Insights: Alerts

Georgia Governor Signs Bill To Legislatively Overrule Court Decision Construing Lien and Bond Waivers to Waive All Rights - But Bill Is Not Effective Until 2021

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On August 5, 2020, the Governor of Georgia signed Senate Bill 315 to legislatively overrule a September 2019 decision by the Georgia Court of Appeals on the effect of a lien claimant's failure to withdraw a lien waiver using the statutory process for invalidating waivers of lien or bond. In that case, *ALA Construction Services, LLC v. Controlled Access, Inc.*,[1] the Georgia Court of Appeals had ruled that statutory lien and bond waivers can also waive claims for breach of contract and leave the claimant with no rights to recover amounts that were rightfully owed to it. This new law will become effective on January 1, 2021. Thus, any party that submits lien or bond waivers on Georgia construction projects during 2020 must be exceptionally careful to avoid making a technical mistake that could waive all of its rights to payment, including its contractual rights.

In *ALA Construction Services*, a subcontractor provided interim lien waiver forms pursuant to Official Code of Georgia Annotated ("O.C.G.A.") § 44-14-366(c) to a general contractor during the normal course of a project. The general contractor then failed to pay the subcontractor within 60 days, and the subcontractor failed to file an Affidavit of Nonpayment to invalidate the previously submitted lien waivers within this 60-day period, as is required by O.C.G.A. § 44-14-366(f).[2] The subcontractor later filed a breach of contract claim against the general contractor to recover the money owed to it.[3]

The trial court awarded the subcontractor the money owed to it, but the Georgia Court of Appeals reversed. Surprisingly, the Court of Appeals held that the subcontractor not only waived its *lien* rights by failing to timely file an Affidavit of Nonpayment under O.C.G.A. § 44-14-366, but also waived its *contractual* rights to payment, holding that the subcontractor was "conclusively deemed" to have been paid in full for its work on the project through the date of the lien waiver.[4]

To support its decision, the Court of Appeals cited the language in the "Interim Waiver and Release Upon Payment" form currently prescribed by O.C.G.A.§ 44-14-366, which provides:

> When you execute and submit this document, *you shall be conclusively deemed to have been paid in full the amount stated above, even if you have not actually received such payment, 60 days after the date stated* above unless you filed either an affidavit of nonpayment or a claim of lien prior to the expiration of such 60 day period.[5]

The Court of Appeals also noted that O.C.G.A. § 44-14-366(f) provides that when a lien claimant executes a waiver "it shall be binding against the claimant for *all purposes*" and "such amounts *shall conclusively be*

deemed paid in full." [6] It interpreted the phrase "for all purposes" to literally mean all purposes, including the waiver of a party's contractual rights and not just its lien rights.[7]

Critics of this decision argue that the phrase "for all purposes" in O.C.G.A. § 44-14-366(f) should be interpreted within the context of Title 44 of the Georgia Code, which governs property rights. For example, the specific statute in question is entitled "Waiver and Release of Lien and Bond Rights." [8] Furthermore, the plain language of O.C.G.A. § 44-14-366 indicates that waivers and releases pursuant to that statute should be limited only to the rights that are at issue in that statute, which are lien and bond rights, not contractual rights.[9] Contractual rights are addressed in Title 13 of the Georgia Code, which governs contracts, not in Title 44 of the Georgia Code, which governs property and lien rights.

Soon after *ALA Construction Services* was reported, the Georgia Senate introduced Senate Bill 315 to legislatively overrule the decision. The Bill makes three key changes. First, it amends the Georgia Code to provide that waivers of lien and bond rights do not affect any other rights or remedies, and specifies new forms for interim and final waivers of lien and bond rights pursuant to O.C.G.A. § 44-14-366(c) and (d).[10] Next, the Bill extends the period that a claimant has to file an Affidavit of Nonpayment from 60 days to 90 days, and specifies a new form for Affidavits of Nonpayment pursuant to O.C.G.A. § 44-14-366(f).[11] Finally, the Bill makes clear that the only way to withdraw a waiver and release is to file an Affidavit of Nonpayment.[12]

After passing through both the Georgia Senate and House, the Bill went to the Governor for signature on June 29, 2020 and was signed by the Governor on August 5, 2020.[13] The new law will be effective on January 1, 2021, which means that:

1. Until January 1, 2021, the lien waiver forms currently prescribed by O.C.G.A. § 44-14-366(c) and (d) must be used for lien waivers. Those seeking payment for their services must be exceptionally diligent in tracking receipt of payment and, if they have not been paid in full within 60 days of submission of a waiver, the lien claimant must file Affidavits of Nonpayment with the court as prescribed by O.C.G.A. § 44-14-366(f) before the expiration of the 60-day period. If they fail to do so, pursuant to *ALA Construction Services*, they may be deemed to have waived all rights for payment, including not only their lien and bond rights, but also their contractual rights.
2. After January 1, 2021, the new lien and bond waiver forms prescribed by the revised version of O.C.G.A. § 44-14-366(c) and (d) and the new Affidavit of Nonpayment form prescribed by O.C.G.A. § 44-14-366(f) must be used. Under those forms and the revised statute, the time for filing Affidavits of Nonpayment under O.C.G.A. § 44-14-366(f) will increase from 60 to 90 days, and the failure to timely file an Affidavit of Nonpayment will waive the claimant's lien or bond rights, but will not waive the claimant's contractual or other rights.

Notably, the lien waivers at issue in *ALA Construction Services* were for relatively small amounts: $4916.76 and $8260.53. The holding of the Georgia Court of Appeals, however, would apply even if millions of dollars were owed for properly performed and completed work, meaning that a contractor, subcontractor, or supplier could lose all rights to recovery. Thus, in addition to the many other challenges facing them in 2020, Georgia lien claimants must diligently track their submission of lien waivers and their receipt of payments for the remainder of calendar year 2020. They must also be prepared to use the newly revised lien and bond waiver forms and Affidavit of Nonpayment Forms prescribed by O.C.G.A. § 44-14-366(c), (d), and (f) starting on January 1, 2021.

Footnotes

1. *ALA Constr. Servs., LLC v. Controlled Access, Inc.*, 351 Ga. App. 841, 833 S.E.2d 570 (2019), *cert. denied* (2020).
2. *Id.*, 351 Ga. App. at 843, 833 S.E.2d at 571.
3. *Id.*
4. *Id.*, 351 Ga. App. at 844, 833 S.E.2d at 572.
5. *Id.*, 351 Ga. App. at 842, 833 S.E.2d at 571 (quoting O.C.G.A. § 44-14-366(c)) (emphasis in original).
6. *Id.*, 351 Ga. App. at 842-43, 833 S.E.2d at 571 (quoting O.C.G.A. § 44-14-366(f)) (emphasis in original).
7. *Id.*, 351 Ga. App. at 843-44, 833 S.E.2d at 572.
8. O.C.G.A. § 44-14-366.
9. O.C.G.A. § 44-14-366(f).
10. S.B. 315, 2019-2020 Gen. Assemb., Reg. Sess. (Ga. 2020), http://www.legis.ga.gov/Legislation/en-US/display/20192020/SB/315.
11. *Id.*
12. *Id.*
13. *Id.*

Related People



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