

MECHANICS' AND MATERIALMEN'S LIENS - A DISCUSSION OF CERTAIN DEFENSE ASPECTS

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I. Contractor's lien.

A. Date of last furnishing – obvious errors and not so obvious errors.

The author will use certain abbreviations: *O* for owner, *C* for contractor, *FTS* for first tier subcontractor, *STS* for second tier contractor and so on.

G.S. 44A-12(c) sets forth the contents of a claim of lien to be filed. The statute states that all claims of lien must be filed using a form *substantially* as that set out in G.S. 44A-12(c). G.S. 44A-12(c)(5) requires the date upon which labor or materials were first furnished by the claimant. This is necessary to determine the priority of a claim of lien under G.S. 44A-10 and G.S. 44A-14(a). G.S. 44A-12(c)(5a) requires including the date of last furnishing of labor or materials. This date is necessary to determine (1) whether a claim of lien is filed within the 120 day period in G.S. 44A-12(b) and (2) whether the action of lien enforcement is commenced within the 180 day period in G.S. 44A-13(a). Both the 120 and 180 day periods are computed from the date of last furnishing.

As to the date of *last* furnishing, the cases of *Strickland v. General Building and Masonry Contractors, Inc.*, 22 N.C. App. 729, 207 S.E.2d 399 (1974); *Beach and Adams Builders, Inc. v. Northwestern Bank*, 28 N.C. App. 80, 220 S.E.2d 414 (1975); and *Brown's Roofing and Remodeling v. Middleton*, 86 N.C. App. 63, 356 S.E.2d 386 (1987) are noteworthy.

In each of these cases, the claim of lien contained the wrong date of last furnishing. In *Strickland* and *Brown's Roofing*, the erroneous claim of lien was filed after the defendants acquired their interests in the real property. In fact, in those two cases, the only owner involved was having the improvement built. In *Beach*, the erroneous claim of lien was filed after the owner acquired its interest but before a lender acquired its interest. In *Beach*, the claim of lien was filed within 120 days of the erroneous date of last furnishing recited in the claim of lien and within 120 days of the actual date of last furnishing. In *Beach*, an original claim of lien enforcement action was commenced against *O* and a prior lender outside of the 180 day enforcement period computed from the erroneous date of last furnishing set out in the claim of lien. The action was commenced within the 180 day period as computed from the actual date of last furnishing. Therefore, in *Strickland* and *Brown's Roofing*, no actual party was actually misled by the erroneous claim of lien. In *Beach*, the owner was clearly not misled, and while Northwestern Bank acquired its deed of trust after the claim of lien was filed and before a second action was filed which raised for the first time a different (and later) date of last furnishing, there was no discussion that Northwestern Bank was misled. In fact, when Northwestern Bank took its interest and recorded a deed of trust on 11-13-73, this date was considerably beyond the 120 day period computed from either 11-16-72 (the erroneous date of last furnishing) or 12-12-72 (the actual date of last furnishing). The same was true of the 180 day lien enforcement period.

In *Strickland*, *Brown's Roofing* and *Beach*, the claim of lien was invalidated.

Therefore, it can be said that the appellate courts are deciding the cases on the basis of whether a hypothetical purchaser for value or lender for value, searching the title itself or having it done by a title examiner, would have been misled by the claim of lien setting forth an erroneous date of last furnishing where the claim of lien is filed *before* the hypothetical purchaser for value or lender for value relying upon the contents of the claim of lien acquires its interest in the improved real property. There is no requirement that a party to the lien enforcement action must actually be misled. This has been confirmed by the North Carolina Supreme Court in *Canady v. Creech*, 288 N.C. 354, 218 S.E.2d 383 (1975), cited and discussed below, dealing with an erroneous date of first furnishing. Only an obvious clerical or scrivener's error will prevent the claim of lien from being invalidated.

None of the reported cases dealing with the "erroneous date of last furnishing problem" deal with the following and involve an on point holding: (1) On 11-30-06, *C*, having contracted with *O-1*, files a claim of lien which erroneously recites the date of last furnishing as 7-10-06 (when the actual date is 8-10-06) (so, on its face, the claim of lien appears invalid); (2) on 12-1-06, *O-1* sells the property to *O-2* and *O-2* records; and (3) on 12-2-06, *C* cancels his erroneous claim of lien and files a new claim of lien within 120 days from 8-10-06, the actual date

of last furnishing set forth in the new claim of lien, and claims a date of first furnishing prior to the recording of *O-2's* deed. Under the cases, clearly the *first* claim of lien would be invalid. But, under G.S. 44A-12(d), literally, *C* can file the new claim of lien to *O-2's* prejudice. The arguments for *C* being able to do so are (1) the invalidity of *C's* original claim of lien is irrelevant; (2) G.S. 44A-12(d) literally allows *C* to file the substituted claim of lien within the time provided in G.S. 44A-12(b) and (3) *O-2* is always subject to unfiled liens that are filed within the 120 day period set forth in G.S. 44A-12(b), including a substituted claim of lien under G.S. 44A-12(d).

