

THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 06

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barbri

Review

New York State Bar Review

Outlines:

PERSONAL PROPERTY

REAL PROPERTY

CONSTITUTIONAL LAW

NEW YORK TRUSTS

NEW YORK WILLS

LIENS

A. COMMON LAW LIEN

A common law lien is the right to possess and retain personal property which has been improved or enhanced in value by the person who claims the lien until the person claiming the property pays in full all charges attaching to the property for such improvement. Every lien requires that (i) a debt has arisen from services performed on the thing, (ii) title to the thing is in the debtor, and (iii) possession of the thing is in the creditor. A lien is a security device to enforce payment.

B. CLASSES OF LIENS

Common law liens are divided into two classes: *general* and *special*.

1. General Lien

A general lien is the right to retain *all of the property* of another person as security for a general balance due from such other person. A factor, a del credere agent, and a universal agent have a general lien on the property of their principal in their possession.

2. Special Lien

A special lien is the right to retain *specific property* of another to secure some particular claim or charge which has attached to the property retained. A common or private carrier, a warehouser or ordinary bailee, a trustee, an attorney at law, an arbitrator, and a general or special agent all have a special, not a general, lien on the property of others in their possession. [Sheinman and Salita, Inc. v. Paraskevas, 22 Misc. 2d 436 (1959)].

3. Consequence of Classification

The question as to whether a lien is general or special becomes important only when the lien holder releases a portion of the chattels held as security. *Note:* Where doubt exists, a lien is construed as special rather than general.

a. General Lien

If a lien holder has a general lien and releases part of the chattels, he releases *no portion of his lien* and he may hold the unreleased portion until the entire lien charge is paid.

b. Special Lien

If the lien is a special lien and the lien holder releases a portion of the chattels held, he thereby waives his lien *to the extent of the chattels released*.

C. PARTICULAR PROBLEMS REGARDING LIENS

1. Lien Given by One Not the Owner

A lien is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner or by someone authorized by him.

Example: A person in possession of a truck with the owner's permission cannot create a lien for repairs. The fact that the repairs are of benefit to the owner is immaterial.

2. Innkeepers and Common Carriers

The lien of an innkeeper and a common carrier is recognized by the common law on the theory that common carriers and innkeepers, being compelled by law to indiscriminately accept all persons who presented themselves, must be protected and secured in their just charges for the services rendered.

a. Innkeepers

The lien of an innkeeper is peculiar in nature, in that it attaches to any property brought into the inn by the guest, although it is not essential that the guest should, in all cases, be the owner of such property. The property may be that of a third person, or even stolen goods, and if the innkeeper has no knowledge that such property is not rightfully in the possession of the guest, his lien will attach generally to all such property to the extent of a reasonable charge for the services rendered.

Example: The samples of a traveling sales representative are subject to a lien for an innkeeper's charges and may be sold, after proper notice, to satisfy such charges, even though the innkeeper has full knowledge that they are owned by the guest's employer.

b. Common Carriers

Although a common carrier is generally required, like an innkeeper, to accept all goods delivered, unlike the innkeeper, it has no lien on the goods which it receives from persons other than the owner. The reason for this rule is that the carrier may demand transportation charges in advance, or in the alternative, proof from the shipper that he is acting with authority from the owner.

3. Warehouser

At common law the warehouser had no lien on the bailed chattel for the reason that he did not in any manner improve it. Gradually, a lien was extended to the warehouser to secure him for the time and labor expended on the chattel and for his storage charges. The lien is now embodied in U.C.C. section 7-209, and this statute has survived federal and constitutional challenge. [See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)] However, its status under the New York State Constitution is uncertain. (See below.)

4. New York Constitutional Law Problem

In spite of the fact that the Supreme Court upheld the provisions for enforcement of the warehouser's lien [U.C.C. §7-210] in *Flagg Bros., Inc. v. Brooks, supra* (no state action), the New York Constitution has been held to prohibit the ex parte sale of property to satisfy the lien of a garagekeeper. [Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152 (1978)]

And note: Actual notice to a lienor whose interest is subordinate to an artisan's lien is necessary before the sale of the property. [Motor Discount Corp. v. Scappy & Peck Auto Body, Inc., 12 N.Y.2d 227 (1963)]

D. WAIVER OF LIEN

1. By Contract

Although a lien is conferred by law, it may be waived by any contract inconsistent with the existence of the lien. Such contracts usually occur when the artisan agrees to deliver the goods before payment for his services is to be made.

Example: If a person delivers cloth to a tailor to be made into a garment, under an agreement by which the tailor is to be paid for his services 30 days after the completion and delivery of the garment, the tailor has no lien on the goods.

2. By Acceptance of Other Security

Where a lienor accepts security for payment, the security eliminates the common law lien. The acceptance of such security indicates an intention to regard it as a substitute for the lien.

3. Demand for Unlawful Charges

Where the lienor includes in his valid lien amounts in excess of his lawful charges, he indicates that a tender of the lawful amount by the owner will not be accepted. A tender, therefore, is waived; the lienor is placed in default and becomes liable in an action of replevin or trover.

4. Reservation of Lien or Temporary Use by Bailor

The lien is not lost if the lienholder surrenders the goods to the bailor specially reserving his lien or the bailor is permitted to make temporary use of the property. Therefore, a garagekeeper does not lose his lien on automobiles stored in his garage where the owners are permitted to use their cars daily.

In the case of surrender of temporary possession, the lien enjoys priority over the claims of the bailor's subsequent creditors.



New
York
Jurisprudence
2d



LIENS

John A. Gebauer, J.D.

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Scope

This article broadly covers the subject of liens, including their creation, operation, and effect; whether created under common law, principles of equity, or statute; and includes treatment of the termination, waiver, and extinguishment of liens, as charges on specific property as security for the payment of debts, whether dependent upon or independent of possession. Also generally discussed are priorities among competing liens and the enforcement of liens on personal property, including the foreclosure of chattel liens.

Federal Aspects

This article covers generally the priority of liens held by the federal government and the effect of bankruptcy upon existing liens.

Treated Elsewhere

Agents' lien for reimbursement, see N.Y. Jur. 2d, Agency and Independent Contractors §§ 1 et seq.

Aircraft, liens on, see N.Y. Jur. 2d, Aviation and Airports §§ 1 et seq.

Animals, liens on, see N.Y. Jur. 2d, Animals §§ 1 et seq.

Architects' lien, see N.Y. Jur. 2d, Businesses and Occupations §§ 1 et seq.

Attachment, lien created by, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 1 et seq.

Attorneys' lien, see N.Y. Jur. 2d, Attorneys at Law §§ 1 et seq.

Auctioneers' lien, see N.Y. Jur. 2d, Auctions and Auctioneers §§ 1 et seq.

Bailees' lien for work upon watch, clock, or jewelry, and other bailed property, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 1 et seq.

Banks, lien and right of setoff by, see N.Y. Jur. 2d, Banks and Financial Institutions §§ 1 et seq.

Brokers' lien, see N.Y. Jur. 2d, Brokers §§ 1 et seq.

Cemetery liens, see N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 1 et seq.

Chattel, recovery of, generally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 1 et seq.

Corporations or partnerships, liens on and of, see N.Y. Jur. 2d, Business Relationships §§ 1 et seq.

Factors' and commission merchants' lien, see N.Y. Jur. 2d, Factors and Commission Merchants §§ 1 et seq.

Garagekeepers' lien, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 1 et seq.

Hospitals and related facilities, liens of, see N.Y. Jur. 2d, Hospitals and Related Health Care Facilities §§ 1 et seq.

Innkeepers' lien, see N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 1 et seq.

Insurable interest in lien, see N.Y. Jur. 2d, Insurance §§ 1 et seq.

Insurance proceeds, lien on, see N.Y. Jur. 2d, Insurance §§ 1 et seq.

Judgment lien, see N.Y. Jur. 2d, Judgments §§ 1 et seq.

Laundry establishments' lien, see N.Y. Jur. 2d, Businesses and Occupations §§ 1 et seq.

Landlords' lien, see N.Y. Jur. 2d, Landlord and Tenant §§ 1 et seq.

Logs and timber, liens on, see N.Y. Jur. 2d, Logs and Timber §§ 1 et seq.

Mechanic's lien and foreclosure on real property thereon, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

Mortgage liens, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 1 et seq.

Purchaser of real property, lien of, see N.Y. Jur. 2d, Real Property Sales and Exchanges §§ 1 et seq.

Recordation of liens and effect of lien on land title, see N.Y. Jur. 2d, Abstracts and Land Titles §§ 1 et seq.

Security interests in personal property, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

Tax liens, see N.Y. Jur. 2d, Taxation and Assessment §§ 1 et seq.

Vehicles, liens on, see N.Y. Jur. 2d, Automobiles and Other Vehicles §§ 1 et seq.

Vendor of real property, lien of, see N.Y. Jur. 2d, Real Property Sales and Exchanges §§ 1 et seq.

Warehousemen's and carriers' lien, generally, see N.Y. Jur. 2d, Documents of Title §§ 1 et seq.

Watercraft, liens on, see N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 1 et seq.

Workers' compensation benefits, lien of, see N.Y. Jur. 2d, Workers' Compensation §§ 1 et seq.

Research References

Westlaw Databases

American Law Reports (ALR)

American Jurisprudence 2d (AMJUR)

American Jurisprudence Legal Forms 2d (AMJUR-LF)

American Jurisprudence Proof of Facts (AMJUR-POF)

American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)

American Jurisprudence Trials (AMJUR-TRIALS)

Corpus Juris Secundum (CJS)

Carmody-Wait 2d New York Practice with Forms (CW2d)

New York Bankruptcy Court Cases (FBKR-BCT-NY)
 West's McKinney's Forms Multibase (MCF-ALL)
 New York Supreme Court Appellate Division Cases (NY-CS-APPDIV)
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 New York Trial Court Cases (NY-CS-TRIAL)
 New York Federal Cases (NYFED-CS)
 New York Forms Legal and Business (NY-LF)
 Lien Priorities in New York (NYLIENPR)
 Evidence in New York State and Federal Courts (NYPRAC-EVID)

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I. CREATION, OPERATION, AND EFFECT OF LIENS

A. GENERAL CONSIDERATIONS

Research References

West's Key Number Digest

Liens ☞ 1, 11, 13, 14

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions

West's A.L.R. Digest, Liens ☞ 1, 11, 13, 14

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 1 to 51

C.J.S., Liens §§ 1 to 24

1. In General

§ 1 Definitions; classification

Research References

West's Key Number Digest, Liens ☞ 1

A lien is a legal right that may be exercised over property in satisfaction of a debt¹ or a duty of the owner of the property.² It may be defined as an encumbrance upon land. An encumbrance is every

[Section 1]

¹Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

Bramhall-Deane Co. v. McDonald, 172 A.D. 780, 158 N.Y.S. 736 (1st Dep't 1916).

Nelson v. Gibson, 143 A.D. 894, 129 N.Y.S. 702 (3d Dep't 1911).

Mathushek & Son Piano Co. v. Weld, 94 Misc. 282, 158 N.Y.S. 169 (App. Term 1916).

As to the rights of a lienor to en-

right to or interest in real property, other than an easement for a highway, to the diminution of the value of the real property though consistent with conveyance of the fee interest therein.³ In the strict or common-law sense of the term, a person may not have a lien on his or her own property.⁴ A specific lien is a charge upon specific property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner.⁵

Liens are broadly classified as common law, generally dependent upon possession;⁶ equitable, not dependent upon possession;⁷ statutory, which may or may not be based upon possession;⁸ and maritime.⁹ Liens on personal property, or chattel liens, are classified by the particular basis or purpose of the lien and include judgment liens¹⁰ and security interests.¹¹

§ 2 Lien distinguished from other legal devices

Research References

West's Key Number Digest, Liens ⇨1

A lien, while analogous to a mortgage or a pledge, is more comprehensive and includes such devices, as well as all similar obligations by which specific property may be subjected to the payment of a particular debt.¹ A security interest, or chattel mortgage, is distinguishable from a common-law lien by the absence of a right to possession until default by the mortgagor while it is essential that the lienor have at all times possession of the personal property to establish and sustain the right of a common-law lien.² While a pledge resembles a common-law lien, the former is unlike the latter in that the chattels in a pledge are delivered as security for a loan or the payment of indebtedness whereas a common-law lien arises from a delivery for

force the lien, generally, see §§ 53 to 76.

²Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

³Village of Spring Valley Urban Renewal Agency v. K. G. R. Realty Co., 82 Misc. 2d 1082, 371 N.Y.S.2d 579 (County Ct. 1975).

⁴Bishop v. Spector, 150 Misc. 360, 269 N.Y.S. 76 (Sup 1932).

⁵Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

⁶§ 11.

⁷§§ 13 to 22.

⁸§§ 23 to 38.

⁹N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 132 to 146.

¹⁰N.Y. Jur. 2d, Judgments §§ 160 to 188.

¹¹N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

[Section 2]

¹Am. Jur. 2d, Liens § 4.

For a detailed discussion of mortgages, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 1 et seq.

²§ 11.

For further discussion of secured transactions, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

work on or in connection with the chattels. An ordinary lien gives no right of property while a contract of pledge carries a special property in the pledge to the pledgee.³ Moreover, unlike a pledge, a common-law lien generally may not be enforced by a sale of the property by the lienor except as authorized by statute.⁴

An equitable lien is distinguished from an equitable assignment in that the former conveys a charge upon but no title in the property while the assignee has title that, although not cognizable at law, equity will enforce.⁵ In many respects, an equitable lien is like a constructive trust,⁶ and in some cases, a court may grant relief on the basis of an equitable lien where the plaintiff has failed to establish a constructive trust.⁷

§ 3 Property subject to lien

Research References

West's Key Number Digest, Liens ⇨11

Common-law liens attach only to personal property,¹ but equitable² and statutory liens³ may be acquired in nearly every form of property, real and personal.⁴ The general rule is that a lien upon property attaches to whatever the property is converted into, whether property or money, and is not destroyed by changing the nature of the subject.⁵ However, liens upon stock in a corporation do not attach to corporate

³Am. Jur. 2d, Liens § 4.

⁴§ 57.

⁵In re Interborough Consol. Corp., 288 F. 334, 32 A.L.R. 932 (C.C.A. 2d Cir. 1923).

As to priority between equitable liens and assignments, see § 42.

⁶Gearns v. Commercial Cable Co., 177 Misc. 1047, 32 N.Y.S.2d 856 (Mun. Ct. 1942), aff'd, 266 A.D. 315, 42 N.Y.S.2d 81 (1st Dep't 1943), aff'd, 293 N.Y. 105, 56 N.E.2d 67, 153 A.L.R. 813 (1944).

⁷Towner v. Berg, 5 A.D.2d 481, 172 N.Y.S.2d 258 (3d Dep't 1958).

The plaintiff was not entitled to a constructive trust on a property, notwithstanding contributions to its upkeep for 30 years, where the record did not indicate any implied promise to convey, reimburse, or to grant a lesser interest in the property. Scivoletti v. Marsala, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d

126 (1984).

As to equitable liens, generally, see §§ 13 to 22.

For a discussion of constructive trusts, see N.Y. Jur. 2d, Trusts §§ 164 to 190.

[Section 3]

¹§ 11.

²§ 13.

³§ 23.

⁴Reynolds v. Ellis, 103 N.Y. 115, 8 N.E. 392 (1886).

For discussion of property to which an artisans' lien may attach, see § 30.

As to liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

⁵Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

Long Island Ins. Co. v. S & L

funds held by a receiver since a stockholder has no legal title to corporate assets by virtue of stock ownership.⁶ No equitable lien in favor of a surety, who has had to make good an amount embezzled, attaches to property given by the embezzler to another in the absence of proof that it was purchased with the stolen money.⁷

§ 4 Property subject to lien—After-acquired property

Research References

West's Key Number Digest, Liens ☞11

An equitable lien may be created in after-acquired property.¹ A contract for a lien on property not yet in existence may be effectual in equity to give a lien as between the parties when the property comes into existence where there are no intervening rights of creditors or third persons.² However, the assignment of a future contingent interest in the principal of a trust does not give the lien creditor a choate lien.³

2. Rights in Lien

§ 5 Generally

Research References

West's Key Number Digest, Liens ☞1

Although a lien by itself is not tangible personal property that may

Delicatessen, 102 Misc. 2d 853, 424 N.Y.S.2d 849 (Sup 1980).

An equitable lien was imposed upon the entire stock and fixtures of a store after the defendants, who occupied a fiduciary relation to such owner, moved, mingled, and sold property of the owner; purchased new stock and fixtures from the proceeds; and so confused the remainder that it could not be identified and separated. *Klinzing v. Blauw Bros.*, 160 N.Y.S. 631 (Sup 1916).

For discussion of the right to recover lien property, see § 7.

As to conversion, generally, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 to 88.

⁶*First Nat. Bank & Trust Co. of Ellenville v. Hyman Novick Realty Corp.*, 68 A.D.2d 191, 416 N.Y.S.2d 844 (3d Dep't 1979).

⁷*American Sur. Co. of N.Y. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929).

As to rights and remedies of a surety, generally, and with regard to embezzlement, see N.Y. Jur. 2d, Guaranty and Suretyship §§ 409 to 481.

