, and (2) obtaining a stay of arbitration on the ground of waiver.

<sup>157</sup> 40 App. Div. 2d 95, 337 N.Y.S.2d 957 (1st Dep't 1972) (per curiam).

<sup>158</sup> *Sowalskie v. Cohoes Housing Authority, Inc.*, 69 Misc. 2d 665, 330 N.Y.S.2d 481 (Sup. Ct. Albany County 1968); *Manitt Constr. Corp. v. J.S. Plumbing & Heating Corp.*, 50 Misc. 2d 502, 270 N.Y.S.2d 716 (Sup. Ct. Queens County 1966). It is not clear from the *Sowalskie* facts that a lien waiver provision was involved. Apparently, the court's underlying rationale was that foreclosure of a lien is not within the purview of Lien Law § 35.

the contract contains a lien waiver provision would defeat the clear purpose of the statute."<sup>159</sup> It also advised that the filing of the lien as a breach of the contract would be a matter for the arbitrator to consider.<sup>160</sup>

The possibility that one party will breach a contract condition is often the very reason for including an arbitration provision. To allow a breach to take the contract out of arbitration would negate the parties' original intent.

#### REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

*RPAPL 735: Service on corporation by delivery of process to Secretary of State, as its agent, supports judgment for rent and possession.*

Rent arrears can be recovered in a summary possession proceeding under article 7 of the Real Property Actions and Proceedings Law. Under RPAPL 735, the court acquires in personam jurisdiction to grant a money judgment if service of the notice and petition is made by personal delivery to the respondent.<sup>161</sup>

In *Leven v. Browne's Business School, Inc.*,<sup>162</sup> a landlord sought a default judgment against a corporate tenant in a summary proceeding for nonpayment of rent. The notice and petition were served by delivery to the Secretary of State pursuant to BCL 306<sup>163</sup> and in satisfaction of the requirements of CPLR 311 for personal service on a corporation.<sup>164</sup> While noting that, in the case of an individual, nothing but delivery to the person himself will suffice,<sup>165</sup> the Nassau County District Court held that, in the case of a corporation, delivery to its agent, including an agent appointed by law, is delivery to the respondent-corporation, authorizing an in personam judgment on de-

<sup>159</sup> 40 App. Div. 2d at 97, 337 N.Y.S.2d at 959.

<sup>160</sup> *Id.*

<sup>161</sup> Originally RPAPL 735 provided that service "shall be made in the same manner as personal service of a summons in an action." Thus, substituted service under the CPLR clearly supported the in personam jurisdiction required for a money judgment in a summary proceeding. See *Callen v. De Koninck*, 23 App. Div. 2d 757, 258 N.Y.S.2d 627 (2d Dep't 1965) (mem.); *Wayside Homes, Inc. v. Upton*, 40 Misc. 2d 1087, 244 N.Y.S.2d 624 (Dist. Ct. Nassau County 1963), discussed in *The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 453 (1964).

<sup>162</sup> 71 Misc. 2d 842, 337 N.Y.S.2d 307 (Dist. Ct. Nassau County 1972).

<sup>163</sup> Under BCL 306, service of process on the Secretary of State as agent of a domestic or authorized foreign corporation is complete upon delivering two copies of such process to him in Albany. The Secretary of State is required to forward one copy by registered mail to the corporation.

<sup>164</sup> CPLR 311(1) provides that personal service on a corporation shall be made by delivering the summons to an officer, director, managing or general agent, cashier, assistant cashier, or "any other agent authorized by appointment or by law to receive service."

<sup>165</sup> 71 Misc. 2d at 843, 339 N.Y.S.2d at 309. But see *1405 Realty Corp. v. Napier*, 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y.C. Civ. Ct. Bronx County 1971), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 184 (1972).