A similar problem can be illustrated as follows: (1) on 4-15-06, *C*, having contracted with *O-1*, files a claim of lien which erroneously recites the date of last furnishing as 1-2-06 (when the actual date is 4-15-06; so, on its face, the claim of lien appears to be valid); (2) when *O-2* purchases the land on 7-10-06 and records the deed, *O-2* assumes that the claim of lien has now expired because the 180 day enforcement period in G.S. 44A-13(a) has run without *C* commencing an action of lien enforcement; (3) on 7-17-06, *C*, pursuant to G.S. 44A-12(d), cancels the original claim of lien and substitutes a new or substitute claim of lien within the 120 day period computed from 4-15-06; and (4) within 180 days from 4-15-06, *C* commences his action to enforce the claim of lien as of a date of first furnishing set forth in the claim of lien which is prior to the recording of *O-2's* deed. For the reasons set forth in the discussion of the first example, arguably, *C* could do this.

In both of the examples, it should be remembered that in *Strickland*, *C* filed a motion in the lien enforcement action to amend his complaint to assert the correct date of last furnishing. *C* did this way outside of the 120 day lien filing period. He made no attempt to cancel one claim of lien and, in a timely manner, substitute a new claim of lien pursuant to G.S. 44A-12(d). The same type of error was made by the lien claimants in *Beach* and *Brown's Roofing*.

In *West Durham Lumber Co. v. Meadows*, __N.C.App.__, __ S.E.2d __ (N.C.Ct.App. No. COA05-1181, f. 9-5-06), *C* did amend his claim of lien in a timely manner under G.S. 44A-12(d). There is no discussion that anyone relied upon a prior erroneous filing.

B. Date of first furnishing – more of the same.

The *Canady* case cited above set the standard. In *Canady*, the erroneous date of *first* furnishing set forth in the claim of lien was an obvious scrivener's error since the date of first furnishing was stated to be 12-4-73, while the claim of lien was filed on 10-8-73 and the actual date of first furnishing was 11-3-72. The court held that the claim of lien was not invalid since it contained an obvious scrivener's error that would not have misled a party relying upon the record title. It is noted that in *Canady*, while *O-2* purchased for value from *O-1*, and *O-1* was the party contracting with *C* (the lien claimant), *O-2* purchased and recorded his deed before *C's* erroneous claim of lien was filed.

The opinion contained an interesting discussion. The Court held that *C's* claim of lien was not fatally defective and was enforceable against *O-2*. The Court also gratuitously stated that the lien could be given effect as of the date of its filing and docketing as against a party relying upon the record.

It would appear that if the error in the date of first furnishing was not an obvious scrivener's error, the lien containing the error could be invalidated. This is not certain, however. For example, if the date of first furnishing was incorrectly set out to be January 17 when, in fact, it was February 3, January 17 would not be an obvious scrivener's error. So, the lien could be invalidated under *Canady* unless the Supreme Court could rule that as to the date of first furnishing, *O-1*, the obligor contracting with *C*, and *O-2*, purchasing and recording before the claim of lien was filed, could not be misled by the erroneous date of first furnishing even when the error is not an obvious scrivener's error. However, in the opinion of the author, that would require changing or distinguishing the *Canady* rule.

In a bankruptcy case, the court construed G.S. 44A-12(c)(5)'s requirement that the claim of lien include the date of first furnishing. In the case, the claim of lien did not specify the exact date of commencement of work. Instead, it indicated the last day of the week during which the claimant commenced his job as the date of first furnishing. The court held that the claim of lien was valid, citing the "substantial compliance" test for the claim of lien's validity and citing the rule of non-prejudicial misstatement. See *In Re the Alexander-Scott Group, Ltd.*, ____ F. Supp. ____ (M.D.N.C. May 1996).

C. Blanket liens.

The problem of the blanket lien filed against, for example, all lots or units in the subdivision, has been discussed extensively in E. Urban, *Real Property Mechanics' Liens, Future Advances and Equity Lines – Including Title Insurance*, Secs. 4-1, et seq. (Thomson & West 1998, Supp. 2005; 2006 Supp. Pending, hereinafter "*Mechanics' Lien Book*"). See *W. H. Dail Plumbing, Inc. v. Roger Baker and Associates*, 64 N.C. App. 682, 308 S.E.2d 452 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 296 (1984), allowing lien appointment in a pre-UCA condo development. Also, see *Dalton Moran Shook, Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994), where the lien apportionment rule in *W. H. Dail Plumbing, Inc.* was reaffirmed, the implication being that, as to all lots, the date of first furnishing and lien priority was considered to be the same. See *Mechanics' Lien Book*, Sec. 4-3. For condominiums created after October 1, 1986, see G.S. 47C-3-117(c), discussed in detail in *Mechanics' Lien Book*, Sec. 4-7.