[Section 4]

¹*Reynolds v. Ellis*, 103 N.Y. 115, 8 N.E. 392 (1886).

For discussion of the creation of equitable liens, generally, see §§ 15 to 22.

As to security interests in after-acquired property, generally, under the Uniform Commercial Code, see N.Y. Jur. 2d, Secured Transactions § 82.

²*Coats v. Donnell*, 94 N.Y. 168, 1883 WL 12738 (1883).

³*In re Rosenberg's Will*, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

be sold by a sheriff, it represents, when combined with the underlying debt, a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied.¹ A lien, while a charge upon property, confers no general right of property or title upon the holder.² The creation of an interest in real property by the filing of a statutory lien, without prior judicial approval, does not prevent the owner from selling, encumbering, renting, or otherwise dealing with the property as he or she chooses, even though filing of a lien creates a cloud on the owner's title, rendering alienation more difficult or perhaps less profitable.³

One who has a lien on insured property has no common-law right to insurance proceeds realized by the insured in the event of a loss of the property.⁴ A lien possessed by a bank on real property owned by a husband and wife conveys a right only to the extent of a husband's interest therein where a settlement agreement, incorporated into the judgment of divorce, provides for a "gift over" by the wife of her interest to the husband.⁵

A right of subrogation is not a lien.⁶

§ 6 Assignability of lien

Research References

West's Key Number Digest, Liens ☞13

[Section 5]

¹U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

As to sale of personal property subject to lien, see §§ 59 to 76.

²Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

³Carl A. Morse, Inc. (Diesel Const., Division) v. Rentar Indus. Development Corp., 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), order aff'd, 43 N.Y.2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978).

⁴Bank of India v. Weg and Myers, P.C., 257 A.D.2d 183, 691 N.Y.S.2d 439, 38 U.C.C. Rep. Serv. 2d 996 (1st Dep't 1999).

McGraw-Edison Credit Corp. v. All

State Ins. Co., 62 A.D.2d 872, 406 N.Y.S.2d 337, 24 U.C.C. Rep. Serv. 767 (2d Dep't 1978).

As to rights of lienholders to proceeds on loss of insured property, generally, see N.Y. Jur. 2d, Insurance § 2281.

⁵Elyachar v. Elyachar, 47 A.D.2d 643, 364 N.Y.S.2d 14 (2d Dep't 1975) (bank had no valid claim to the proceeds).

For discussion of the distribution of marital property upon divorce, generally, see N.Y. Jur. 2d, Domestic Relations §§ 2606 to 2664.

⁶Kozlowski v. Briggs Leasing Corp., 96 Misc. 2d 337, 408 N.Y.S.2d 1001 (Sup 1978).

For discussion of subrogation rights of a guarantor or surety, generally, see N.Y. Jur. 2d, Guaranty and Suretyship §§ 420 to 456.

A lien, including an equitable lien, may be assigned.¹ Furthermore, the assignee of a lien that has been properly filed has priority over an asserted lien that has not been properly filed.² Where the debt is assigned, even without mention of the lien, the lien passes as an incident of the debt.³ A lien will pass upon assignment of the claim and transfer of possession except when the transfer constitutes a material breach of the bailment.⁴

§ 7 Right to recover lien property

Research References

West's Key Number Digest, Liens ⇨14

In general, the holder of a merely equitable lien cannot avail himself or herself of an action to recover the property.¹ However, the holder of a valid lien on property in his or her possession has such a special property therein that he or she can maintain an action to recover the chattel if it is wrongfully taken from his or her possession even by the true owner.²

[Section 6]

¹Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

²Harman v. Fairview Associates, 30 A.D.2d 492, 294 N.Y.S.2d 442 (4th Dep't 1968), order rev'd on other grounds, 25 N.Y.2d 101, 302 N.Y.S.2d 791, 250 N.E.2d 209 (1969).

For discussion of priority among competing liens, see §§ 39 to 44.

As to assignable rights, generally, see N.Y. Jur. 2d, Assignments §§ 4 to 33.

³Mortgage Electronic Registration Systems, Inc. v. Coakley, 41 A.D.3d 674, 838 N.Y.S.2d 622 (2d Dep't 2007); Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

The assignee of an ordinary artisan's lien where the debt is assigned and the chattel is transferred upon the same terms as those upon which the original lienor held it acquires the right to the lien as the true owner is not prejudiced. Triple Action Spring Co. of New York v. Goyena, 93 Misc. 171, 156 N.Y.S. 1064

(App. Term 1916).

For discussion of creation of an equitable lien by an assignment of rights, see § 22.

⁴Susi v. Belle Acton Stables, Inc., 360 F.2d 704 (2d Cir. 1966).

As to bailment agreements, generally, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 1 et seq.

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¹Denier v. Bonewur, 134 A.D. 577, 119 N.Y.S. 313 (2d Dep't 1909).

²People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 405 N.E.2d 1012 (1980).

Hudson v. Swan, 83 N.Y. 552, 1881 WL 12769 (1881).

A lienor has a special property interest in the object of his lien that, for example, is sufficient to support a prosecution for larceny where the owner of such property wrongfully takes it from him. People ex rel. Travis v. Sheriff of Cortland County, 275 A.D. 444, 90 N.Y.S.2d 848 (3d Dep't 1949).

§ 8 Effect on lien of bankruptcy

Research References

West's Key Number Digest, Liens ⇨1

A trustee in bankruptcy takes the bankrupt's estate subject to all valid claims, liens, and equities, and these, in the absence of federal statutes, are to be determined by state law.¹ A chattel mortgagee gives a lien that may be enforced against the trustee in bankruptcy of the mortgagor if the transaction is free from fraud, based upon an actual consideration, and recorded or filed as required by the local law.² Similarly, since a judgment is, by operation of law, a lien on real property, it survives bankruptcy, and purchasers take subject to lien.³

B. CREATION AND ATTACHMENT OF LIENS

Research References

West's Key Number Digest

Liens ⇨2, 2.1, 5, 7, 8

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions

West's A.L.R. Digest, Liens ⇨2, 2.1, 5, 7, 8

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 11 to 56

C.J.S., Liens §§ 10 to 24

Treatises and Practice Aids

Bowmar, Lien Priorities in New York § 3:21

Trial Strategy

Avoidance and Recovery of Fraudulent Transfers, 25 Am. Jur. Proof of Facts 3d 591

[Section 8]

¹Archibald v. Panagouloupoulos, 233 N.Y. 478, 135 N.E. 857 (1922) (equitable lien).

Swartz, Inc., v. City of Utica, 223 A.D. 506, 228 N.Y.S. 660 (4th Dep't 1928), aff'd, 254 N.Y. 555, 173 N.E. 864 (1930) (attorney's lien).

Vanderlip v. Walker, 144 Misc. 629, 259 N.Y.S. 289 (Sup 1932).

²Sprague v. Glynn, 136 Misc. 163, 238 N.Y.S. 696 (Sup 1930).

As to security interests under the Uniform Commercial Code, see N.Y. Jur.

2d, Secured Transactions §§ 1 et seq.

³Leonard v. Brescia Lumber Corp., 174 A.D.2d 621, 571 N.Y.S.2d 322 (2d Dep't 1991).

Holdsworth v. Maxey, 53 A.D.2d 853, 385 N.Y.S.2d 366 (2d Dep't 1976) (judgment creditor by failing to specifically refer in notice of claim to debt and judgment entered thereon as secured did not waive security as embodied in judgment).

For discussion of judgment liens, generally, see N.Y. Jur. 2d, Judgments §§ 160 to 188.

Forms

Am. Jur. Legal Forms 2d §§ 165:6 to 165:8, 165:10, 165:12, 165:19 to 165:24, 165:27, 165:29

Am. Jur. Pleading and Practice Forms, Liens §§ 5, 48

New York Forms Legal and Business §§ 16A:19, 16A:20

1. In General

§ 9 Creation of lien by property owner**Research References**

West's Key Number Digest, Liens ☞2, 2.1

New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

A lien generally can be created only by the owner of property—or by some person authorized by him or her¹—by contract,² either expressly or by implication, or by some positive rule of law, such as by statute, and no one has a lien upon the property of another with whom he or she deals unless it is conferred in such a manner.³

◆ **Definition:** The term “owner” includes the owner in fee of real property, or of a less estate therein; a lessee for a term of years; a vendee in possession under a contract for the purchase of such real property; and all persons having any right, title, or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment; and all persons having any right or franchise granted by a public corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise.⁴

◆ **Illustrations:** Retention of the plaintiff's vehicle by the defendants pending payment of a rust-proofing charge could not be justified on basis of an asserted lien where, at time of the request and rendition of service, the plaintiff was a purchaser as opposed to an owner.⁵ Additionally, where the plaintiff neither requested nor

[Section 9]

¹Am. Jur. 2d, Liens § 12.

As to liens for the improvement of real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

²Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

As to liens created by contract, generally, see §§ 17, 18.

³Jordan v. National Shoe & Leather

Bank, 74 N.Y. 467, 1878 WL 12681 (1878).

Kozlowski v. Briggs Leasing Corp., 96 Misc. 2d 337, 408 N.Y.S.2d 1001 (Sup 1978).

As to equitable liens created by express contract or implication, see §§ 15 to 22.

⁴Lien Law § 2(3).

⁵Slank v. Sam Dell's Dodge Corp., 46 A.D.2d 445, 363 N.Y.S.2d 138 (4th

consented to the storage of a vehicle, it cannot incur any liability for the storage charges by reason of the bailee's assertion of a lien.⁶

The purchaser of real property at a statutory or judicial sale is deemed the owner thereof from the time of sale. If such purchaser fails to complete the purchase pursuant to the terms of the sale, all subsequent liens on the property created by his or her consent are liens on any deposit made by him or her and not on the real property.⁷

§ 10 Effect of right to repossess

Research References

West's Key Number Digest, Liens ⇨2, 2.1

Since a person may not have a lien on property of which he or she is already the owner,¹ the mere exercise of a reserved right to repossess does not create a lien upon the property of a third party.² Title retained only for security purposes in property delivered to another, as in the case of a conditional sale, does not create a lien therein although treated like one for some purposes,³ such as enforcement by action. A contract of conditional sale of personal property is deemed a lien upon a chattel.⁴

In general, a lien that depends upon possession is not created where the parties agree that the owner is to have the right to take and use his or her property periodically or at pleasure during the term of the contract.⁵ However, once the lien has been created, the mere temporary surrender of possession does not necessarily destroy the

Dep't 1975).

⁶O'Connor v. B. J. Auto Make Ready Corp., 101 Misc. 2d 665, 421 N.Y.S.2d 758 (N.Y. City Civ. Ct. 1979), judgment modified on other grounds, 115 Misc. 2d 575, 455 N.Y.S.2d 164, 35 U.C.C. Rep. Serv. 725 (App. Term 1982).

⁷Lien Law § 2(3).

As to real property foreclosures and sales, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

[Section 10]

¹§ 9.

²John W. Snyder, Inc., v. Aker, 134 Misc. 721, 236 N.Y.S. 28 (Sup 1929) (conditional sale).

As to recovery of a chattel, gener-

ally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 89 to 245.

³Bishop v. Spector, 150 Misc. 360, 269 N.Y.S. 76 (Sup 1932).

As to security interests and conditional sales transactions, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

⁴Lien Law § 206.

For discussion of enforcement by action to foreclose, generally, see §§ 77 to 103.

⁵Smith v. O'Brien, 46 Misc. 325, 94 N.Y.S. 673 (Sup 1905), aff'd, 103 A.D. 596, 92 N.Y.S. 1146 (1st Dep't 1905).

The exception is the statutory lien of an owner of a self-storage facility, discussed at § 35.

lien.⁶

2. Common-Law Possessory Lien

§ 11 Generally

Research References

West's Key Number Digest, Liens ☞5

Am. Jur. Legal Forms 2d § 165:27 (Notice of lien—Attorney's services); § 165:29 (Notice of lien and of sale—Personal property—General form for non-statutory lien)

Am. Jur. Pleading and Practice Forms, Liens § 48 (Complaint, petition, or declaration—Allegation—Lien claimants' possession of property as satisfying prerequisite to establishment of common-law lien)

At common law, liens attached exclusively to personal property.¹ A common-law lien is the right to retain possession of all or some² personal property belonging to another until some debt due on or secured by such property is paid or satisfied.³ For example, an attorney has a general possessory-retaining lien, established by common law, that allows retention of a client's papers or assets until his or her legal fee is paid.⁴ It is indispensable that the person claiming a common-law lien have independent and exclusive possession of the property⁵ and that such possession is properly acquired or retained.⁶

⁶§ 48.

[Section 11]

¹Am. Jur. 2d, Liens § 19.

²Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

³Jordan v. National Shoe & Leather Bank, 74 N.Y. 467, 1878 WL 12681 (1878).

Loftus v. Carlton, 164 A.D. 879, 148 N.Y.S. 556 (1st Dep't 1914).

Goldwater v. Mendelson, 170 Misc. 422, 8 N.Y.S.2d 627 (Mun. Ct. 1938).

⁴Spinello v. Spinello, 70 Misc. 2d 521, 334 N.Y.S.2d 70 (Sup 1972).

As to attorneys' liens, generally, see N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

⁵Deeley v. Dwight, 132 N.Y. 59, 30 N.E. 258 (1892).

In re Site for Low-Rent Housing Project, Borough of Manhattan, City of New York (Gov. Alfred E. Smith Houses,

Project No. N.Y.S. 25), 193 Misc. 399, 83 N.Y.S.2d 689 (Sup 1948).

⁶Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911).

A lender did not have a "common-law" lien against a garden apartment unit in a building owned by a residential cooperative corporation, given that the corporation repaid \$650,000 of funds advanced by the lender in connection with the corporation's settlement of litigation that resulted in the corporation's ownership of the unit, and the remainder of the lender's claim was never reduced to a docketed judgment and was unliquidated and disputed by the corporation and its directors. McDaniel v. 162 Columbia Heights Housing Corporations, 21 Misc. 3d 244, 863 N.Y.S.2d 346, 66 U.C.C. Rep. Serv. 2d 508 (Sup 2008).

As to the right of a lienor to recover lien property, generally, see § 7.

For discussion of recovery of lien property, generally, see N.Y. Jur. 2d,

The common-law lien is lost by a voluntary surrender of possession⁷ though in limited circumstances the lienor may enforce the lien by extrajudicial sale.⁸

§ 12 Effect of statute; nonpossessory liens

Research References

West's Key Number Digest, Liens ⇨5

A lien that is created by statute is limited by the terms of the statute. Where the legislature has enlarged and defined a common-law lien, its definition supersedes that of the courts, and a court's exercise of power in connection with that lien thereafter must be consistent with the statute.¹ For instance, the common-law rule that liens have priority in the order of their acquisition may be changed by statute in specific cases awarding priority in the order of filing or registration.² However, liens that may be established under common-law principles are not invalidated merely because they are not expressly validated by the enforcement provisions of the Lien Law,³ inasmuch as the enforcement of liens by extrajudicial sale or foreclosure is apparently applicable even to liens that are recognized only under the common law.⁴

Particular liens allowed by the common law in favor of persons such as innkeepers,⁵ common carriers and warehousemen,⁶ and bailees employed to change, repair, or do work on some article⁷ are now the subject of statutes defining, modifying, enlarging, or extending them

Conversion, and Action for Recovery of Chattel §§ 89 to 245.

⁷§ 48.

⁸*Loftus v. Carlton*, 164 A.D. 879, 148 N.Y.S. 556 (1st Dep't 1914).

As to enforcement by extrajudicial sale, generally, see §§ 59 to 76.

[Section 12]

¹*Robinson v. Rogers*, 237 N.Y. 467, 143 N.E. 647, 33 A.L.R. 1291 (1924) (attorney's lien).

Liens given by statute or other rule of law for services or materials are specifically excluded from those rights and transactions governed by the secured transaction article of the Uniform Commercial Code. U.C.C. § 9-109(d)(2).

For discussion of security interests, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

For discussion of statutory liens, generally, see §§ 23 to 38.

²*Booth v. Bunce*, 33 N.Y. 139, 1865 WL 4017 (1865).

As to priority, generally, see §§ 39 to 44.

³§§ 53 to 58.

⁴§ 58.

⁵N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 128 to 132.

⁶N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

⁷N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

to some degree.⁸ An attorney's retaining lien upon money, papers, and securities belonging to his or her client is an example of a common-law lien still recognized by the courts.⁹ The common-law lien of a pledgee is statutory so far as a collateral-loan broker, or pawnbroker, is concerned.¹⁰ A safe-deposit company is entitled to a lien on a deposit to the same extent as a warehouseperson.¹¹ Other particular possessory liens, some of them with common-law antecedents, are defined by statute.¹²

3. Equitable Lien

a. In General

§ 13 Generally

Research References

West's Key Number Digest, Liens ☞7

Building and construction contracts: contractor's equitable lien upon percentage of funds withheld by contractee or lender, 54 A.L.R.3d 848

◆ **National Background:** Although equitable liens are not recognized in some states, they are in most jurisdictions and are held to have survived the enactment of the Uniform Commercial Code. Although the tendency in some states is to restrict them, they generally are looked upon with favor, and in many jurisdictions, the doctrine of equitable liens has been liberally extended to give effect to the intention of the parties to create specific charges and to facilitate mercantile transactions.¹ In New York, the doctrine of equitable liens has been liberally extended to give effect to the intentions of the parties to create specific charges upon property.