It applies to claims of lien for work or material furnished before creation of the condominium (as well as to other liens) and allows the unit holder to pay the lien holder the amount of the lien attributable to his unit, which is proportionate to the ratio which that unit owner's common expense liability bears to the common expense liability of all unit owners whose units are subject to the lien. A similar provision was not included in the PCA in Chapter 47F. The reasoning for the omission stated in the North Carolina comment appears faulty, for G.S. 47C-3-117(c) deals with more than common elements.

II. Subcontractor's lien.

A. An overview of the statutory scheme.

The statutes governing a subcontractor's lien on *real property* are G.S. 44A-23 and G.S. 44A-20(d).

To over simplify for the sake of a clear example, consider the following: (1) *O* contracts with *C*; (2) *C* first furnishes on 8-21-06; (3) *C* contracts with *FTS*; (4) *FTS* first furnishes on 8-30-06; (5) *FTS* last furnishes on 8-31-06; (6) *C* last furnishes on 12-31-06; (7) *C* and *FTS* are unpaid; (8) *FTS* gives notice of claim of lien upon funds to *O* pursuant to G.S. 44A-19 to perfect *FTS's* lien on funds granted to *FTS* under G.S. 44A-18(1).

At this moment, *O* is obligated to withhold enough from payment to *C* to cover *FTS's* claim. G.S. 44A-20(a). At this moment, *FTS* can file a claim of lien upon *O's* real property pursuant to G.S. 44A-23, which grants *FTS* a right of subrogation to *C's* lien rights. At any time before *FTS* files his action of lien enforcement, *C* can accept payment, waive his lien, or subordinate his lien and *FTS* will be affected to the extent of his claim. However damaged *FTS's* rights under G.S. 44A-23 may be, if *O* has not held back from *C* enough to cover *FTS's* claim, to the extent *O* no longer owes *C* funds to fully cover *FTS's* claim *O* will be personally liable to *FTS* under G.S. 44A-20(b). To the extent of that personal liability, *FTS* can file a claim of lien against *O's* real property under G.S. 44A-20(d).

B. The statutory scheme in motion – some interesting cases and aspects, including the effect of waiver and subordination by the contractor.

Mace v. Bryant Construction Corp., 48 N.C. App. 297, 269 S.E.2d 191(1980), should be noted.

In this case, (1) *O* (V-2 Top and Jack E. Bryant) contracted with *C* (Bryant Con. Corp) and *C* contracted with *FTS* (Mace); (2) on 4-11-73, *FTS* began furnishing labor and materials and continued to do so "through the month of June 1974 and thereafter"; (3) on 4-17-73 *C* waived its right to file a claim of lien; (4) on 8-26-74, *FTS* filed a notice of claim of lien in the clerk's office showing that *FTS* was owed \$20,213.99; (5) on 10-4-74, the notice of claim of lien was served on *O*; (6) on 12-30-74, *FTS* commenced an action against *C* and *O* to recover and enforce a lien; (7) on 7-16-75, *O* conveyed the real property to GAP-GA.; (8) on 4-23-76, GAP-GA conveyed the real property to MOR Prop.; (9) the defendants answered by 1-13-77; (10) on 5-2-77, MOR Prop. conveyed to InterMont. (Subsequently, there was a host of procedural maneuverings including argument over a lien escrow LTIC was holding.) *FTS* appealed an adverse summary judgment. *C's* 4-17-73 waiver of liens precluded *FTS's* right to a lien under G.S. 44A-23. As a matter of fact, a waiver (in compliance with G.S. 44A-12(f)'s prohibition against "no lien contracts") or subordination by *C* at any time before *FTS* commences his action of lien enforcement affects *FTS's* lien rights to the same extent *C's* rights are affected. See G.S. 44A-23.

However, the Court of Appeals pointed out that *C's* waiver of the right to a lien on the real property could not affect *FTS's* right to a lien upon funds under G.S. 44A-18(1) or *FTS's* right to a lien upon real property under G.S.

44A-20(d), G.S. 44A-20(d) allowing *FTS* to obtain a lien upon real property to the extent *O* did not hold back funds under G.S. 44A-20(a) and incurred personal liability under G.S. 44A-20(b).

The Court of Appeals found that there were no facts showing that on 10-4-74, the date *O* received the notice of claim of lien on funds, *O* owed *C* anything and so, there was no lien on funds for *FTS* and accordingly no lien on real property under G.S. 44A-20(d) since a G.S. 44A-20(d) lien is dependent upon a valid lien on funds which *O* disregards and creates personal liability on *O*'s part.

Another case touching on these points is *Con Co, Inc. v. Wilson Acres Apts. Ltd.*, 56 N.C. App. 661, des. rev. den., 306 N.C. 382, 294 S.E.2d 206 (1982).