An equitable lien is a right, not recognized at law, to have a fund, specific property, or its proceeds² applied in whole or in part to the

⁸Goldwater v. Mendelson, 170 Misc. 422, 8 N.Y.S.2d 627 (Mun. Ct. 1938).

For discussion of statute creating nonpossessory liens, see § 27.

As to liens for artisans, throwsters of silk, laborers on stone, and providers of services on motion-picture films, see §§ 28 to 30.

⁹N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

¹⁰N.Y. Jur. 2d, Banks and Financial Institutions § 978.

¹¹N.Y. Jur. 2d, Banks and Financial Institutions § 283.

¹²For example, U.C.C. § 7-307 confers upon carriers a specific lien, defines its coverage, and generally states the carrier's rights.

As to a detailed discussion of carriers, see N.Y. Jur. 2d, Carriers §§ 1 et seq. [Section 13]

¹Am. Jur. 2d, Liens § 33.

²Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985) (where a defendant's promise that her husband's debt would be paid from the proceeds of the sale of their home did not create an equitable lien upon the home itself).

payment of a particular debt or class of debts.³ An equitable lien is neither an estate or property in the thing itself, nor a right to recover it.⁴ It may not be the basis of a possessory action but is merely a charge upon the property itself.⁵ Where property is held by one person subject to an equitable lien, the lienor can enforce it by a proceeding in equity.⁶ Possession of the property charged is not essential to the creation and attachment of an equitable lien⁷ unlike the common-law lien that is conditioned upon possession.⁸ Additionally, an equitable lien may be created in after-acquired property.⁹

§ 14 Pleading and proof

Research References

West's Key Number Digest, Liens ⇨7

In deciding whether a plaintiff has sufficiently pleaded a cause of action to impress an equitable lien, the court is bound to accept every allegation set forth in the complaint as true regardless of whether the plaintiff would ultimately prevail on the merits. Defects in a complaint in an action seeking to impress an equitable lien upon certain real property may be remedied by affidavits and other documentary evidence submitted.¹

The lienholder has the burden of proof on any factual issues, the resolution of which is necessary to determine the validity and propriety of the purported lien.² No particular formality is essential in the creation of an equitable lien, but, because equity will enforce a lien where it is clear to the court that the intent of the parties was to

As to the necessity of designating the specific property to which an equitable lien is intended to attach, see § 18.

As to attorneys' lien, generally, see N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

³*Disanza v. Gaglione*, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

⁴*Hovey v. Elliott*, 118 N.Y. 124, 23 N.E. 475 (1890).

⁵*Hovey v. Elliott*, 118 N.Y. 124, 23 N.E. 475 (1890).

For discussion of conversion and actions to recover a chattel, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 et seq.

⁶§ 54.

⁷*McCoy v. American Exp. Co.*, 253

N.Y. 477, 171 N.E. 749 (1930).

An equitable lien may be imposed upon a seat on the New York Stock Exchange after the requirements of the Exchange have been satisfied. In re Gruner, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628 (1946).

⁸§ 11.

⁹§ 4.

[Section 14]

¹*Datlof v. Turetsky*, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

²*Gibor Associates v. City of New York*, 91 Misc. 2d 915, 399 N.Y.S.2d 84 (Sup 1977).

As to statutory liens, generally, see §§ 23 to 38.

give such a lien or impose a charge upon specific property,³ it is necessary that the intention to create such a charge clearly appear from the language and the attendant circumstances. Strict proof of such intention is required.⁴

b. Creation of Equitable Lien

§ 15 Generally

Research References

West's Key Number Digest, Liens ⇨7

An equitable lien may be created by a contract, express¹ or implied,² indicating a clear intention that specific property is to be held, given, or transferred as security for an obligation.³ Mere expectation, however sincere, is insufficient to establish an equitable lien.⁴ No particular form, language, or formality is essential in the creation of an equitable lien⁵ because equity looks to the intent, not the form.⁶ Where the intent is found, and no paramount rights intervene, equity will enforce the intent. In such cases, equity merely gives effect to the clear agreement of the parties and treats as done that which the parties intended to be done.⁷ An equitable lien may be created where an attempt to make a legal mortgage failed for want of some formality⁸

³§ 15.

⁴*Pennsylvania Oil Products Refining Co. v. Willrock Producing Co.*, 267 N.Y. 427, 196 N.E. 385 (1935).

Conkling v. First Nat. Bank of Olean, 286 A.D. 537, 145 N.Y.S.2d 682 (4th Dep't 1955).

Castelli v. Walton Lake Country Club, 112 N.Y.S.2d 179 (Sup 1952).

An agreement between drawer and drawee of a foreign bill of exchange for security to the latter in the form of another bill on another drawee would not alone as matter of law charge a debt owed by the second drawee with a lien. *Muller v. Kling*, 149 A.D. 176, 133 N.Y.S. 614 (1st Dep't 1912), *aff'd*, 209 N.Y. 239, 103 N.E. 138 (1913).

[Section 15]

¹§ 17.

²§ 19.

³*M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 12 N.Y.3d 798, 879

N.Y.S.2d 812, 907 N.E.2d 690 (2009).

James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401 (1931).

Ryan v. Cover, 75 A.D.3d 502, 904 N.Y.S.2d 750 (2d Dep't 2010).

Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

⁴*M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

Scivoletti v. Marsala, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d 126 (1984).

⁵*In re Friedlander's Estate*, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

⁶*Fiore v. Smith*, 96 N.Y.S.2d 610 (Sup 1950).

⁷N.Y. Jur. 2d, Equity § 88.

⁸*Payne v. Wilson*, 74 N.Y. 348, 1878 WL 12662 (1878).

In re Friedlander's Estate, 178

or where a party attempts to give a mortgage or a lien,⁹ or a contract pledging property,¹⁰ or an agreement to hold property as security for a debt to another.¹¹ However, an agreement, either by parol or in writing to pay a debt out of a designated fund does not operate to create an equitable lien upon the fund, or operate as an equitable assignment of it.¹²

◆ **Illustrations:** In an action to foreclose on a mortgage, the bank was not entitled to the imposition of an equitable lien on the proceeds of a settlement received by the defendant homeowners as result of a lawsuit against the contractor and architect arising from serious structural defects in home since: (1) the mortgage did not extend the bank's lien against the property to recovery by the homeowners in an action against the contractor and architect; (2) there was no provision in the mortgage that could be construed to create an intent on the part of the homeowners that settlement of any lawsuit by the homeowners against third parties that related to the home would inure to the benefit of the bank; (3) the homeowners were under no duty to restore the property to the same condition as when the mortgage was executed; and (4) there was no evidence that the present value of the property did not exceed the amount owed on the mortgage.¹³ A promise of the building manager that the construction company would be paid out of rents and profits collected during a foreclosure action was not enforceable, and would not create the necessary security interest to support an equitable lien, where the manager had no power to make such a promise without court approval, the manager neither sought nor obtained such approval, and the company itself did not seek such approval.¹⁴ Finally, in the absence of evidence that specific property was being given to secure an obligation, the parties had no lien encumbering the plaintiff's tools, equipment, and vehicles as required to support

Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

⁹Coats v. Donnell, 94 N.Y. 168, 1883 WL 12738 (1883).

In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

¹⁰Chase v. Peck, 21 N.Y. 581, 1860 WL 7877 (1860).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984) (no express or implied contract concerning specifically identified or identifiable property sufficient to establish existence of an equitable lien).

¹¹McCoy v. American Exp. Co., 253 N.Y. 477, 171 N.E. 749 (1930).

As to the creation of equitable mortgages, see N.Y. Jur. 2d, Mortgages and Deed of Trust §§ 20 to 22.

¹²NYCTL 1999-1 Trust v. N.Y. Pride Holdings, Inc., 68 A.D.3d 952, 892 N.Y.S.2d 418 (2d Dep't 2009).

¹³Albany Sav. Bank, F.S.B v. Novak, 151 Misc. 2d 956, 574 N.Y.S.2d 140 (Sup 1991).

¹⁴Security Pacific Mortg. and Real Estate Services, Inc. v. Republic of Philippines, 962 F.2d 204, 22 Fed. R. Serv. 3d 883 (2d Cir. 1992) (applying New York law).

an equitable lien.¹⁵

§ 16 Necessity of agreement to create lien

Research References

West's Key Number Digest, Liens ⇨7

Am. Jur. Legal Forms 2d § 165:21 (Notice of lien—Health care provider—Lien against cause of action of person injured); § 165:22 (Notice of lien—Hospital lien—Lien against cause of action of person injured); § 165:23 (Notice of lien—Hospital lien for emergency services—Notice to responsible party)

In order to impose an equitable lien, there must be an agreement that the property in question will be held as security for an obligation.¹ Generally, courts should not permit a party to assert an equitable lien in a case that is essentially one for money owed as the party has an adequate remedy at law to collect the debt.² Although parties may agree to the creation of a lien that equity will enforce,³ in the absence of a statute or a transaction creating a lien, or of circumstances from which the court can hold on equitable principles that specific property should be charged in order to prevent the perpetration of a wrong, equity will refuse to recognize a lien unless an agreement therefor is established.⁴ However, there are instances where equity will enforce a lien upon property without an agreement of the parties, as where there might otherwise be no relief to the injured party, and where the one claiming the lien has made advancements of money for the purchase, preservation, or enhancement of the property.⁵ Equitable liens may be recognized in surplus money proceedings.⁶ A lien that might otherwise be implied from an agreement is negated if inconsistent with the express terms or the clear intent of the contract

¹⁵Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

[Section 16]

¹IMS Engineers-Architects, P.C. v. State, 51 A.D.3d 1355, 858 N.Y.S.2d 486 (3d Dep't 2008).

Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

Matco Elec. Co., Inc. v. Plaza Del Sol Const. Corp., 82 A.D.2d 979, 440 N.Y.S.2d 407 (3d Dep't 1981).

²Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

³Castelli v. Walton Lake Country Club, 112 N.Y.S.2d 179 (Sup 1952).

As to enforcement of equitable liens, generally, see § 54.

⁴Hampton Bottlers v. Distributors Consol. Corp., 38 N.Y.S.2d 236 (Sup 1942).

For discussion of creation of an equitable lien by implication, see § 19.

⁵In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

⁶Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

between the parties.⁷

◆ **Illustrations:** An equitable lien will not be imposed upon property for plaintiff asserting joint ownership where, upon purchase, the plaintiff ordered his name stricken from the deed and title placed strictly in the name of his wife to insulate his family against possible downturns in his fortunes as a gambler.⁸ Similarly, a lender that provided a bridge loan to a borrower in connection with the refinancing of the borrower's townhouse was not entitled to an equitable lien after the mortgagee foreclosed on the property; although the lender alleged that it made the loan in exchange for a security interest in the property, a letter contemporaneous with the transaction stated that any mortgage on the property was to be in favor of another entity.⁹ Additionally, a health insurance plan, providing that if the insured were repaid for all or some of its medical expenses by another source, the insurer "will have the right to a refund" from the insured, did not give rise to an equitable lien in favor of the insurer as to that portion, if any, of proceeds of settlement of the insured's personal injury action that represented covered medical payments since the plan did not identify the property subject to the right of refund, it did not describe the property in such way as to make identification possible, and it did not state the parties' intention that the property be held, given, or transferred as security for the obligation.¹⁰ Moreover, the promise of a building manager that the construction company would be paid out of rents and profits collected during a foreclosure action, whether written or parol, did not operate to create an equitable lien on such rents and profits, even if the manager could have made the promise absent court approval, where the original contract between the company and the manager failed to designate any property in which the company would obtain a security interest; the contract between the construction company and the building owner was insufficient to support a claim by the company for an equitable lien on the building's rents and profits, even though the company fully performed, where the terms of the contract in no way identified the building, or rents and profits generated by the building, as security for payment for the work performed.¹¹

⁷§ 19.

⁸*Macina v. Macina*, 94 A.D.2d 791, 463 N.Y.S.2d 43 (2d Dep't 1983), order aff'd, 60 N.Y.2d 691, 468 N.Y.S.2d 463, 455 N.E.2d 1258 (1983).

⁹*M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

¹⁰*Teichman by Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514, 640 N.Y.S.2d 472, 663 N.E.2d 628 (1996).

¹¹*Security Pacific Mortg. and Real Estate Services, Inc. v. Republic of Philippines*, 962 F.2d 204, 22 Fed. R. Serv. 3d 883 (2d Cir. 1992) (applying New York law).

§ 17 Creation by express contract

Research References

West's Key Number Digest, Liens ⇨7

New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

Where an equitable lien is created by an express contract, the contract should:

- deal with a debt or obligation, liquidated or unliquidated, running in favor of one of the contracting parties and against the other
- be concerned with particularly described property or a fund, existing or to come into being, adequately defined therein and referable to the debt or obligation
- contain language indicating that the owner of the property or fund clearly intended that the property or fund was to be held, given, or transferred as security for the debt or obligation¹

◆ **Illustrations:** An agreement to pay a debt out of a designated fund does not operate to create an equitable lien on the fund.² Additionally, a subsequent lienor has no right to any part of the fund deposited for the purpose of discharging the plaintiff's lien.³ However, a borrower's expressed covenant to secure all proceeds of its assets as collateral for the debt gave the lender an equitable lien against the collateral and all proceeds thereof.⁴

§ 18 Creation by express contract—Designation or appropriation of property

Research References

West's Key Number Digest, Liens ⇨7

Am. Jur. Legal Forms 2d § 165:10 (Repair contract provision—Authorization for lien and sale on nonpayment of repair charges)

New York Forms Legal and Business § 16A:19 (Repair contract provision—Authorization for lien and sale on nonpayment of charges)

The essence of an equitable lien created by express contract is that

[Section 17]

N.Y.S.2d 343 (App. Term 1940).

¹Fiore v. Smith, 96 N.Y.S.2d 610 (Sup 1950).

⁴Bank of India v. Weg and Myers, P.C., 257 A.D.2d 183, 691 N.Y.S.2d 439, 38 U.C.C. Rep. Serv. 2d 996 (1st Dep't 1999).

²Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

³Teitelbaum v. Watford Estates, 18

specific property is to be held, given, or transferred as security.¹ The contract must contain language particularly describing the property or a fund referable to the debt or obligation.² The existence of an equitable lien requires specifically identified or identifiable property,³ and the designation of the specific property to which it is to attach is essential to the creation of an equitable lien.⁴ However, an agreement, verbal or written, to pay a debt out of a designated fund does not give an equitable lien upon the fund.⁵ For example, a promise that a debt will be paid from the proceeds of the sale of real property does not create an equitable lien upon the property.⁶

§ 19 Creation by implication

Research References

West's Key Number Digest, Liens ⇨7

An equitable lien may be implied in the clear intention that specific property is to be held, given, or transferred as security for an obligation.¹ However, no lien will be implied where it would be inconsistent with the express terms of a contract between the parties.²

Circumstances in which an equitable lien is created by implication include:

- an advancement of money for the purchase, preservation, or enhancement of the property³
- real property subject to a tax lien subject to a condemnation

[Section 18]

¹Authorized Credit Corp. v. Enterprise Indus. Co., 109 N.Y.S.2d 687 (City Ct. 1951).

²§ 17.

³Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984).

⁴Lighthouse v. Third Nat. Bank, 162 N.Y. 336, 56 N.E. 738 (1900).

A preclosing possession agreement under which purchasers paid the real estate taxes before the vendor cancelled the contract of sale did not make any sums paid pursuant to the agreement; an equitable lien on the property as the agreement merely provided for the repayment of taxes in the event title failed to close. Kaya v. B & G Holding Co., LLC, 48 A.D.3d 521, 853 N.Y.S.2d 95 (2d Dep't

2008).

⁵James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401 (1931).

Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984).

⁶Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[Section 19]

¹§ 15.

²Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984) (contract between the parties to have the property stand as security).

³§ 21.

proceeding⁴

- a conveyance of real property without any security in reliance upon consideration being rendered⁵
- a conveyance, with knowledge, of real estate secured by a purchase-money mortgage, for funds held in trust for an infant⁶
- an erroneous application by a clerk of payments of taxes to the wrong property⁷
- a subcontract with the bidder for property on a partition sale⁸
- the moving by defendants of estate property from its original location to a new one, mingling the stock and fixtures with their own, selling a part of it, purchasing new stock with the proceeds of the sale, and so confusing the remainder that it could not be identified and separated⁹

§ 20 Creation by implication—Property insured for benefit of creditor or third person

Research References

West's Key Number Digest, Liens ⇨7

Circumstances in which an equitable lien is created by implication include an agreement by the owner, notwithstanding that the policy proceeds are made payable to himself or herself, to insure property for the benefit of a creditor.¹

◆ **Illustrations:** Where an insured agrees to insure for the protection and indemnification of a third person having an interest in the subject of insurance, such third person has an equitable lien, in case of loss, upon the money due under the policy to the extent of such interest.² Additionally, the seller of restaurant held an equitable lien in fire insurance proceeds to the extent of the seller's security inter-

⁴In re Mill Creek Phase 1 Staten Island Bluebelt System, 38 A.D.3d 665, 831 N.Y.S.2d 532 (2d Dep't 2007), rev'd on other grounds, 10 N.Y.3d 898, 861 N.Y.S.2d 605, 891 N.E.2d 721 (2008).