The order of facts were: (1) *C* (McGowan) contracted to build an apartment for *O* (Wilson Acres) (*O*'s contract with *C* contained a "no lien provision" wherein *C* agreed not to file a lien against *O*'s real property); (2) on 2-5-79, *FTS* (Con Co) contracted with *C*; (3) on 8-31-79, *FTS* last furnished labor or materials; (4) on 11-27-79, *FTS* filed against *O*'s real property what the Court called a "notice of claim of lien by a contractor and a claim of lien by a first tier subcontractor" and on that date, *FTS* filed its action to enforce those liens; (5) apparently, *FTS* joined *C*, *O* and *M* (Kennedy Mortgage), the construction lender; (6) on 12-30-79, *O* was served with a copy of the summons and complaint with the liens attached (this was the first time *O* received a copy of the liens); (7) on 2-11-80, *M* was served with a copy of the summons and complaint (this was the first time *M* ever saw the liens); (8) *M* disbursed to *O* a sum sufficient to pay *FTS*'s claim but *O* paid *C*.

The Court held that *C*'s "no lien provision" precluded *FTS*'s lien rights against *O*'s real property under G.S. 44-23 because under G.S. 44A-23, *FTS* would be claiming a lien upon *O*'s real property pursuant to *C*'s right to do so and *C* had given up *C*'s rights to have a lien pursuant to the "no lien provision." The Court cited *Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191(1980). Any time *C* waives or subordinates *C*'s lien prior to *FTS* commencing his action to enforce his lien rights against *O*'s real property pursuant to G.S. 44A-23, *FTS* is affected to the extent *C* is. (It is noted that G.S. 44A-12(f) today prohibits such "no lien provisions." G.S. 44A-12(f) does not prohibit or affect any type of lien subordination. See E. Urban, *North Carolina Real Property Mechanics' Liens, Future Advances and Equity Lines – Including Title Insurance*, Sec. 9-1 (1998, Supp. 2006).)

The Court also held that *C*'s "no lien provision" had no affect on (1) *FTS*'s right to a lien upon funds in *O*'s hands under G.S. 44A-18; (2) *O*'s duty under G.S. 44A-20(a) to hold funds sufficient to cover *FTS*'s claim of lien upon funds; (3) *O*'s personal obligation to *FTS* under G.S. 44A-20(b) to the extent *O* violated his duty under G.S. 44A-20(a); and (4) *FTS*'s right to a claim of lien under G.S. 44A-20(d) upon *O*'s real property to the extent of *O*'s personal obligation to *FTS* under G.S. 44A-20(b).

Very interestingly, the Court of Appeals held that the fact that *FTS* did not give actual notice of the claim (to *O*) until after *FTS* filed the claim of lien did not void the claim of lien (available under G.S. 44A-20(d), but not G.S. 44A-23).

The court held that *M*, the construction lender, was not an "owner" as defined in G.S. 44A-7(3) and therefore, was not an "obligor" under G.S. 44A-17(3) and so, *M* was not personally obligated to *FTS* for *M*'s payment after *M* received notice of *FTS*'s lien rights.

Another interesting case is *Watson Electrical Constr. Co v. Summit Cos.*, 160 N.C. App. 647, 587 S.E.2d 87(2003).

(1) *O* contracted with *C* to build a center; (2) In 9/99, *C* hired *FTS* to replace the original electrical subcontractor; (3) on 12-1-99, *O* made the final payment to *C* in return for *C*'s waiver of lien rights for furnishings through 11-30-99; (4) on 11-30-99, *FTS*, unpaid, ceased work; (5) on 1-19-2000, *FTS* filed a "Claim of Lien and Lien of Funds" for \$100,932.10; (6) on 1-31-2000, *FTS* commenced its action to enforce its lien; (7) in 2/2000, *O* declared *C* in default, fired *C* and contracted with *C-2* to complete the job; (8) on 3-1-2000, *C* filed a claim of lien for \$495,617.60; (9) on 8-8-2000, *C* filed a complaint against *O*; (10) arbitration concluded that *O* owed *C* \$294,000, *C* owed *O* \$575,000, *C* should pay *O* \$281,000, *C*'s claim of lien should be dismissed with prejudice and that the award was fully determinative; (11) after the arbitration award in the *O* and *C* litigation, the trial court in *FTS*'s litigation entered summary judgment for *O*; (12) *FTS* appealed.

The Court of Appeals upheld the trial court's dismissal of *FTS*'s breach of contract action against *O* since there was no evidence of a contract or *O*'s ratification of a contract. The Court of Appeals also upheld the trial court's grant of summary judgment against *FTS* regarding *FTS*'s claim of lien against the owner's real property under

G.S. 44A-23 since such lien rights under G.S. 44A-23 are based upon subrogation to *C*'s lien rights and *C* was not entitled to a lien as noted above. The Court of Appeals also disposed of *FTS*'s lien upon funds since the offset mentioned above negated that right. (The court also noted and discussed the difference between a suretyship contract which must be in writing pursuant to G.S. 22-1 and an agreement within the "main purpose rule" exception which does not require a writing to be enforceable.)