⁵Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

⁶Mann v. Benedict, 47 A.D. 173, 62 N.Y.S. 259 (3d Dep't 1900).

⁷Baranowski v. Wetzol, 174 A.D. 507, 161 N.Y.S. 153 (2d Dep't 1916).

⁸Bowen v. Horgan, 237 A.D. 832, 261 N.Y.S. 163 (2d Dep't 1932).

⁹Klinzing v. Blauw Bros., 160 N.Y.S.

631 (Sup 1916).

[Section 20]

¹Cromwell v. Brooklyn Fire Ins. Co., 44 N.Y. 42, 1870 WL 7784 (1870).

Rath v. Aerovias Interamericanas De Panama, 205 Misc. 135, 127 N.Y.S.2d 231 (Sup 1953).

As to the rights of creditors to assert liens on insurance proceeds, generally, see N.Y. Jur. 2d, Insurance §§ 2290 to 2293.

²Schleimer v. Empire Mut. Ins. Co., 65 Misc. 2d 520, 318 N.Y.S.2d 182 (N.Y. City Civ. Ct. 1971), judgment rev'd on other grounds, 71 Misc. 2d 1014, 337

est in the premises, and the insurer was liable to the seller for the proceeds that the insurer paid to the purchaser under the purchaser's insurance policy after ignoring the seller's notice to the insurer of its equitable stake; although the insurer had no duty to investigate the legitimacy of the seller's claim, the insurer had an obligation, when confronted with apparently conflicting claims, to preserve the insurance proceeds for the rightful owner, which it could accomplish by way of an interpleader action.³

However, a secured creditor may not recover proceeds from the insurer of the transferee of secured property, absent an agreement between the transferee and the lienholder, notwithstanding an agreement by the transferor, his or her assigns, and transferees to insure for the creditor, since one who has a lien only on the insured property has no claim to insurance proceeds in the event of a loss of the property.⁴

§ 21 Creation by implication—Advancement for improvement or purchase of real property

Research References

West's Key Number Digest, Liens ☞7

Avoidance and Recovery of Fraudulent Transfers, 25 Am. Jur. Proof of Facts 3d 591

An equitable lien may result from proof of the expenditure of money in the improvement of real property¹ by a person in a confidential relationship to the owner² or proof of an intention that the premises be held as security for the obligation.³ However, a plaintiff is not

N.Y.S.2d 872 (App. Term 1972), order aff'd, 43 A.D.2d 825, 352 N.Y.S.2d 429 (1st Dep't 1974).

³Burns v. Burns, 84 N.Y.2d 369, 618 N.Y.S.2d 761, 643 N.E.2d 80 (1994).

⁴McGraw-Edison Credit Corp. v. All State Ins. Co., 62 A.D.2d 872, 406 N.Y.S.2d 337, 24 U.C.C. Rep. Serv. 767 (2d Dep't 1978).

[Section 21]

¹Farr v. Covert, 34 A.D.3d 1204, 824 N.Y.S.2d 515 (4th Dep't 2006).

Merrihew v. Parrott, 168 A.D. 704, 154 N.Y.S. 747 (3d Dep't 1915).

Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

For discussion of statutory liens for

improvements upon real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

²Leary v. Corvin, 181 N.Y. 222, 73 N.E. 984 (1905).

Farr v. Covert, 34 A.D.3d 1204, 824 N.Y.S.2d 515 (4th Dep't 2006).

Petrukevich v. Maksimovich, 1 A.D.2d 786, 147 N.Y.S.2d 869 (2d Dep't 1956).

Billson Housing Corp. v. Harrison, 26 Misc. 2d 675, 205 N.Y.S.2d 387 (Sup 1960).

³Conkling v. First Nat. Bank of Olean, 286 A.D. 537, 145 N.Y.S.2d 682 (4th Dep't 1955).

Di Niscia v. Olsey, 162 A.D. 154, 147 N.Y.S. 198 (2d Dep't 1914).

entitled to an equitable lien for her labor and services in improving property in the absence of an express or implied promise to convey an interest in the property to the plaintiff.⁴

◆ **Illustrations:** The plaintiff was not entitled to an equitable lien or a constructive trust on property, notwithstanding contributions to its maintenance for 30 years, where the record did not indicate any implied promise to convey, reimburse, or to grant a lesser interest in property.⁵ Additionally, the plaintiff was not entitled to recovery on the theory of equitable lien where he claimed that he loaned money to his former business partner to whom defendant was then married, that the money was used to improve real property now owned by the defendant after her husband's death, and that the defendant stated that her husband's debt would be paid from the proceeds of the sale of the property since an agreement to pay the debt out of the designated fund does not operate to create an equitable lien on the fund.⁶ However, where a relation of confidence has been abused, and a person has never had title to the property but has expended money in its improvement on the basis of an oral promise to convey which money does not constitute the entire consideration for the purchase of the interest claimed, that person is entitled to an equitable lien thereon for the amount expended.⁷ Similarly, a person who advances a portion of the consideration for the purchase of property is entitled to an equitable lien for the amount advanced.⁸ Finally, in an action to impose a constructive trust on real property, the court should have awarded the plaintiffs an equitable lien for the amounts they expended in repairing the defendants' home while believing that the defendants would deed the house to them rather than an amount representing the increase in value of the defendants' home.⁹

Billson Housing Corp. v. Harrison, 26 Misc. 2d 675, 205 N.Y.S.2d 387 (Sup 1960).

For discussion of proof of intention to establish an equitable lien, generally, see § 14.

As to the similarity between an equitable lien on real property and a constructive trust, see § 2.

⁴*Lester v. Zimmer*, 197 A.D.2d 783, 602 N.Y.S.2d 711 (3d Dep't 1993).

⁵*Scivoletti v. Marsala*, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d 126 (1984).

⁶*Datlof v. Turetsky*, 111 A.D.2d 364,

489 N.Y.S.2d 353 (2d Dep't 1985).

⁷*Petrukevich v. Maksimovich*, 1 A.D.2d 786, 147 N.Y.S.2d 869 (2d Dep't 1956).

McCarthy v. McCarthy, 284 A.D. 813, 132 N.Y.S.2d 194 (2d Dep't 1954), judgment aff'd, 308 N.Y. 1035, 127 N.E.2d 868 (1955).

Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

⁸*Rella v. Torrioni*, 235 N.Y.S.2d 462 (Sup 1962).

⁹*Jacone v. DeRosa*, 173 A.D.2d 525, 570 N.Y.S.2d 302 (2d Dep't 1991).

§ 22 Creation by assignment of rights

Research References

West's Key Number Digest, Liens ⇨7

An assignment of rights is considered an equitable lien.¹ The assignment of a future interest in the proceeds of a claim is an equitable lien only and does not become a legal lien until the proceeds have come into existence.² A recorded agreement by a tenant-in-common, recipient of money provided by a county social services unit, to repay the county by creation of a lien upon specifically designated property, which states that all subsequent deeds, mortgages, or other documents are not to be valid or effective until the county is paid, is an assignment of the recipient's proceeds in his or her interest in the property and a valid lien thereon.³ However, the ripening of an equitable lien into a legal lien does not relate back to the date of the execution of the original assignment creating the equitable interest.⁴

4. Statutory Lien

a. In General

§ 23 Generally

Research References

West's Key Number Digest, Liens ⇨8

Statutory liens may be legislative enactments of common-law liens¹ or liens that did not exist at common law, such as the mechanic's lien.² Many of the accepted common-law possessory liens have been made the subject of statutory definition with varying degrees of modification, extension, or limitation.³ The Lien Law provides for numerous others, including liens—

[Section 22]

¹Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

²U.S. v. Colby Academy, 524 F. Supp. 931 (E.D. N.Y. 1981) (applying New York law).

³Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

⁴U.S. v. Colby Academy, 524 F. Supp. 931 (E.D. N.Y. 1981) (applying New York law).

As to the priority of equitable liens, generally, see § 42.

[Section 23]

¹Horace Waters & Co. v. Gerard, 189 N.Y. 302, 82 N.E. 143 (1907) (overruled on other grounds by, Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973)) (innkeeper's lien).

As to the effect of statute on the common law of liens, generally, see § 12.

²N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

³§ 12.

- on vessels.⁴
- on monuments, gravestones, and cemetery structures.⁵
- of hotel, apartment hotel, inn, and boarding, rooming, and lodging housekeepers.⁶
- of manufacturers and throwsters of silk goods.⁷
- of bailees for hire for work upon watches, clocks, or jewelry.⁸
- of warehousepersons and carriers.⁹
- of motion-picture film laboratories.¹⁰
- of hospitals.¹¹
- of garagepersons.¹²
- for labor on railroads.¹³
- for labor on stone.¹⁴
- for service of stallions or bulls.¹⁵
- for work by artisans on personal property.¹⁶
- under contracts for public improvements.¹⁷

§ 24 Constitutional limitations; possessory liens

Research References

West's Key Number Digest, Liens ⇨8

It is within the power of the legislature, subject to constitutional limitations, to provide for liens to secure the payment of debts and other obligations.¹ Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute.² However, a State may not authorize the taking of any significant property interest without giving the owner prior notice and a hearing unless the State provides other statutory safeguards sufficient to protect the owner against a mistaken deprivation of his or her

⁴N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 132 to 146.

⁵N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 32 to 34.

⁶N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 128 to 132.

⁷§ 33.

⁸N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

⁹N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

¹⁰§ 31.

¹¹N.Y. Jur. 2d, Hospitals and Related

Health Care Facilities §§ 221 to 231.

¹²N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

¹³N.Y. Jur. 2d, Mechanics' Liens §§ 9, 10, 58.

¹⁴§ 34.

¹⁵N.Y. Jur. 2d, Animals § 18.

¹⁶§§ 28 to 30.

¹⁷N.Y. Jur. 2d, Mechanics' Liens § 10.

[Section 24]

¹Am. Jur. 2d, Liens § 53.

²Am. Jur. 2d, Liens § 54.

property.³ A statutory lien does not violate the provisions of the state and federal constitutions, providing that no person is deprived of property rights without due process of law, that is, notice and opportunity to be heard.⁴

The constitutionality of the statutory possessory lien has been upheld,⁵ inasmuch as the possessory nature of the lien that a lienor has on a property until his or her charges are satisfied does not constitute state action sufficient to trigger the protections afforded by the due-process clause of the state constitution.⁶ However, the enactment of substantive provisions of law that authorize a creditor to bypass the courts to carry out the foreclosure sale encourages him or her to adopt this procedure rather than to rely on the more cumbersome methods that might comport with constitutional due-process guaranties.⁷ A statute that creates a lien and permits a person to summarily seize property of another for satisfaction of a debt cannot be said to serve an important governmental or general public interest.⁸ Since a possessory lien is merely a security interest, the State may not constitutionally permit a lienor to extinguish the owner's interest without adhering to minimum due-process standards.⁹

§ 25 Constitutional limitations; possessory liens—Taking of property

Research References

West's Key Number Digest, Liens ☞8

A State may not authorize the taking of any significant property

³Hercules Chemical Co., Inc. v. VCI, Inc., 118 Misc. 2d 814, 462 N.Y.S.2d 129 (Sup 1983).

⁴Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

IDS Leasing Corp. v. Hansa Jet Corp., 82 Misc. 2d 741, 369 N.Y.S.2d 922 (Sup 1975), order aff'd, 51 A.D.2d 536, 377 N.Y.S.2d 639 (2d Dep't 1976).

As to the filing of a notice of lien as a taking of property, see § 25.

⁵Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

IDS Leasing Corp. v. Hansa Jet Corp., 82 Misc. 2d 741, 369 N.Y.S.2d 922 (Sup 1975), order aff'd, 51 A.D.2d 536, 377 N.Y.S.2d 639 (2d Dep't 1976).

⁶N.Y. Const. Art. I, § 6.

⁷Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

⁸Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973).

As to enforcement of statutory liens by extrajudicial sale, see §§ 59 to 76.

⁹Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

For discussion of proceedings to determine the validity of a lien prior to extrajudicial sale, see § 62.

As to constitutional due process, generally, see N.Y. Jur. 2d, Constitutional Law §§ 387 to 433.

interest without giving the owner prior notice and a hearing unless the State provides other statutory safeguards sufficient to protect the owner against a mistaken deprivation of his or her property.¹ However, the statutory notice of lien once filed is a lien upon the property and nothing more.² It does not constitute a taking of property without due process inasmuch as an opportunity for an immediate hearing exists upon application either to enforce or to discharge the lien wherein the propriety of the lien and the existence of appropriate grounds therefor can be tested and a hearing directed where necessary.³ However, the State, by authorizing the enforcement of such lien by means of an ex parte sale without first affording its owner an opportunity to be heard, has delegated to private parties functions traditionally associated with sovereignty, constituting meaningful state participation that triggers the protections afforded by that clause.⁴

§ 26 Construction of statutes

Research References

West's Key Number Digest, Liens ⇨8

The Lien Law is to be liberally construed to secure the purposes for which it was intended, particularly in the case of a lien statute that expressly provides for its liberal construction.¹ Generally, a lien provided for by a statute that is merely declaratory of the common law must be interpreted in conformity with its principles, but where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the

[Section 25]

¹§ 24.

²§§ 57, 58.

³*Gibor Associates v. City of New York*, 91 Misc. 2d 915, 399 N.Y.S.2d 84 (Sup 1977).

As to the requirement that notice of sale include notice that a proceeding to challenge the lien or amount claimed may be brought, see § 69.

For discussion of proceedings to determine the validity of liens prior to extrajudicial sale, see § 62.

⁴*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

Crouse v. First Trust Union Bank,

109 Misc. 2d 89, 438 N.Y.S.2d 438, 31 U.C.C. Rep. Serv. 1494 (Sup 1981), order rev'd on other grounds, 86 A.D.2d 978, 448 N.Y.S.2d 329, 33 U.C.C. Rep. Serv. 1170 (4th Dep't 1982).

[Section 26]

¹*Fedders Central Air Conditioning Corp. v. Karpinecz & Sons, Inc.*, 83 Misc. 2d 720, 372 N.Y.S.2d 470, 17 U.C.C. Rep. Serv. 1377 (N.Y. City Civ. Ct. 1975).

State Ins. Fund v. Parrilla, 31 Misc. 2d 835, 225 N.Y.S.2d 236 (Mun. Ct. 1961).

For example, Lien Law § 23 provides that the laws pertaining to mechanic's liens must be construed liberally. See N.Y. Jur. 2d, Mechanics' Liens § 4.

exercise of the powers of the courts with respect to such liens must be consistent with the legislative definition.²

To the extent that a statute creating a lien is in derogation of the common law, the statute is subject to the rule that statutes in derogation of the common law are to be strictly construed.³ Because the right of a garage owner to a lien for storage charges is purely statutory, and since the statute confers privileges in derogation of the common law, it must be strictly construed.⁴

§ 27 Establishing nonpossessory lien; filing and notice

Research References

West's Key Number Digest, Liens ☞8

Am. Jur. Legal Forms 2d § 165:24 (Notice of lien—Employee's contractual or statutory lien for unpaid wages—Employer in bankruptcy)

Am. Jur. Pleading and Practice Forms, Liens § 5 (Claim, statement, or notice of lien—Arising by contract—On merchandise—To secure loans and advances made by lienor to lienee)

Nonpossessory statutory liens ordinarily must be established by notice of some kind so that innocent third parties may have a measure of protection from secret liens¹ although it is possible, by the act of public authority, to create liens without physical attachment to the property affected and without filing notices in the available public offices where they may be searched out by interested parties² as in the case of an ordinance creating a lien for a public improvement.³

A lien does not come into existence unless the notice upon which it is founded substantially complies with the statute that authorized the creation of the lien.⁴ For instance, the Lien Law creates a nonposses-

²Am. Jur. 2d, Liens § 55.

³N.Y. Jur. 2d, Statutes § 177.

⁴Wyche v. New Amsterdam Garage Corp., 82 Misc. 2d 956, 371 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1975).

As to garageman's lien, generally, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

[Section 27]

¹Clark v. Flynn, 120 Misc. 474, 199 N.Y.S. 583 (Sup 1923).

²Oxford Distributing Co. v. Famous Robert's, Inc., 5 A.D.2d 507, 173 N.Y.S.2d 468 (3d Dep't 1958).

³Cummins v. U. S. Life Title Ins.

Co. of New York, 40 N.Y.2d 639, 389 N.Y.S.2d 319, 357 N.E.2d 975 (1976) (public notice of a prospective ordinance, to provide for a special assessment of taxes upon property to pay cost of an improvement project, did not create such lien where the ordinance was never actually enacted).

As to public improvement liens, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 9 to 11.

⁴Houseknecht v. Reeve, 108 N.Y.S.2d 917 (Sup 1951).

The subsequent purchaser of an apartment building in which a dangerous condition had been found to exist by the court was not subject to liens in favor of

sory lien for labor performed on stone only upon the filing of notice of lien in compliance with the Uniform Commercial Code.⁵ A positive legislative enactment prescribing the conditions essential to the existence and preservation of a statutory lien may not be disregarded, and in order to create such a lien, there should be a substantial compliance with the statute. For example, there should be a compliance with requirements as to the filing of liens and notices of liens.⁶

The filing of notice of liens does not establish the correctness or validity of the lien.⁷ Additionally, even though the lien has been perfected in the manner provided by statute, a lienholder may lose the lien by delay in bringing a foreclosure action⁸ or by failure to take statutory steps to keep the lien alive.⁹

Examples of statutory nonpossessory liens that must be established by notice are those on vessels,¹⁰ cemetery structures,¹¹ liens of hospitals on actions for injury or death of patients,¹² and liens on animals for service or breeding fees.¹³ The liens on strays and drifts are examples of liens that are possessory, yet must be established by notice.¹⁴ The Lien Law also provides for the filing of notices of liens for taxes payable to the United States.¹⁵

On the other hand, some statutory liens need not be filed or recorded. For example, the Workers' Compensation Law¹⁶ provides that compensation is a lien against the assets of the carrier or employer without limit of amount, subordinate, however, to claims for unpaid wages and prior recorded liens. Such lien need not be recorded, docketed, or filed to be effective.¹⁷

New York City that secured loans taken to finance repairs of the building, where New York City did not file any purchase or work orders relating to borrowed funds, as required under the provision of the New York City Housing Maintenance Code governing such liens. *Rosenbaum v. City of New York*, 96 N.Y.2d 468, 730 N.Y.S.2d 774, 756 N.E.2d 62 (2001).

⁵§ 34.

⁶Am. Jur. 2d, Liens § 56.

⁷*Becker v. Romanzo*, 245 A.D. 185, 281 N.Y.S. 317 (3d Dep't 1935).

As to notice of lien and sale, see §§ 66 to 73.

For discussion of the proceeding to determine the validity of liens after notice of sale, see § 62.

⁸§ 80.

⁹§§ 45 to 52.

¹⁰N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 135 to 146.

¹¹N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 32 to 34.

¹²N.Y. Jur. 2d, Hospitals and Related Health Care Facilities §§ 221 to 231.

¹³N.Y. Jur. 2d, Animals § 18.

¹⁴N.Y. Jur. 2d, Animals §§ 192 to 194.

¹⁵Lien Law § 240.

¹⁶WCL § 34, discussed at N.Y. Jur. 2d, Workers' Compensation § 964.

¹⁷*Albert Pipe Supply Co. v. Callanan*, 159 Misc. 547, 288 N.Y.S. 307 (App. Term 1936).

b. Artisans' Lien

§ 28 Generally

Research References

West's Key Number Digest, Liens ☞8

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases, 44 A.L.R.4th 271

Am. Jur. Legal Forms 2d § 165:12 (Professional services contract provision—Right of accountant to lien on client's books); § 165:19 (Notice of lien—Artisan's common-law lien); § 165:20 (Notice of lien—Artisan's statutory lien)

New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

At common law, a workperson who by his or her labor enhanced the value of a chattel obtained a lien upon it for the reasonable value of the work performed. That lien endowed the artisan with the exclusive right to possession of the repaired article until his or her charges were satisfied.¹ The Lien Law provides that a person who makes, alters, repairs, or performs work or services of any nature and description upon, or in any way enhances the value of, an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his or her reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid.²

◆ **Definition:** The term “artisan” is generally associated with trained works, mechanics, and tradespeople.³ A corporation may hold an artisans' lien for computer services rendered,⁴ but an accountant may not assert, for services rendered, such a lien over a client's books or records.⁵

The statute, in effect and intent, is simply declaratory of the common law granting to an artisan a lien upon personal property for work done thereon with a right to retain possession of it until the lien

[Section 28]

¹Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

²Lien Law § 180.

³Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

⁴American Consumer, Inc. v. Anchor Computers, Inc., 93 Misc. 2d 452, 402 N.Y.S.2d 734 (Sup 1978) (corporation that enhanced the value of tapes is entitled to artisan's lien).

⁵Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

is discharged either by payment or proper tender. It does not enlarge in any way the common-law right.⁶ One who by performance of skilled, as distinguished from common, labor has transferred the object into a thing of use by the exertion of skill acquires, by statute, a lien on the object.⁷ However, an artisans' lien extends to nonskilled labor performed by the artisan prior to commencement of the actual manufacturing process, where such work is done in the ordinary course of the artisan's business and as a necessary preliminary step to the manufacturing process,⁸ such as the storage and handling of goods received for enhancement of their value.⁹ Possession may be retained, and an artisans' lien obtained, until charges are paid:

- where cut garments are delivered for manufacture¹⁰
- where computer services are performed on magnetic computer tapes, including data manipulation, modification, and assembly, that enhance the value of the computer tapes¹¹
- where the petitioner, engaged to dismantle and preserve the architectural interior of a certain room, fulfilled its engagement by removing the wall panels, cornices, ceilings, leaded glass, and other parts, and numbered and properly identified them so that they could be reconstructed at some future time, and packed or crated and removed them to a warehouse¹²
- by a manufacturer of automobile truck bodies who mounts bodies upon chassis delivered to him for that purpose¹³

However, there is no artisan's lien where:

- the value of the alteration, repair, or enhancement of a press was so small that the payment therefor by the sum for which the lien was asserted or the lessened sum awarded in the judgment would be excessive¹⁴
- a defendant stored a piano but performed no services other than

⁶Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

⁷Bush v. Springall, 36 N.Y.S.2d 708 (Sup 1942).

⁸Mickey's Clan, Inc. v. New York Credit Men's Adjustment Bureau, Inc., 114 Misc. 2d 926, 452 N.Y.S.2d 555 (Sup 1981).

⁹Mickey's Clan, Inc. v. New York Credit Men's Adjustment Bureau, Inc., 114 Misc. 2d 926, 452 N.Y.S.2d 555 (Sup 1981) (where completion of the work was

prevented without fault of the artisan).

¹⁰Davidson v. Fankuchen, 88 N.Y.S. 196 (App. Term 1904).

¹¹American Consumer, Inc. v. Anchor Computers, Inc., 93 Misc. 2d 452, 402 N.Y.S.2d 734 (Sup 1978).

¹²In re Harriss' Estate, 174 Misc. 34, 18 N.Y.S.2d 842 (Sur. Ct. 1940).

¹³Hare's Motors v. Fred Roeder Mfg. Co., 207 A.D. 670, 202 N.Y.S. 830 (2d Dep't 1924), aff'd, 238 N.Y. 590, 144 N.E. 904 (1924).

¹⁴Strauss v. Keyes, 117 N.Y.S. 951 (App. Term 1909).

the ordinary simple act of cleaning and polishing¹⁵

- a laborer made a claim simply for the value of labor and services “in and about the business of cutting, trimming and preparing logs to be sawed, hauling the same from wood lots”¹⁶

The right to possess property that is the subject of an artisan’s lien, impounded by the sheriff in a creditor’s action against the debtor-owner, is an integral part of the lienor’s interest, and while the court has the authority to direct the disposition of the claim against the debtor, only the claim and not the property itself may be sold by the sheriff; the purchaser-lienor may then execute the lien by sale of the chattel.¹⁷

§ 29 Establishment and perfection of lien

Research References

West’s Key Number Digest, Liens ⇌8

The Lien Law requires to establish an artisans’ lien¹ that the artisan or lienor have possession of the goods over which the lien is asserted.²

◆ **Illustration:** A corporate metal fabricator, having worked on certain aluminum extrusions in accordance with a purchase order for fabrication on the understanding that after completion of the work, the extrusions and leftover scrap aluminum would be returned to the owner, has a lien upon the scrap and extrusions remaining in its possession for the reasonable charges for the work done inasmuch as where the artisan returned to the owner a portion of the property worked upon, and retains the balance, the lien attaches to the retained property to the full extent of work done on the entire order, including the portion returned.³

The artisans’ lien is established simply by lawful possession for the purpose of performing the work for which the lien is claimed.⁴ Noth-

¹⁵Bush v. Springall, 36 N.Y.S.2d 708 (Sup 1942).

¹⁶Brackett v. Pierson, 114 A.D. 281, 99 N.Y.S. 770 (3d Dep’t 1906).

¹⁷U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan’s lien).

[Section 29]

¹Lien Law § 180.

²North Am. Leisure Corp. v. A & B Duplicators, Ltd., 468 F.2d 695, 11 U.C.C.

Rep. Serv. 518 (2d Cir. 1972) (applying New York law).

Similarly, the liens of manufacturers and throwsters of silk goods and of motion-picture film laboratories are conditioned upon possession. See §§ 31, 33.

³U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

⁴Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep’t 1911).

ing more is required to perfect such lien.⁵ Additionally, the lien is perfected by the performance of the work and continues as long as the artisan retains lawful possession of the property.⁶ The burden of proof of lawful possession is on the lienor.⁷

An artisan has no lien unless his or her work was done at the request or with the consent of the owner⁸ and, for example, where the plaintiff delivered her piano to a third person who delivered it to the defendant, the defendant cannot enforce a lien against the plaintiff without showing authority on the part of the third person to deliver it to the defendant.⁹

§ 30 Extent of lien

Research References

West's Key Number Digest, Liens ⇨8

The lien of an artisan extends to all goods delivered under one contract and is not confined to the particular portion on which the labor has been bestowed.¹ Where the artisan returns to the owner a portion of the property worked upon and retains the balance, the artisan's lien attaches to the retained property to the full extent of the work done on the entire order, including the portion returned.² The fact that the property retained by the artisan is surplus, resulting from the owner's overestimate of goods necessary for the artisan's work, which is not improved, does not eliminate the artisan's lien thereon for work done in the past so long as the property came to him or her as part of the same transaction.³ Generally, a lien for work done on goods other than those on which the lien is asserted must be

⁵U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law).

⁶Lieberman v. Mulhern Steam Heating Co., 159 N.Y.S. 43 (App. Term 1916).

⁷§ 98.

⁸L.B. Repair Co. v. Whicher, 140 N.Y.S. 133 (App. Term 1913).

As to the necessity that a lien be created by the property owner, generally, see § 9.

⁹Ludwick v. Davenport-Treacy Piano Co., 112 N.Y.S. 1023 (App. Term 1908).

[Section 30]

¹Wiles Laundry Co. v. Hahlo, 105

N.Y. 234, 11 N.E. 500 (1887).

Bauer v. Cohen, 127 A.D. 194, 111 N.Y.S. 46 (2d Dep't 1908).

North Am. Leisure Corp. v. A & B Duplicators, Ltd., 468 F.2d 695, 11 U.C.C. Rep. Serv. 518 (2d Cir. 1972) (applying New York law).

²U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

³U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law) (publisher that had been furnished paper stock under a contract for printing was entitled to a lien on the excess paper in

based on a special contract between the owner and the artisan.⁴ Where garments were delivered to an artisan to perform work thereon, under circumstances that showed that the contract was not entire but that each garment was a separate transaction, the retention of some by reason of nonpayment for work done upon others that had been returned was unauthorized.⁵

The protections afforded by the Lien Law are not precluded by the copyrighted character of goods in the possession of the lienor where the person for whom the goods were made, altered, repaired, or in any way enhanced unjustifiably declines to pay the price of such service.⁶ A defendant, who allegedly has artisan's lien on a vehicle, lacks standing to challenge a search of the vehicle in which vials of cocaine were seized since the possessory interest created by the lien is for the single and limited purpose of obtaining payment for work done and does not authorize the defendant's use of the vehicle.⁷

c. Other Statutory Liens

§ 31 Lien of motion-picture film laboratories

Research References

West's Key Number Digest, Liens ⇌8

The Lien Law provides for the protection of all persons, firms, or corporations engaged in the business of a motion-picture film laboratory or in the business of developing, titling, storing, assembling, or reproducing motion-picture films a lien for the services rendered for another upon positive prints and negative film from which other positive prints are made, printed, reproduced, or repaired, at the request, or with the consent or knowledge, of the owner or his or her agent.¹ Such services expressly include every case where such persons or corporations copy, print, reprint, reproduce, or in any manner prepare, at the request, with the consent, or with the knowledge of the owner or his or her agent, a positive print or prints from a motion-picture negative film.² No valid lien exists on motion-picture film negatives

its possession for the unpaid balance on the contract).

⁴*Sheinman & Salita, Inc. v. Paraskevas*, 22 Misc. 2d 436, 194 N.Y.S.2d 62 (App. Term 1959).

⁵*Solomon v. Bok*, 49 Misc. 493, 98 N.Y.S. 838 (App. Term 1906).

⁶*Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963)

(applying New York law).

⁷*People v. Ayala*, 147 Misc. 2d 278, 557 N.Y.S.2d 236 (Sup 1990).

[Section 31]

¹Lien Law § 188.

²Lien Law § 188.

unless positive prints have been made thereof.³

Possession of motion-picture film by any person who delivers the same to any motion-picture laboratory is presumptive evidence of the consent of the owner thereof to the performance of the work that may be done thereon or therefrom by such laboratory. No lien hereby granted will be waived or impaired by the taking of any note or notes for the moneys so due or for the work and labor performed and materials and moneys furnished.⁴ Absent a judicial determination of the rights of the parties, a lienor for services performed on motion-picture film has no legal right to effect a sale of lien property in his or her possession.⁵ Where the film owner establishes a question of fact whether the film lab agreed to defer payment for services performed until funds were payable to the owner from its distributor, the owner is entitled to injunctive relief preventing an ex parte extrajudicial sale until a litigation of the respective rights of the parties.⁶ In an action by a film distributor contesting the amount owed to defendant film processors, who claimed a possessory lien in the film,⁷ the defendants were directed to release the film to distributor on its filing of a surety bond or making of a cash deposit even though the Lien Law does not expressly provide for substitution of undertaking for possessory lien.⁸

§ 32 Lien of motion-picture film laboratories—Extent of lien

Research References

West's Key Number Digest, Liens ⇨8

The lien of a motion-picture film laboratory extends to distribution and exhibition rights given in such films by those parties who request, consent to, or have knowledge of the performance thereon of film

³21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958).

⁴Lien Law § 188.

As to waiver of lien, generally, see § 45.

⁵Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

⁶Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

As to sale under statute, in enforcement of liens, generally, see §§ 59 to 76.

As to proceedings to determine the validity of the lien or the amount claimed, see § 62.

⁷Pursuant to Lien Law §§ 180, 188.

⁸Angelika Films, Inc. v. Urban Entertainment Associates, Inc., 140 Misc. 2d 408, 530 N.Y.S.2d 979 (Sup 1988) (defendants thereby would be fully protected on their claims and to permit them to retain possession of prints until final disposition of action unless they were paid full amount allegedly owing would give them unfair advantage).

laboratory services¹ and is intended to ensure the payment of the cost of the services performed, including storage charges,² insurance, cost of containers, and any money advanced in connection with the developing, printing, reproducing, and preparing of such films, whether negative or positive.³ The lien is on positive films copied, printed, reprinted, reproduced, or prepared, and to any and all negative or positive prints or films of such owner, lessee, licensee, mortgagee, or conditional vendee in their possession, including the distribution and exhibition rights therein of all such persons, firms, and corporations aforesaid.⁴ These distribution and exhibition rights apply to a negative film only when the laboratory has made a positive print or prints from the negative film, and then the lien attaches to both the positive prints and the negative film.⁵ Once a positive print of motion-picture film is made, the lien extends to any and all other negative or positive prints of films in the lienor's possession, not merely those upon which work has been performed.⁶

◆ **Illustrations:** A motion-picture film laboratory was entitled, upon serving proper notice, to sell 12 films submitted for positive prints as payment for past work performed on another film.⁷ However, another case provides that no lien on a negative film, accompanied by a lien on the right of distribution and exhibition, can attach until positive prints are made by the laboratory from the negative.⁸

§ 33 Lien of manufacturer or throwster of silk goods

Research References

West's Key Number Digest, Liens ☞8

All persons or corporations engaged in the business of manufacturing, spinning, or throwing silk into yarn or other goods are entitled to a lien upon the goods and property of others in their possession for the amount of any account that may be due them, from the owners of such silk, by reason of any work and labor performed, and materials

[Section 32]

¹Lien Law § 188.

²21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

³Lien Law § 188.

⁴Lien Law § 188.

⁵Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958).

⁶21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

⁷21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

⁸Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958) (applying New York law).

furnished in or about the manufacturing, spinning, or throwing of the same, or other goods, of such owner or owners. Such lien may not be waived or impaired by the taking of any note or notes for the moneys so due, or for the work and labor performed and materials furnished.¹

§ 34 Lien for labor on stone; notice of lien

Research References

West's Key Number Digest, Liens ⇨8

A person employed in a quarry, mine, yard, or dock at excavating, quarrying, mining, dressing, or cutting sandstone, granite, cement stone, limestone, bluestone, or marble may have a lien on such stone for the amount due for the labor expended thereon.¹ However, this lien does not attach to any material that becomes a part of any building or structure, or has ceased to be the property of the person for whom the labor was performed.²

Inasmuch as nonpossessory statutory liens ordinarily must be established by notice of some kind so that innocent third parties may have a measure of protection,³ the statute provides that a lien for labor on stone is established by filing a notice of lien with the Secretary of State in compliance with the Uniform Commercial Code requirement to perfect a security interest in such stone.⁴ This notice must be filed within 30 days after the completion of such labor and must state the:

- amount due therefor
- name and residence of the lienor
- name of the person for whom the labor was performed
- quantity and description of the stone against which the claim is made⁵

The notice must be marked, filed, and indexed by the filing officer in the same manner as a financing statement and the same fees charged therefor. In addition, a copy of the notice so filed must be served upon the owner of the stone or upon the person in charge of the quarry,

[Section 33]

¹Lien Law § 185.