C. The statutory scheme in motion – amount secured.

In *Carolina Builder Serv. v. Boardwalk, LLC*, 2006 CoA 05-1030 (7-18-06), in the following order, the facts were: (1) prior to 9/01, *O* (Boardwalk) contracted with *C* (Miller) and *C* contracted with *FTS* (Carolina Building); (2) in 2/02, *C* removed its personnel and equipment, well before completion; (3) on 2-22-02, *FTS* gave *O* notice of lien on funds; (4) on 2-25-02, *FTS* filed a "subrogation lien" on *O*'s real property; (5) in 4/02, *FTS* filed suit against *O* and *C*; (6) in 6/02, *FTS* obtained a default judgment against *C*; (7) on 6-28-04, *O* filed a cross claim against *C* alleging *C*'s breach of contract, and failure to pay parties; (8) on 1-26-05, *O* obtained entry of default against *C* and *O* sought a default judgment to which *FTS* intervened and objected; (9) the trial court entered a default judgment for *O* against *C* for \$172,265.63 (difference between the contract price and the excess cost to complete the project); (10) because of this, the trial court entered a summary judgment for *O* against *FTS* in the lien enforcement action between *O* and *FTS*. The Court said that in view of *C*'s admissions of *O*'s cross claim allegations by reason of the default judgment, *FTS* is not entitled to a lien on funds since *O* did not owe *C* funds and *FTS* is not entitled to a lien on *O*'s real property.

The Court of Appeals held that *FTS* could not intervene in *O*'s cross claim against *C* to in effect litigate on behalf of *C*, citing authority. *FTS* had no standing to appeal the judgment in favor of *O* against *C*.

The Court gets into an entertaining discussion of *funds* owed under G.S. 44A-18(1) (lien on funds) and *debts* owing under G.S. 44A-8 and G.S. 44A-23. When dealing with a lien on *funds* pursuant to G.S. 44A-18, the critical time for determining whether an amount is owed is when the obligor receives the notice of lien—in other words, the *funds* which are owed *C* at the time *O* receives the notice. The Court reasons that *O*'s default judgment against *C* should *not* have a bearing on the lien on funds since it occurred after *O* had notice of *FTS*'s lien. According to the Court, both parties agreed that when *O* received *FTS*'s notice of claim of lien on funds, *O* did not owe *C* any sum of money, therefore, there could be no lien upon funds and *O*, making no payments to *C* after receipt of *FTS*'s notice, incurred no personal liability to *FTS* under G.S. 44A-20(b). The Court reached the right result in denying *FTS* a lien upon funds for a very good, statutory reason: at the time *O* received *FTS*'s notice (and thereafter) *O* owed *C* nothing. However, to add confusing language stating that *O*'s default judgment against *C* rendered after *O* received *FTS*'s notice should have no bearing on a lien upon funds is not correct. The default judgment does not exist in a vacuum. It is a judgment stating—or at least meaning—that *O* owed *C* nothing at the time *O* received *FTS*'s notice. In other words, the default judgment did not mean that, maybe *O* owed *C* enough to pay *FTS* at the time *O* received *FTS*'s notice but then thereafter, *O* paid *C* in full. All the opinion clearly says is that in February 2002 *C* walked off the job "well before completion of the project." Then, on 2-22-02, *FTS* gave *O* the notice.

The Court also found that *O*'s default judgment against *C* referred to above cut off any rights to a lien on the land under G.S. 44A-23 that *FTS* might have had.

It seems that if *O*'s cross claim against *C* was not also a cross claim against *FTS* with *FTS* being a party defendant to the cross claim, while *O*'s default judgment against *C* would be binding as between *O* and *C*, the default judgment would not be binding upon *FTS* and *FTS* should be able to show, in his lien enforcement action that, notwithstanding *C*'s chronic failure to answer, resulting in a default judgment, *O* actually owed *C* money which would support a lien upon funds under G.S. 44A-18 and a lien upon real property pursuant to G.S. 44A-23—if, in fact, *O* did owe *C* money at the critical time.