[Section 34]

¹Lien Law § 140.

²Lien Law § 141.

³§ 27.

⁴Lien Law § 140, referring to U.C.C. § 9-501(a)(2).

For discussion of security interests, including the properly filed lien for labor performed on stone, enforceable as a lien upon chattel, see § 83.

As to the filing requirements to perfect a security interest, generally, under the Uniform Commercial Code, see N.Y. Jur. 2d, Secured Transactions §§ 181 to 236.

⁵Lien Law § 140.

mine, yard, or docks wherein the services were performed, within five days after the filing of the notice.⁶

If the labor upon such sandstone, cement stone, granite, bluestone, limestone, or marble is performed for a contractor under a contract with the owner of such quarry, mine, yard, or dock, the owner is not liable to pay by reason of all the liens filed against such quarry, mine, yard, or dock a greater sum than the amount unpaid upon such contract at the time of filing such notices, or, in case there is no contract, than the aggregate amount unpaid of the value of labor and services performed.⁷

§ 35 Lien of owner of self-storage facility

Research References

West's Key Number Digest, Liens ⇌8

The owner of a self-storage facility has a lien upon all personal property stored in such facility, for occupancy fees and other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to law, or any other charges pursuant to the occupancy agreement.¹ The lien attaches as of the date the personal property is brought to the facility for storage and is superior to any other lien or security interest.²

◆ **Illustrations:** The operator of a self-storage facility in which a stolen automobile is stored has a lien on the contents of the storage unit, including the stolen car, since the Lien Law does not distinguish stolen property from other property in creation of the lien and since the Uniform Commercial Code,³ which excludes stolen property from a warehousepersons' lien, does not govern the self-service storage facility owner's claim for storage expenses.⁴ Similarly, the lessor of a storage unit who sold a lessee's property that was stored in the unit, after the lessee defaulted on rent and moved without notifying the lessor of a new address, did not violate the Lien Law, where the lease agreement provided that the lessor had the right to sell the lessee's property if the lessor defaulted on his rent, and the lessor tried three times unsuccessfully to serve the lessee with notice of default by certified mail, and the lessor twice noticed a public sale in

⁶Lien Law § 140.

⁷Lien Law § 141.

[Section 35]

¹Lien Law § 182(6).

²Lien Law § 182(6).

As to enforcement of statutory

liens, see §§ 57, 58.

³U.C.C. § 7-209.

⁴E-Z Self Storage, Inc. v. Aetna Cas. & Sur. Co., 132 Misc. 2d 357, 503 N.Y.S.2d 690, 1 U.C.C. Rep. Serv. 2d 1297 (City Ct. 1986).

a newspaper.⁵ On the other hand, a personal property storage company did not properly notice the sale of a customer's property under the Lien Law, and thus, the company was liable for any damages resulting from the sale where the notices allegedly sent by the company to the customer did not include an itemized statement of the amount due, a description of the property subject to the lien, the nature of the proposed sale, a conspicuous statement that unless the claimant paid within an allotted time the goods would be advertised for sale and sold, a statement that any person claiming an interest in the goods was entitled to bring a proceeding within 10 days of service of the notice if he disputed the validity of the lien or the amount claimed.⁶ Also, in an action to recover the value of goods stored in a self-service storage facility, the plaintiff was properly limited to \$1,000 recovery where he had exclusive control of the storage space, and under the terms of the written storage agreement, which conformed to the applicable statute,⁷ he covenanted that the value of the goods stored would not exceed \$1,000 and agreed that the storage facility operator had no duty to secure the stored property.⁸

§ 36 Lien for arrears and past-due support

Research References

West's Key Number Digest, Liens ☞8

Am. Jur. Legal Forms 2d § 165:6 (Agreement—Creating lien on personal property—In favor of public welfare agency); § 165:7 (Agreement—Creating lien on real and personal property—In favor of public welfare agency); § 165:8 (Agreement—Lien against cause of action—In favor of public welfare agency)

The State Office of Temporary and Disability Assistance, or local social services district, or its authorized representative on behalf of persons receiving services, has a lien against personal property owned by a support obligor when the support obligor is under a court order to pay child support or combined child and spousal support to a support collection unit, and such support obligor has accumulated support arrears/past-due support in an amount equal to or greater than the amount of current support due for a period of four months. Such lien is in an amount sufficient to satisfy such support arrears/past-due support. Said lien must be perfected in case of a vehicle with the Department of Motor Vehicles. The filing of a notice of lien or of a

⁵Seaforth v. Public Storage Management, Inc., 288 A.D.2d 368, 733 N.Y.S.2d 228 (2d Dep't 2001).

⁶Anderson v. Pods, Inc., 70 A.D.3d 820, 896 N.Y.S.2d 88 (2d Dep't 2010).

⁷Lien Law § 182.

⁸Ross v. Tuck-It-Away, Inc., 180 A.D.2d 428, 579 N.Y.S.2d 92 (1st Dep't 1992).

release of lien must be completed without payment of fee and may be done by electronic means.¹ The State must accord full faith and credit to liens that arise in another state when such state agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to such liens, as is appropriate. Such rules may not require judicial notice or hearing prior to enforcement of such a lien, and enforcement will be governed by Article 9 of the Lien Law.² For purposes of determining whether a support obligor has accumulated support arrears/past-due support for a period of four months, the amount of any retroactive support, other than periodic payments of retroactive support that are past due, may not be included in the calculation of arrears/past-due support. However, if at least four months of support arrears/past-due support has accumulated subsequent to the date of the court order, the entire amount of any retroactive support may be collected.³

§ 37 Lien for arrears and past-due support—Against real and personal property under the Social Services Law

Research References

West's Key Number Digest, Liens ⇨8

Bowmar, Lien Priorities in New York § 3:21

The State Office of Temporary and Disability Assistance, or a local social services district, or its authorized representative has a lien against real and personal property owned by a support obligor when such support obligor is under a court order to pay child support or combined child and spousal support to a support collection unit on behalf of persons receiving services,¹ and such obligor has accumulated support arrears/past due in an amount equal to or greater than the amount of current support due for period of four months. Such lien incorporates unpaid support that accrues in the future.²

When the Office of Temporary and Disability Assistance, or social services district, or its authorized representative on behalf of person receiving services determines that the requisite amount of child support is past due, it must send, by first-class mail, a notice of intent to file a lien to the support obligor.³ Filing of the notice of the lien must

[Section 36]

¹Lien Law § 211(1).

²Lien Law § 211(2).

³Lien Law § 211(3); SSL § 111-u(2).

[Section 37]

¹Under SSL §§ 111-y, 111-z.

²SSL § 111-u(1).

³SSL § 111-u(3).

be as provided⁴ or as otherwise authorized by law.⁵ The obligor may assert a mistake of fact and must have the opportunity to make a submission in support of the assertion. The assertion and any supporting papers must be submitted within 35 days from the date a notice was mailed. Thereafter, the social services district must determine the merits of the assertion and must notify the obligor of its determination within 90 days after notice to obligor was mailed.⁶ If the social services district finds no mistake of fact exists, or the obligor fails to assert a mistake of fact within 35 days, the social services district may file a notice of lien, which must contain the caption of the support order and a statement of arrears and that constitutes a lien on the property. The social services district may not enforce its lien until after the expiration of any applicable period for review of an administrative action, or if the obligor has initiated an Article 78 proceeding,⁷ until completion of such review.⁸ Within five days before or 30 days after filing the notice of the lien, the social services district must send by first-class mail a copy of such notice upon the owner of the property.⁹

§ 38 Lien on dies, molds, forms, and patterns

Research References

West's Key Number Digest, Liens ⇨8

Molders have a lien, dependent on possession, on all dies, molds, forms, or patterns in their hands belonging to a customer, for the balance due them from such customer for any manufacturing or fabrication work, and in the value of all material related to such work. Such lien does not have priority over any security interest in the die, mold, form, or pattern that is perfected at the time the molder acquires the lien. The molder may retain possession of the die, mold, form, or pattern until the charges are paid.¹

Before enforcing such a lien, notice in writing must be given to the customer and to the holder of a perfected security interest either delivered personally or sent by registered mail to the last-known address of the customer or holder of a perfected security interest. This notice must state that a lien is claimed for the damages set forth in or attached to such writing for manufacturing or fabrication work contracted and performed for the customer. Notice to the customer

⁴In Lien Law §§ 65, 211; VTL §§ 2101 et seq. (Art. 46).

⁵SSL § 111-u(5).

⁶SSL § 111-u(3).

⁷CPLR 7801 et seq. (Art. 78).

⁸SSL § 111-u(4).

⁹SSL § 111-u(6).

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¹Lien Law § 151.

must also include a demand for payment.²

◆ **Definition:** A “molder” means any individual or entity who fabricates, casts, or otherwise makes or uses a die, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product or products for a customer. A “molder” includes, but is not limited to, a tool or die maker.³ A “customer” means any individual or entity who causes a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern or who provides a molder with a die, mold, form, or pattern to manufacture, assemble, cast, fabricate, or otherwise make a product or products for a customer.⁴

II. PRIORITIES OF LIEN

Research References

West's Key Number Digest

Liens ⇨7, 8, 12

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions

West's A.L.R. Digest, Liens ⇨7, 8, 12

Legal Encyclopedias

Am. Jur. 2d, Bankruptcy §§ 1235 to 1244; Federal Tax Enforcement §§ 244 to 272; Liens §§ 68 to 75

C.J.S., Liens §§ 27, 28

Forms

Am. Jur. Legal Forms 2d § 165:41

Am. Jur. Pleading and Practice Forms, Liens §§ 45, 78

§ 39 Generally

Research References

West's Key Number Digest, Liens ⇨12

Am. Jur. Pleading and Practice Forms, Liens § 78 (Judgment or decree—Provision—Establishing existence and priority of lien)

As a general rule, common-law liens, which arise by operation of law upon considerations of justice and policy, as distinguished from liens created by contract or statute, attach to the property itself, without any reference to ownership, and override all other rights in

²Lien Law § 152.

⁴Lien Law § 150(1).

³Lien Law § 150(2).

the property.¹ The common-law rule with respect to the priority of liens is that the first in time is the first in right,² and, in the absence of any statutory alteration of the common law or where a statute creating a lien fails to address priority, the common-law rule still controls.³

In determining which claim is superior, it must be ascertained which lien attached first to the disputed property and whether any lien takes precedence as a matter of public policy since irrespective of the dates particular liens come into existence, if one is of a type preferred over the others, that factor must control.⁴ Further, the parties may agree among themselves as to the order of priority of liens.⁵ A judgment lien and a mortgage lien stand upon the same footing as regards the real property that is the sole asset from which a judgment lien or mortgage may be satisfied.⁶

◆ **Illustrations:** An instrument entitled "Assignment of Proceeds of Real Property" executed by a public assistance recipient in a lien on her interest in real property, duly recorded, has priority in a surplus money proceeding of a foreclosure action over a junior and subsequently recorded mortgage executed by recipient and her husband in favor of a bank.⁷ Additionally, in an action commenced after the defendant mortgagor was discharged in bankruptcy wherein the bank sought to foreclose on a mortgage obtained in connection with the defendant's purchase of a "qualified leasehold condominium" (in which each unit's ownership is based on a ground lease between the sponsor and the public authority rather than a fee

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¹Peter Barrett Mfg. Co. v. Wheeler, 212 N.Y. 90, 105 N.E. 811 (1914).

Conklin v. Long, 18 A.D.2d 246, 239 N.Y.S.2d 193 (4th Dep't 1963).

²Metropolitan Life Ins. Co. v. U.S., 9 A.D.2d 356, 194 N.Y.S.2d 168 (1st Dep't 1959).

City and County Sav. Bank v. Oakwood Holding Corp., 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

³Morawski v. Gaunay, 22 A.D.2d 745, 253 N.Y.S.2d 330 (3d Dep't 1964).

Long Island Ins. Co. v. S & L Delicatessen, 102 Misc. 2d 853, 424 N.Y.S.2d 849 (Sup 1980).

As to the effect of statute on priority of liens, see § 40.

For discussion of the effect of statute on the common law of liens, gener-

ally, see § 12.

⁴Spinello v. Spinello, 70 Misc. 2d 521, 334 N.Y.S.2d 70 (Sup 1972) (particularly where no express statute or recording scheme dictates a contrary order of enforcement).

⁵Cummins v. U. S. Life Title Ins. Co. of New York, 40 N.Y.2d 639, 389 N.Y.S.2d 319, 357 N.E.2d 975 (1976).

⁶Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

For a discussion of priority of liens as affecting mortgages, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 224 to 249.

⁷Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

simple estate), the bank's interest as first mortgagee took priority over the sponsor's lien for common charges and the public authority's lien for past-due rent under the ground lease, and the sponsor's lien for common charges took priority over the public authority's lien for past rent under the condominium lease since the ground lease and the Condominium Act both provided that "common charges" included the unit owner's proportionate share of the ground lease rent.⁸ Finally, in a surplus money proceeding following a foreclosure and sale, the referee properly gave preference to two judgments entered against married mortgagors with the remainder, if any, to be divided into two equal shares with the first share representing the wife's equity of redemption to go directly to her, and the second share used to satisfy a third judgment which was entered only against the husband, with any surplus from that share going to the successor-in-interest to the husband's equity of redemption.⁹

§ 40 Statutory liens

Research References

West's Key Number Digest, Liens ☞ 8, 12

Am. Jur. Legal Forms 2d § 165:41 (Notice of sale to satisfy lien—Carrier's lien)

Statutory liens are subject to all other existing rights in the property,¹ inasmuch as lien priorities are not strictly matters of statutory creation and concern but instead are governed in the first instance by the common law.² However, the common-law rule that first in time is

⁸Dime Sav. Bank of New York, F.S.B. v. Pesce, 217 A.D.2d 299, 636 N.Y.S.2d 747 (1st Dep't 1995), aff'd, 93 N.Y.2d 939, 693 N.Y.S.2d 66, 715 N.E.2d 93 (1999) (the Court of Appeals concluding on appeal that the first mortgage on the qualified leasehold condominium unit, which was held by a lender that had financed purchase of unit, had priority over a claim for past-due ground rent by a municipal authority that owned land on which condominium stood).

⁹Adirondack Trust Co. v. Snyder, 136 Misc. 2d 159, 518 N.Y.S.2d 337 (Sup 1987).

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¹Peter Barrett Mfg. Co. v. Wheeler, 212 N.Y. 90, 105 N.E. 811 (1914).

Conklin v. Long, 18 A.D.2d 246,

239 N.Y.S.2d 193 (4th Dep't 1963).

Although it is possible for a public authority to create liens without physical attachment to the property affected and without filing notice in the available public offices where it may be searched out by interested parties, such liens cannot wipe out the property rights in existing liens, and probably could not, with regard to due process, take priority over the subsequently created liens of judgment creditors and other lienees acting in good faith without notice. Oxford Distributing Co. v. Famous Robert's, Inc., 5 A.D.2d 507, 173 N.Y.S.2d 468 (3d Dep't 1958).

²City and County Sav. Bank v. Oakwood Holding Corp., 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

A carriers' lien is subordinate to

first in right³ may be changed by statute in specific cases awarding priority in order of filing or registration.⁴

A statute creating a nonpossessory lien, such as the lien for labor upon stone, may require the filing of notice of such lien in compliance with the filing requirements of the Uniform Commercial Code⁵ to perfect a security interest.⁶ Where a statute expressly decrees that one lien has preference over another, regardless of the order in which they are filed, the common law is to that extent displaced.⁷ The Lien Law may expressly provide that a particular lien is superior to any other lien or security interest as in the case of the lien of a self-service storage facility.⁸ The artisans' lien has priority over a chattel mortgage, or security interest,⁹ as does the carriers' lien,¹⁰ and over the lien of a seller under a conditional sales contract.¹¹ By statute, one lien may also be expressly subordinated to another as in the case of a hospital lien that is subsequent to an attorney's lien on the amount recovered in a personal-injury or wrongful-death action.¹²

The Lien Law also specifically provides that a lien on dies, molds, forms, or patterns does not have priority over any security interest in the die, mold, form, or pattern that is perfected at the time the molder acquires the lien.¹³

lien of chattel mortgage previously recorded inasmuch as no statute provides a different priority. *Morawski v. Gaunay*, 22 A.D.2d 745, 253 N.Y.S.2d 330 (3d Dep't 1964).

³§ 39.

⁴*Booth v. Bunce*, 33 N.Y. 139, 1865 WL 4017 (1865).

As to the requirement that a statutory lien be filed and recorded to effect notice, see § 27.

⁵U.C.C. § 9-501(a)(2).

⁶Lien Law § 140.

As to the priority of Uniform Commercial Code security interests, generally, as against statutory liens, see § 41.

For discussion of security interests, including the lien for labor upon stone, as liens upon chattel for purposes of an action for foreclosure, see § 83.

⁷*City and County Sav. Bank v. Oakwood Holding Corp.*, 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

⁸Lien Law § 182(6).

⁹*Manufacturers Trust Co. v. Stehle*, 1 A.D.2d 471, 151 N.Y.S.2d 384 (1st Dep't 1956).

A.I. Pedersen Co. v. Imperial Export Trading Corp., 174 Misc. 118, 19 N.Y.S.2d 9 (Sup 1940).

An artisan's lien on a taxpayer's paper stock in its possession was held superior to a federal lien for taxes thereafter assessed against the taxpayer. *U.S. v. Toys of the World Club, Inc.*, 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961).

¹⁰N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

¹¹*Smith v. Pierce-Arrow Sales Corporation*, 224 A.D. 769, 230 N.Y.S. 194 (2d Dep't 1928).

Dealer Plan Corp. v. Automotive Wholesalers, Inc., 9 Misc. 2d 1052, 164 N.Y.S.2d 516 (App. Term 1957).

¹²Lien Law § 189(7), discussed at N.Y. Jur. 2d, Attorneys at Law § 312.

¹³Lien Law § 151, discussed at § 38.

§ 41 Statutory liens—Security interests

Research References

West's Key Number Digest, Liens ⇨12

Under the Uniform Commercial Code, a possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.¹ If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority even if the statute has been construed judicially to make the possessory lien subordinate.²

◆ **Definition:** As used by the statute, a “possessory lien” means an interest, other than a security interest or an agricultural lien that secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person’s business, which is created by statute or rule of law in favor of the person, and whose effectiveness depends on the person’s possession of the goods.³

For example, if the lienor, subsequent to 30 days from the accrual of such lien, allows the motor vehicle, motor boat, or aircraft out of his or her actual possession, the lien statutorily provided for becomes void as against all security interests, whether or not perfected, in such motor vehicles, motor boat, or aircraft and executed prior to the accrual of such lien, notwithstanding possession of such motor vehicle, motor boat, or aircraft is thereafter acquired by such lienor.⁴

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or the U.C.C. Article governing leases unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.⁵ Other statutory provisions govern the priority of liens arising by attachment or levy

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¹U.C.C. § 9-333(b).

For a detailed discussion of U.C.C. Article 9, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

²Official Comment to U.C.C. § 9-333.

³U.C.C. § 9-333(a).

⁴Lien Law § 184(1), as discussed at N.Y. Jur. 2d, Garages, Parking, and Filling Stations § 79.

⁵U.C.C. § 2-A-306, discussed at N.Y. Jur. 2d, Bailments and Chattel Leases § 153.

on, security interests in, and other claims to goods under the article⁶ governing leases of personal property.⁷

§ 42 Equitable liens

Research References

West's Key Number Digest, Liens ⇨7, 12

The rule that the lien that is prior in time is prior in right¹ does not apply if the junior lien is legal and was acquired without notice of a prior equitable lien² since, in accordance with the equitable maxim that equity follows the law, legal liens are favored against mere equitable interests.³ A recorded lien will prevail over the subsequently recorded equitable lien since the public policy behind the requirement for prompt recording would be hindered if the equitable lien were to prevail. An equitable lien, in the form of an undocketed judgment in favor of a judgment creditor, which is prior in time to a legal lien in the form of a docketed judgment in favor of a second-judgment creditor, does not enjoy priority with respect to surplus money following a mortgage-foreclosure sale. Although a legal lien is favored as against a mere equitable interest, parties enjoying a lien upon real property are entitled to share in surplus money regardless of whether their lien is legal or equitable.⁶

A valid legal lien is entitled to precedence over an equitable

⁶U.C.C. §§ 2-A-101 et seq.

⁷U.C.C. § 2-A-307, discussed at N.Y. Jur. 2d, Bailments and Chattel Leases § 153.

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¹§ 39.

²Kovacs v. New York Property Ins. Underwriting Ass'n, 101 Misc. 2d 244, 420 N.Y.S.2d 837 (Sup 1979).

As to equitable liens, generally, as distinct from common-law and statutory liens, see §§ 13 to 22.

³Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

See, however, Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979), where a duly recorded agreement by a tenant-in-common expressly creating a lien upon her interest in the

property and stating that all subsequent deeds, mortgages, or other documents signed by her were not to be valid or effective was a valid lien against the debtor's interest in the property and had priority over a subsequent mortgage executed and delivered by both tenants-in-common in the same property.

Kovacs v. New York Property Ins. Underwriting Ass'n, 101 Misc. 2d 244, 420 N.Y.S.2d 837 (Sup 1979).

⁵Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

⁶Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

As to disposition of proceeds upon sale of property in satisfaction of lien, see § 64.

assignment.⁷ Persons who furnish labor and materials may have an equitable claim, which may arise from work done on personal, as well as real property, to be paid ahead of general creditors.⁸

§ 43 Government liens; federal priority

Research References

West's Key Number Digest, Liens Ⓒ12

Am. Jur. Pleading and Practice Forms, Liens § 45 (Complaint in federal court—Diversity of citizenship—For declaration of lien priority and for foreclosure on real property)

Federal law governs in a dispute as to the priority of a lien of the United States over other competing liens and, absent a statutory direction to the contrary, the first in time is the first in right.¹ Congress has given priority to the payment of an indebtedness owing to the United States out of the effects of an insolvent,² but this does not create a lien upon the debtor's property in favor of the United States. It merely confers a right of payment out of that property. A claim of the United States within the scope of the statute has priority as against a preexisting inchoate lien but not as against specific and perfected liens.³

◆ **Illustration:** An agency, acting in its sovereign authority, enjoys a prerogative right to priority in the payment of debts owed to it unless it is displaced either by some express statutory provision or by a specific prior lien of another creditor of the same debtor. There being no such statutory provision applicable and no indication that any of the other creditors to the conservatee had a specific prior lien, the Office of Mental Health was entitled to priority in the payment of its claim against the conservatee.⁴

To be choate, a lien must be definite in three respects: (1) the identity of the lienor; (2) the property subject to the lien; and (3) the

⁷Bankers Trust Co. v. Equitable Life Assur. Soc. of U.S., 19 N.Y.2d 552, 281 N.Y.S.2d 57, 227 N.E.2d 863 (1967) (tax lien).

Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

For discussion of priorities of equitable assignments, generally, see N.Y. Jur. 2d, Assignments §§ 78 to 82.

⁸In re Industrial Laundry Machinery Co., 3 A.D.2d 843, 161 N.Y.S.2d 547 (2d Dep't 1957).

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¹Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

²31 U.S.C.A. § 3713.

³N.Y. Jur. 2d, Creditors' Rights and Remedies § 207.

⁴Application of Gallucci, 87 A.D.2d 818, 448 N.Y.S.2d 767 (2d Dep't 1982).

amount of the lien.⁵ An artisan's lien upon goods in its possession belonging to a delinquent taxpayer is superior to a federal lien for taxes assessed thereafter.⁶ However, should both a state-created competing lien and a federal lien attach simultaneously, the federal tax lien receives priority.⁷ Generally, the assignee of a lien that has been properly filed has priority over an asserted lien of the United States that has not been properly filed.⁸

Other federal statutes, such as the Bankruptcy Act⁹ and federal tax lien statutes, also give priority to liens and claims of the United States.¹⁰

◆ **Illustrations:** A government lien was superior to that of the pledgee with respect to money advanced after the date the lien was filed.¹¹ Additionally, a federal tax lien duly filed prior to the accident in which the taxpayer is injured has priority over a hospital lien arising out of care and treatment of the taxpayer's injuries against the settlement proceeds of his claim for personal injuries sustained in the accident since the hospital's lien had not yet become choate.¹² Finally, liens in competition with liens of the United States and state or local tax liens subsequent in time are in effect taxes upon the liens of the United States.¹³

§ 44 Government liens; federal priority—State priority

Research References

West's Key Number Digest, Liens ☞12

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317

The State of New York has a common-law prerogative right to priority in payment out of the assets of an insolvent debtor and is entitled

⁵In re Rosenberg's Will, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

⁶U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law).

⁷In re Rosenberg's Will, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

⁸Harman v. Fairview Associates, 30 A.D.2d 492, 294 N.Y.S.2d 442 (4th Dep't 1968), order rev'd on other grounds, 25 N.Y.2d 101, 302 N.Y.S.2d 791, 250 N.E.2d 209 (1969).

As to assignability of liens, generally, see § 6.

⁹Am. Jur. 2d, Bankruptcy §§ 1235 to 1244.

¹⁰Am. Jur. 2d, Federal Tax Enforcement §§ 244 to 272.

¹¹Bankers Trust Co. v. Equitable Life Assur. Soc. of U.S., 19 N.Y.2d 552, 281 N.Y.S.2d 57, 227 N.E.2d 863 (1967).

¹²In re Walton's Estate, 20 A.D.2d 386, 247 N.Y.S.2d 21 (1st Dep't 1964).

¹³Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

to a preference over private creditors whose claims stand on the same footing as those of the State. The State's priority over general unsecured creditors extends not only to taxes but also to any debt due the State. However, the State's claim is not preferred over specific prior liens in the absence of statute.¹ The legislature has power to give a statutory lien priority over existing liens where the lien is in the nature of a public charge, such as taxes and assessments.²

A state has a common-law right of priority with respect to the payment of taxes over all other creditors of the taxpayers,³ except the United States, with respect to a lien that arises before the State attempts to enforce its right.⁴ Similarly, the Department of Health (DOH), as a state entity, enjoys a priority over claims of private creditors unless such creditors can demonstrate a superior lien or statutory right to defeat the State's preference.⁵ Since the State enjoys a common-law prerogative right to priority in payment of debts owed to it from assets of insolvent debtor, it has no obligation to share pro rata with other creditors.⁶

III. WAIVER, LOSS, ESTOPPEL, OR DISCHARGE OF LIEN

A. WAIVER, LOSS, AND ESTOPPEL

Research References

West's Key Number Digest

Liens ⇨16

A.L.R. Library

A.L.R. Index, Liens and Encumbrances

West's A.L.R. Digest, Liens ⇨16

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¹N.Y. Jur. 2d, Creditors' Rights and Remedies § 208.

²*Petrow v. Bonim Demolition & Const. Corp.*, 51 Misc. 2d 589, 273 N.Y.S.2d 743 (Sup 1966).

For discussion of the priority among state and other local government liens, see N.Y. Jur. 2d, Taxation and Assessment § 645.

³*Security Trust Co. v. West*, 120 A.D.2d 84, 507 N.Y.S.2d 546 (3d Dep't 1986).

⁴*Lacaille v. Feldman*, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

⁵*Benedictine Hosp. v. Glessing*, 47 A.D.3d 1184, 850 N.Y.S.2d 291 (3d Dep't 2008).

⁶*Security Trust Co. v. West*, 120 A.D.2d 84, 507 N.Y.S.2d 546 (3d Dep't 1986) (holding that a state tax commission lien for unpaid sales and income taxes is entitled to priority over a general creditor's lien even where the liens attached simultaneously to the debtor's after-acquired property).

As to the preference and priority of claims of the state on the assets of a debtor, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies § 208.

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 57 to 67

C.J.S., Liens §§ 29 to 42

Forms

Am. Jur. Legal Forms 2d §§ 165:45 to 165:48

Am. Jur. Pleading and Practice Forms, Liens § 49

New York Forms Legal and Business §§ 16A:30 to 16A:33

§ 45 Waiver, generally**Research References**

West's Key Number Digest, Liens ☞ 16

Am. Jur. Legal Forms 2d § 165:45 (Anticipatory waiver of lien); § 165:46 (Waiver of existing lien); § 165:47 (Contract provision—Lien created by contract not to be construed as waiver of statutory lien); § 165:48 (Agreement to subordinate lien—Between lienholder and lender extending credit to owner)

Am. Jur. Pleading and Practice Forms, Liens § 49 (Counterclaim—For recovery of property in lienor's possession—For damages—Demand by lienor in excess of amount due as constituting waiver of lien)

New York Forms Legal and Business § 16A:30 (Contract provision—Lien created by contract not to be construed as waiver of statutory lien)

New York Forms Legal and Business § 16A:32 (Waiver of existing lien)

◆ **National Background:** In some jurisdictions, the waiver of a lien may be express, or it may be implied from conduct that is inconsistent with the continued existence of the lien.¹ In New York, a waiver of lien generally will not be implied.

A lien may be lost by an intentional waiver, but a lien will not be held to be waived unless the intent to do so is express,² and it is shown that the lien was knowingly surrendered.³ A possessory lien is lost where the bailee converts the property entrusted to him or her.⁴ A

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¹Am. Jur. 2d, Liens § 59.

²Beacon Const. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392 (2d Cir. 1975) (applying New York law).

Sometimes, there may be a waiver of lien by an express agreement allowing the owner open credit for work done instead of requiring payment upon delivery of the completed goods under penalty of lien. U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

As to the voluntary surrender of the lien property constituting a waiver of lien, see § 48.

³Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

⁴Susi v. Belle Acton Stables, Inc., 360 F.2d 704 (2d Cir. 1966) (applying New York law).

As to bailees' liens, generally, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

For discussion of conversion, gener-

lien may be waived by surrender of possession⁵ or by inconsistent agreements as to credit or payment or otherwise.⁶

The question whether there has been a waiver depends upon the intent of the parties as drawn from the surrounding circumstances.⁷ If an equitable lien has once arisen, the subsequent taking of a legal and perfected lien does not extinguish the equitable lien by waiver.⁸

§ 46 Statutory prohibition against waiver

Research References

West's Key Number Digest, Liens ☞16

Statutes may prohibit the waiver of a statutory lien as against public policy.¹ The Lien Law expressly provides that various liens may not be waived or impaired as by the taking of any note or notes for the moneys due under a lien of a motion-picture film laboratory² or of a manufacturer or throwster of silk goods.³ However, an express waiver of a lien in a contract in compliance with statute is binding and enforceable in that such waiver extinguishes the right to file a notice of lien and the relinquishment of such right cannot be recalled or expunged.⁴

A written instrument that purports to be a release in whole or in part of a lien upon personal property is not invalid because of the absence of consideration or of a seal.⁵

§ 47 Estoppel or preclusion

Research References

West's Key Number Digest, Liens ☞16

A waiver embraces the idea that a lienholder by agreement, express or implied, has relinquished the lien, while estoppel results where the

ally, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 to 88.

⁵§ 48.

⁶§ 49.

⁷*Blumenberg Press v. Mutual Mercantile Agency*, 177 N.Y. 362, 69 N.E. 641 (1904).

Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

⁸*Payne v. Wilson*, 74 N.Y. 348, 1878 WL 12662 (1878).

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¹Lien Law § 34, as discussed at N.Y. Jur. 2d, Mechanics' Liens § 119.

²Lien Law § 188, discussed further at §§ 31, 32.

³Lien Law § 185, discussed further at § 33.

⁴*Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392 (2d Cir. 1975) (applying New York law).

⁵GOL § 15-303, discussed at N.Y. Jur. 2d, Compromise, Accord, and Release § 90.

lienor by his or her acts and conduct has precluded himself or herself from asserting the lien.¹ One having a lien upon a chattel in his or her possession who does not disclose the lien and claims to be the owner is estopped from setting up his or her lien in an action to recover possession.² Moreover, the failure to proceed against all the security is an abandonment of the lien on the portion omitted.³

§ 48 Surrender of possession

Research References

West's Key Number Digest, Liens ⇨16

The common-law right to retain possession of personal property belonging to another, until some debt due as to or secured by such property is paid or satisfied,¹ is lost by the voluntary² surrender of possession.³ This rule as to the requirement of possession applies where a common-law lien is extended by statute.⁴ However, in some cases, the statute will be construed to permit a lien upon goods in possession for services performed upon goods already surrendered.⁵

◆ **Illustrations:** The release by a motion-picture film laboratory of a negative and positive print of a film for distribution, for which service payment was never received, did not act as a waiver of the laboratory's right to a lien on 12 remaining films where the contract for work performed expressly reserved to the laboratory all statutory⁶ rights.⁷ However, it was held that although a garage person's lien has been extended by statute, it still depends on possession and

[Section 47]

¹Am. Jur. 2d, Liens § 59.

²Maynard v. Anderson, 54 N.Y. 641, 1873 WL 10507 (1873).

³Wydra v. Chai, 50 A.D.3d 779, 857 N.Y.S.2d 580 (2d Dep't 2008).

[Section 48]

¹§ 11.

²Higgins v. Murray, 73 N.Y. 252, 1878 WL 12558 (1878).

³Rapp v. Mabbett Motor Car Co., 201 A.D. 283, 194 N.Y.S. 200 (4th Dep't 1922).

Dean v. Butler, 166 A.D. 367, 152 N.Y.S. 34 (3d Dep't 1915).

⁴Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911) (artisan's lien).

Rochester Production Credit Ass'n v. Dickens Bros., Inc., 39 Misc. 2d 847, 242 N.Y.S.2d 309 (County Ct. 1963) (artisan's lien waived by surrender of possession).

⁵21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

The statute defining the garageperson's lien contains special provisions that modify this rule. For discussion of a garageperson's lien, generally, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

As to the effect, generally, of statute on the common-law lien, see § 12.

⁶Lien Law § 188.