In *O & M Industries v. Smith Engineering Co.*, 165 N.C. App. 705, 601 S.E.2d 330, reversed, 360 N.C. 263, 624 S.E.2d 345 (2006), the Supreme Court set forth the following facts: (1) on 12-14-00, *O* and *C* entered into a contract to improve *O*'s real property; (2) sometime thereafter, *C* contracted with *FTS*; (3) during June 2001, *FTS* completed performance; (4) on 6-8-01, *FTS* gave notice of claim of lien upon funds in the amount of \$113,655 to *O* pursuant to G.S. 44A-18 and G.S. 44A-19; (5) on 7-6-01, *O* paid *C* \$164,831.25; (6) on 8-1-01, *O* paid *C* \$150,000 (bringing the total paid to *C* to \$314,831.25); (7) at that time, it was estimated that it was going to cost *O* somewhere between \$25,000 and \$415,000 to complete the project; (8) on or about 8-22-01, *C* filed bankruptcy; (9) on 8-23-01, *FTS* gave *O* another notice of claim of lien on funds for \$127,392.12 (this turned out

to be irrelevant to the Court's decision); (10) *FTS* sued *O* and *C*; (11) *FTS* obtained a default judgment against *C* and a judgment against *O* for \$113,655.

The Supreme Court, citing G.S. 44A-18(1) (grant of lien upon funds to *FTS*); G.S. 44A-18(5) (the amount secured by the lien upon funds); G.S. 44A-18(6) (perfecting a lien upon funds); G.S. 44A-20(a) (*O*'s duty as a G.S. 44A-17(3) "obligor" to retain funds up to the amount of *FTS*'s lien) and G.S. 44A-20(b) (*O*'s personal liability to *FTS* for *O*'s wrongful payments to *C*), held for *FTS* reversing and remanding the Court of Appeal's decision. The Court noted that, significantly, G.S. 44A-20 makes no provision for set off against the retained funds in the event the cost for completing the project exceeds the amount of the retained funds. The Court noted that *O* retained \$243,713, an amount exceeding *FTS*'s lien upon funds for \$113,655. The Court said that "the mere retention" of funds equal to or in excess of the amount of the lien was not enough for *O* to avoid personal liability. *O*'s option to set off the costs of completion against the retained amount would not negate *O*'s personal liability to *FTS* under G.S. 44A-20(b). The critical time for determining whether an amount is owed by *O* to *C* for purposes of G.S. 44A-18(1) is when *O* receives the notice of claim of lien. G.S. 44A-18(6). When *O* made payments to *C* after receipt of *FTS*'s notice, *O* acknowledged it owed *C* money.

This correct decision would have been clearer if the Court had said that if *O* retained \$243,713 from *C*, it could pay *C* \$314,831.25 after *O* received *FTS*'s notice as long as the \$243,713 was not subject to a set off which would reduce the amount owed to *C* below \$113,655. It is misleading for the Court to use sloppy language saying that mere retention of funds equal to or in excess of the amount of the lien is not sufficient to avoid personal liability. Such a retention *is* sufficient under G.S. 44A-20(a) and logically under G.S. 44A-20(b) but not if the retention is subject to an offset wiping out the amount otherwise retained for *C*.

The Court cited and distinguished *Lewis-Brady Builders Supply, Inc. v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199 (1977) on the basis that in *Lewis-Brady Builders*, on the date *O* received *FTS*'s notice, *O* owed *FTS* nothing due to *O* ceasing performance, with *O* subsequently contracting with *X* to complete the house, total payments to *C* and *X* exceeding the contract price with *C*. *O* made no further payments to *C* after *O* received *FTS*'s notice. It is significant to note that after *O* received *FTS*'s notice, *O* entered into the contract with *X* to finish the house.

In order for the rule of the *Lewis-Brady Builders* case to apply, the contract with *X* need not be entered into before *O* receives *FTS*'s notice. For other cases, see *Watson Electrical v. Sumit Cos.*, 160 N.C. App. 647, 587 S.E.2d 2003 (*O* made no post notice payments) and *Martin Architectural Product, Inc. v. Meridian Con. Co.*, 155 N.C. App. 176, 574 S.E. 2d 189 (2002). The issue of the amount secured by a lien upon funds is discussed in *Mechanics' Lien Book*, Sec. 15-2.

In the late breaking news, on remand, the Court of Appeals in *O & M Industries* dismissed the lien claimant's theories of estoppel and novation. See 2006 WL 2346390 (8-15-06).

D. Cases dealing with lien perfection procedural problems.

See *Cameron & Barkley Co. v. The American Ins. Co.*, 112 N.C. App. 36, 434 S.E.2d 632 (1993).

The reported sequence of events was as follows: (1) In 6-87, *O* (Marriott) contracted with *C* (Blaine Hayes) to construct a motel; (2) *C* contracted electrical work to *FTS* (Roper Electric); (3) *FTS* ordered supplies from *STS* (Cameron & Barkley); (4) *STS* first furnished on 9-28-87 and last furnished on 1-5-88; (5) *FTS* abandoned work and filed bankruptcy on 2-24-88; (6) on 2-26-88, *STS* filed a "Claim of Lien and Notice of Claim of Lien" against *O*'s real property and served a copy on *O*, *C*, and *FTS*; (7) *STS*'s lien document named *STS* as the person claiming the lien, named *O* as the owner, named *FTS* as "the general contractor or subcontractor against or through whom subrogation is claimed," described *O*'s property, stated that *STS* contracted with *FTS* to provide electrical equipment, again stated that *STS* contracted with *FTS*, included the dates of first and last furnishing by *STS* (see above), again described what *STS* furnished, set forth the amount claimed, and dated the lien document (however, nowhere in the lien document did *STS* mention *C* and *C*'s position as contractor); (8) on 11-1-89, *C* filed a surety bond; and (9) the trial court held that *STS*'s lien on the land was fatally defective due to failure to comply with G.S. 44A-23. The Court of Appeals agreed. The Court of Appeals held that *STS*'s lien on funds failed because *C* did not owe *FTS* funds at the time notice was given. (This case was decided after *Electric Supply Co. v. Swain*, 328 N.C. 651, 403 S.E.2d 291, which held that when *C* owes *FTS* nothing, but *O* owes *C* funds, *STS* cannot get a lien on funds but *STS*, if he otherwise perfects his lien on the land, can establish a lien on the land. The case is simply totally incorrect as to lien rights against the land. See *Mechanics' Lien Book*, Sec. 21-3.)

The Court construed G.S. 44A-23 as it existed before its 1991 amendment which applies only to actions filed on or after 7-22-92. (The differences in the statute would actually make no difference in the case.) The first line of G.S. 44A-23 requires, "notice as provided by this Article." That means a notice of claim of lien on funds under G.S. 44A-19. Among other things, G.S. 44A-19(a) requires the notice to name the person (*FTS*), with whom the claimant *STS* contracted and to name each person against or through whom subrogation is claimed (*FTS* and *O*). The form in G.S. 44A-19(b) requires the name of the general contractor *C*. Nowhere in its lien document (which was obviously an ill-fated attempt to combine the lien upon funds under G.S. 44A-19 with a claim of lien upon the real property under G.S. 44A-23) was *C* named. The court stated G.S. 44A-19(a)(4) expressly required this.

The court stated that, while *O* received *STS's* document,

We nonetheless hold more is required in a claim of lien affecting title to real estate which is intended to place "the world" on notice of the claim.

Such notice must clearly delineate the tiered relationships in which the claimant is involved. This is so the owner may understand how the lien has arisen, and also so a title-searcher may ascertain which entities are potential claimants and how each is connected to the real estate. We hold the trial court correctly construed the statutory scheme, and that it was necessary for plaintiff to give notice in accordance with the form specified in G.S. 44A-19.

The court goes on to state, or at least to imply, that for a subrogation claim of lien against *O's* real property pursuant to G.S. 44A-23, G.S. 44A-19 governs content while G.S. 44A-12 governs filing. Yet, the language of the opinion is hazy, blurring the distinction between the notice of claim of lien upon funds pursuant to G.S. 44A-18 and G.S. 44A-19 and a claim of lien against real property pursuant to G.S. 44A-23. Note how the court, in the passage quoted above, seems to say the hypothetical "world" looking at the filing by *STS* must see in that filing mention of *C's* name. Yet, under the statutory scheme existing then, *STS* would have been well within *STS's* rights *not* to combine a G.S. 44A-19 notice and a G.S. 44A-23 claim of lien. *STS* could have been well within its rights to give the G.S. 44A-19 "notice of claim of lien" on funds pursuant to G.S. 44A-18. That would mean *STS* giving the notice to *O* and *C*. If *O* owed *C* money, *O* would be subject to a lien on funds. That notice is the notice *STS* must give as required by the first lines of G.S. 44A-23. Next, or simultaneously, *STS* would have been well within *STS's* rights to file a claim of lien upon *O's* real property pursuant to a right of subrogation to *C's* right to do so which claim of lien *should*, but is not expressly required by G.S. 44A-23 to, include the fact that *STS* is subrogating to *C's* rights under G.S. 44A-23. What would the court have decided had *STS* filed and served the notice (naming *C*) under G.S. 44A-19 and G.S. 44A-18 and filed a claim of lien under G.S. 44A-23 not naming *C*, but attaching and incorporating by reference the G.S. 44A-19 and G.S. 44A-18 notice? The case could have been decided differently. And, at the time, G.S. 44A-23 did not require the notice of claim of lien upon funds to be attached to a G.S. 44A-23 lien upon real property. G.S. 44A-20(d)'s lien must have attached a copy of the notice of claim of lien upon funds—this has been true since 1985.

Under the current version of G.S. 44A-23, it is anticipated that a claim of lien on real property will have attached to it the notice of claim of line upon funds.

See *Universal Mechanical, Inc. v. Hunt*, 114 N.C. App. 484, 442 S.E.2d 130 (1994). The facts recited in the opinion: (1) *O* (Marriott) contracted with *C* (Dunn), *C* contracted with *FTS* (Hunt/Interstate) and *FTS* contracted with *STS* (Universal); (2) *STS* furnished materials from 10-15-89 to 6-18-90 and was owed \$47,663.69; (3) on 7-10-90, *STS* filed a "Claim of Lien" with the clerk; (4) on 9-25-90, *STS* filed a complaint against *FTS* and *O* claiming a lien on the real property; (5) on 4-2-91, *STS* amended its complaint to add *C* as a defendant.

Once again, the claimant, *STS*, attempted to combine a notice of claim of lien upon funds under G.S. 44A-18 and G.S. 44A-19 and a claim of lien under G.S. 44A-23. The Court of Appeals stated that *STS* should have filed and served on all parties a notice of claim of lien in compliance with G.S. 44A-19. The Court disagreed with *STS's* contention that (1) the claim of lien or (2) its complaint and notice to amend the complaint read together with the claim of lien amounted to a notice of claim of lien, since under neither alternative was all of the G.S. 44A-19 information included. The claim of lien did not name *C*. The collection of documents did not amount to a notice of claim of lien under G.S. 44A-19 since the Court interpreted *Contract Steel Sales, Inc.* as meaning that the notice of claim of lien must be contained in a single document and not in a claim of lien and enforcement complaint. Note that *Cameron & Barkley* dealt with one document called a "Claim of Lien and Notice of Claim of Lien."

In *Contract Steel Sales, Inc. v. Freedom Construction Co.*, 321 N.C. 215, 362 S.E.2d 547 (2006), the facts were: (1) on 7-20-83, FTS (Contract Steel) contracted with C (Freedom); (2) FTS furnished materials; (3) on 12-6-83, FTS's president wrote to O (Dupont) claiming a lien on funds O owed C (the letter touched upon all of the information required by the statutory form in G.S. 44A-19); (4) on 3-5-84, O paid C fully and C released C's liens and claims against O; (5) on 4-18-84, FTS sued C for breach of contract and O for lien rights (although the opinion is unclear as to what the exact facts were).

The court held that the letter contained all the requisite information required by G.S. 44A-19. The court also held that the materials furnished but not incorporated into the improvement and not present at the site still would support lien rights.

See *Sherrill Lumber Ind. V. Estes*, 2003 COA 02-993. This is another case involving a claim by a FTS. Summary judgment was inappropriate because so many facts were in dispute. The court discussed service of a notice of lien upon funds under G.S. 44A-19(d) and noted that while G.S. 44A-19(b) allows for compliance by using a form "substantially" like the statutory form, G.S. 44A-19(d) does not create such a "substantially" standard in service. The court discussed G.S. 1A-1, Rule 4(j)(2) to which G.S. 44A-19(d) refers.

E. Dates of first and last furnishing.

As discussed in *Mechanics' Lien Book*, Sec. 22-5(b), it is quite arguable that due to the wording of G.S. 44A-23, FTS, STS or TTS can use the contractor's date of last furnishing from which to compute the 120 day claim of lien filing period in G.S. 44A-12(b). See *Electrical Supply Co. of Durham, Inc. v. Swain Electrical*, 97 N.C. App. 479, 389 S.E.2d 128 (1990), aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991) at n.1. Likewise, C's date of last furnishing could govern the lien enforcement period under G.S. 44A-13(a). See *Mechanics' Lien Book*, Sec. 23-3.

As noted above, to the extent O ignores a notice of claim of lien upon funds and pays C, the subcontractor would not have G.S. 44A-23 lien rights but he would have G.S. 44A-20(d) lien rights. There are conflicting views as to whether, given the way G.S. 44A-20(d) is worded, a subcontractor's 120 day and 180 day periods can be computed from the contractor's date of last furnishing. *Mechanics' Lien Book*, Sec. 27-4 (claim of lien) and Sec. 28-3 (action to enforce). The lien right under G.S. 44A-20(d) is not truly a subrogation claim of lien at the time it is filed. However, the G.S. 44A-20(d) claim of lien arises because a lien on funds owed by O to C, which is a subrogation right, is ignored, creating O's personal liability to the subcontractor. That would not seem to make a G.S. 44A-20(d) lien a subrogation lien as is a lien under G.S. 44A-23. Therefore, no one knows for sure whose date of last furnishing a subcontractor can use, particularly under G.S. 44A-20(d). G.S. 44A-20(d) states that the lien shall be entitled to the same priority, filing requirements and periods of limitation applicable to the contractor. Obviously, this loaded language is amenable to two interpretations: (1) the subcontractor can use C's dates or (2) the same rules applicable to C apply to the subcontractor, but the subcontractor must use his own dates.

If a subcontractor uses and is entitled to use C's date of last furnishing under G.S. 44A-23 and G.S. 44A-20(d), and the subcontractor makes an error in selecting the date that is not an obvious scrivener's error (as discussed in I above), the subcontractor could be in deep trouble.