⁷21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

that the lien was lost when the owner took the car without objection.⁸

Surrender of possession under an express agreement that the lien will continue may give rise to an equitable lien.⁹ The mere temporary surrender of possession does not necessarily destroy an equitable lien.¹⁰ For example, the owner cannot destroy the possession, or the lien, at least as between himself and the lienholder, by receiving the property under an agreement to use it in a certain way for a special purpose and thereupon return it provided that the agreement is reasonably consistent with the existence of the bailment, and there is not a voluntary relinquishment of the lien.¹¹

If one obtained possession of property subject to a lien without the consent of the lienor, the lien is not thereby destroyed and continues after the lienor regains possession.¹²

A lienor does not lose the lien on a chattel for services rendered by surrendering possession on the strength of a check that is subsequently dishonored.¹³

§ 49 Agreement inconsistent with lien

Research References

West's Key Number Digest, Liens ⇨16

New York Forms Legal and Business § 16A:33 (Agreement to subordinate lien—Between lienholder and lender extending credit to owner)

Inasmuch as a lien that otherwise would be implied from an agreement or a relationship is negated if inconsistent with the express terms or the clear intent of the contract between the parties,¹ possessory liens may be lost, or never attach in the first place, where special² or inconsistent payment terms are agreed upon.³ Similarly, the right of detaining a thing until the money due upon it is paid may be

⁸Grand Garage v. Pacific Bank, 170 N.Y.S. 2 (App. Term 1918).

⁹§ 15.

¹⁰Fidelity & Casualty Co. of New York v. Peckett, 220 A.D. 118, 220 N.Y.S. 612 (1st Dep't 1927) (even in the absence of acquiescence on the part of the mortgagee in a lienor's release of the chattel, where there is a promise of the owner to return it, such relinquishment of possession does not destroy the lien, and the lienor still has constructive possession).

¹¹Johanns v. Ficke, 224 N.Y. 513, 121 N.E. 358 (1918).

¹²Horowitz v. Hurlburt Motor Truck

Co., 176 N.Y.S. 514 (App. Term 1919).

¹³Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

Yellow Mfg. Credit Corp. v. Horowitz, 166 Misc. 251, 2 N.Y.S.2d 566 (App. Term 1938).

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¹§ 19.

²U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

³Morgan v. Congdon, 4 N.Y. 552, 1851 WL 5463 (1851).

Brackett v. Pierson, 114 A.D. 281,

deemed waived by a special agreement as to the time or mode of payment.⁴

◆ **Illustrations:** There may be a waiver of a lien by an express agreement allowing the owner open credit for work done instead of requiring payment upon delivery of the completed goods under penalty of lien.⁵ Additionally, where a film owner establishes a question of fact whether the film lab agreed to defer payment for services performed until funds were payable to the owner from its distributor, the owner is entitled to injunctive relief preventing an ex parte extrajudicial sale until a litigation of the respective rights of the parties.⁶ Similarly, a lender that provided a bridge loan to a borrower in connection with the refinancing of the borrower's townhouse was not entitled to an equitable lien after the mortgagee foreclosed on the property; although the lender alleged that it made the loan in exchange for a security interest in the property, a letter contemporaneous with the transaction stated that any mortgage on the property was to be in favor of another entity.⁷

B. DISCHARGE OR CANCELLATION OF LIEN

Research References

West's Key Number Digest

Liens ⇨16

A.L.R. Library

A.L.R. Index, Liens and Encumbrances

West's A.L.R. Digest, Liens ⇨16

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 57 to 67

C.J.S., Liens §§ 29 to 42

Forms

Am. Jur. Legal Forms 2d §§ 165:51 to 165:53

Am. Jur. Pleading and Practice Forms, Liens §§ 17, 18

West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 184 Form 1 to 184 Form 9

West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 201-a Form 1 to 201-a Form 6

New York Forms Legal and Business § 16A:34

99 N.Y.S. 770 (3d Dep't 1906).

⁴Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

⁵U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

⁶Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

⁷M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

§ 50 Discharge of lien; mistake

Research References

West's Key Number Digest, Liens ⇨16

Am. Jur. Legal Forms 2d § 165:51 (Release of lien); § 165:52 (Release of lien—By health care provider); § 165:53 (Release of judgment lien)

New York Forms Legal and Business § 16A:34 (Release of lien)

Payment of a debt extinguishes a lien that is based thereon,¹ and a lien will normally continue to be a charge upon property until the obligation for which it is security has been discharged² unless it is lost by waiver or estoppel.³ Where there exists no defect upon the face of a notice of lien, any dispute regarding the validity of the lien must await a judicial determination, and the court cannot summarily discharge the lien.⁴

Under general principles of equity, a lien affecting real estate, discharged by mistake, may be restored to its original status and priority as a lien provided that no injury is inflicted thereby upon anyone who innocently relied upon the discharge and either purchased the property or made a loan thereon in reliance upon the validity of such satisfaction.⁵

◆ **Illustration:** Where the court granted the plaintiff an equitable lien on property conveyed as a result of the defendant's fraud, the plaintiff is entitled to recover the value of the property within 60 days after service of the order upon the defendant, or the lien would be discharged through execution and sale of the defendant's property.⁶

§ 51 Discharge of nonpossessory liens

Research References

West's Key Number Digest, Liens ⇨16

Am. Jur. Pleading and Practice Forms, Liens §§ 17 (Petition or application—For discharge of lien on substitution of bond), 18 (Order—Directing discharge of lien on substitution of bond therefor)

Statutes creating nonpossessory liens frequently provide for their

[Section 50]

¹Am. Jur. 2d, Liens § 66.

²Baranowski v. Wetzel, 174 A.D. 507, 161 N.Y.S. 153 (2d Dep't 1916).

³§§ 45 to 49.

⁴In re Lowe, 4 A.D.3d 476, 772 N.Y.S.2d 359 (2d Dep't 2004).

Melniker v. Grae, 82 A.D.2d 798,

439 N.Y.S.2d 409 (2d Dep't 1981).

As to proceedings to determine the validity of a lien or the amount claimed, see § 62.

⁵Application of Ditta, 221 N.Y.S.2d 34 (Sup 1961).

⁶Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

discharge. For example, the Lien Law provides that a lien for labor on stone may be discharged by a payment of the amount due thereon, by:

- a failure to bring an action to enforce the lien within three months after the filing of notice¹
- the written consent of the lienor, duly acknowledged and filed with the proper officer²
- the owner of the stone labored upon, by filing an undertaking in an amount twice the sum specified in the notice of lien, conditioned for the payment of the lienor³

The failure to obtain an order continuing a lien within the prescribed period is a fatal omission and, inasmuch as such lapses are final, no lien is therefore in effect to support a foreclosure action.⁴

§ 52 Judgment of cancellation

Research References

West's Key Number Digest, Liens ⇨16

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 18 Form 2 (Counterclaims Based on Lien of Bailee in Action to Recover Possession of Aircraft)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 1 (Affirmative Defense of Lien of Bailee in Action to Recover Possession of Aircraft)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 3 (Affirmative Defense of Lien of Bailee in Action to Recover Damages for Conversion of Motor Vehicle)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 4 (Notice of Motion for Summary Judgment to Dismiss Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 5 (Affirmation in Support of Motion for Summary Judgment to Dismiss Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 6 (Order Dismissing Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form

[Section 51]

¹Lien Law § 141.

As to statutory enforcement of liens, generally, see §§ 57, 58.

²Lien Law § 142.

³Lien Law § 142.

⁴Walker v. Buffalo Elec. Const., Inc., 83 A.D.2d 768, 443 N.Y.S.2d 619 (4th Dep't 1981), order aff'd, 55 N.Y.2d 843, 447 N.Y.S.2d 705, 432 N.E.2d 598 (1982) (mechanic's lien).

For discussion of discharge of mechanic's liens, see N.Y. Jur. 2d, Mechanics' Liens §§ 124 to 142.

- 7 (Complaint in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 8 (Notice of Motion for Partial Summary Judgment on Issue of Liability in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 9 (Affidavit in Support of Motion for Partial Summary Judgment on Issue of Liability in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 1 (Notice of Petition to Determine Validity of Lien on Personal Property—Reduction of Amount of Lien)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 2 (Petition to Determine Validity of Lien on Personal Property—Reduction of Amount of Lien)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 3 (Judgment Determining Validity of Lien on Personal Property—Reduction of Amount of Lien)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 4 (Order to Show Cause in Special Proceeding to Determine Validity of Lien on Personal Property—Cancellation of Lien)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 5 (Petition in Special Proceeding to Determine Validity of Lien on Personal Property—Cancellation of Lien)
- West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 6 (Judgment in Special Proceeding Determining Validity of Lien on Personal Property—Cancellation of Lien)

If the owner of personal property, upon which a lien is sought to be enforced by extrajudicial sale, or any person entitled to notice of such sale, shows that the lienor is not entitled to claim a lien on the property, or that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court must direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly.¹

◆ **Illustrations:** In a special proceeding to determine the validity of certain liens,² a lienor's motion to vacate a judgment invalidating liens was properly denied as academic since the petitioner was authorized to take possession of the property in question after notices of sale and notices of lien were discharged and in fact had removed it from the lienor's premises; under the statute governing

[Section 52]

¹Lien Law § 201-a.

As to enforcement of liens by extrajudicial sale, generally, see §§ 59 to 76.

For discussion of special proceedings to determine the validity of a lien prior to enforcement thereof, see § 62.

²Pursuant to Lien Law § 201-a.

liens of a bailee of motor vehicles, motor boats, or aircraft,³ the lien was vacated once the property was no longer in the lienor's possession.⁴

IV. ENFORCEMENT OF LIENS

A. IN GENERAL

Research References

West's Key Number Digest

Liens ⇨7, 8, 17 to 22

A.L.R. Library

A.L.R. Index, Liens and Encumbrances

West's A.L.R. Digest, Liens ⇨7, 8, 17 to 22

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 79 to 82

C.J.S., Liens §§ 46 to 59

Forms

New York Forms Legal and Business § 16A:21

1. Judicial Enforcement

§ 53 Generally

Research References

West's Key Number Digest, Liens ⇨17 to 22

The Lien Law provides in detail as to the manner of enforcement of liens on real property¹ and on personal property.² While at common law, a possessory lien on personal property amounted only to a right of detention,³ the statute now affords means of realizing payment upon possessory liens by extrajudicial public sale.⁴ However, the lienholder has no authority to sell the property except as provided by statute.⁵

³Lien Law § 184.

⁴Matter of Kahoud, 128 A.D.2d 531, 512 N.Y.S.2d 464 (2d Dep't 1987).

[Section 53]

¹Lien Law §§ 40 to 65.

Additionally, Lien Law §§ 40 to 65 provide proceedings for the enforcement of mechanic's liens for labor performed and materials furnished in the improvement of real property.

For discussion of enforcement proceedings for mechanic's liens, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

²Lien Law §§ 200 to 211.

³§ 11.

⁴§§ 59 to 76.

⁵In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941,

◆ **Illustration:** The right to possess property under an artisan's lien, impounded by the sheriff in a creditor's action against the debtor-owner, is an integral part of the lienor's interest, but only the claim and not the property itself may be sold by the sheriff, who then transfers possession of the property to the purchaser of the debt and the lien thereon; the purchaser-lienor must then execute the lien by sale of the chattel.⁶

The Lien Law governing the enforcement of liens on personal property⁷ provides to lienors, that is, a person having a lien by virtue of its provisions,⁸ the right of sale that always existed at common law in a pledge of personal property.⁹

§ 54 Enforcement of equitable liens

Research References

West's Key Number Digest, Liens ⇨7, 17, 18

New York Forms Legal and Business § 16A:21 (Notice of claim of lien and intention to sell)

An equitable lien is cognizable only in equity, and the only remedy for its establishment and enforcement is an action in equity.¹ Since an equitable lien does not divest the debtor of title or possession, a court action is necessary to reach the property or its proceeds.² Where property is held by one person subject to an equitable lien, the lienor can enforce it by a proceeding in equity in which the court may order the sale of the lien property.³

In an equitable action to establish and enforce a lien upon a fund, or upon the money into which the subject of the lien has been converted, a judgment of foreclosure and sale is unnecessary since a money judgment may be rendered therein.⁴

131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130 N.E.2d 745 (1955).

⁶U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

⁷Lien Law §§ 200 to 211.

⁸§ 58.

⁹In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941, 131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130

N.E.2d 745 (1955).

[Section 54]

¹Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

As to the establishment of equitable liens, generally, see §§ 13 to 22.

For discussion of equity foreclosure, see § 79.

²In re Gruner, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628 (1946).

³Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

⁴Fischer-Hansen v. Brooklyn

§ 55 Enforcement of equitable liens—Jurisdiction of court

Research References

West's Key Number Digest, Liens ☞17, 18

The county courts are courts of limited jurisdiction, with no inherent equitable power, that can exercise only such powers, not within the exclusive jurisdiction of the Supreme Court, as are conferred upon them by the constitution or by legislative act.¹

A court with equity jurisdiction has the power and the right to deal with liens.² Where a lien has been created by statute, and no remedy is provided for its enforcement, resort to a court's equitable powers may generally be had.³ For example, a suit lies in equity to enforce a lien where the lienor has no adequate remedy at law, as where the security is presently not in existence, or it or its proceeds are in the hands of a third person and can be reached only by the application of equitable maxims.⁴

Where a statute creates a specific lien and gives a specific remedy for the enforcement of such lien, without expressly saving other remedies, a court of equity has no jurisdiction to enforce it in the absence of some special ground of equitable interposition rendering the remedy at law unavailable or inadequate.⁵ Generally, if a statutory lien fails at law, it must also fail of enforcement in equity. For example, a defective statutory mechanic's lien cannot be enforced as an equitable lien.⁶

Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

[Section 55]

¹N.Y. Jur. 2d, Courts and Judges § 746.

²Queen v. Fryer, 232 A.D. 222, 249 N.Y.S. 651 (1st Dep't 1931).

For discussion of the equitable jurisdiction of the courts, generally, see N.Y. Jur. 2d, Courts and Judges §§ 738 to 945.

³Bogartz v. Astor, 7 Misc. 2d 158, 45 N.Y.S.2d 74 (Sup 1943).

⁴National Bank of Deposit of City of New York v. Rogers, 166 N.Y. 380, 59 N.E. 922 (1901).

Because a party holding an equi-

table lien arising from another's fraud does not have a mere charge on the property but an enforceable right to the debt secured by the lien, a divorced woman whose former husband had fraudulently induced her to convey her interest in property formerly held by the couple could proceed in equity to immediately enforce the obligation without waiting until her former husband sold the property. *Disanza v. Gaglione*, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

⁵*In re Rosenberg's Will*, 269 N.Y. 247, 199 N.E. 206, 105 A.L.R. 1238 (1935).

⁶*General Electric Co. v. Mori*, 201 N.Y.S. 561 (Sup 1923).

§ 56 Election of remedies

Research References

West's Key Number Digest, Liens ⇨17, 18

The Lien Law does not preclude any other remedy by action or otherwise, now existing, for the enforcement of a lien against personal property, or bar the right to recover so much of the debt as will not be paid by the proceeds of the sale of the property.¹ The provisions of the Lien Law governing foreclosure actions² do not affect any existing right or remedy to foreclose or satisfy a lien upon, or a security interest in, a chattel without action.³ The failure to use the statutory remedy to test the validity of a lien prior to extrajudicial sale does not estop one from contesting or obtaining relief from the results of a lien sale, or foreclose other available remedies, such as an action for conversion or replevin.⁴

◆ **Illustrations:** An unpaid manufacturer of copyrighted articles, where delivery is refused on the ground that the articles were defective, is not precluded by the federal copyright law from obtaining an artisan's lien on the goods, and, notwithstanding the copyright, he may avail himself of the statutory remedies under New York law for sale on notice or for enforcement by action.⁵ Also, there is no inconsistency between an attempt to collect the indebtedness by ordinary suit and the enforcement of a reservation of title if the attempt is not successful.⁶

Circumstances may limit the lienor's choice of remedies. For example, if for any reason there is no personal obligation on the part of the debtor to pay the debt secured by the lien, there is no remedy either at law for a personal judgment for the debt or deficiency, or in the foreclosure action for a deficiency judgment.⁷ If the statute of limitations has run against an action on the debt, a remedy in rem alone may exist.⁸ As regards the proceeding in rem, the lienor may, depending upon the nature of the lien involved, be limited either to an action or to an extrajudicial sale, or, as in the case of an attorney's

[Section 56]

¹Lien Law § 205.

²Lien Law §§ 200 to 209.

³Lien Law § 210.

⁴§ 62.

⁵Platt & Munk Co. v. Republic Graphics, Inc., 315 F.2d 847 (2d Cir. 1963).

⁶Ratchford v. Cayuga County Cold Storage & Warehouse Co., 217 N.Y. 565, 112 N.E. 447 (1916).

⁷§ 103.

⁸Hutson v. Title Guarantee & Trust Co., 118 Misc. 795, 195 N.Y.S. 316 (Sup 1922).

As to limitations and laches, generally, see § 80.

retaining lien, he or she may have no right whatsoever to foreclose.⁹ However, respecting liens on real property, if a lienor fails, for any reason, to establish a valid lien in any action, he or she may recover judgment therein for such sums as are due him or her, or that he or she might recover in an action on a contract against any party to the action.¹⁰

2. Statutory Remedies

§ 57 Enforcement of statutory liens

Research References

West's Key Number Digest, Liens ⇨8, 17, 18

Generally, a statutory lien may be enforced only in the manner provided by the statute creating the right thereto unless the lienor is in lawful possession of the property.¹ The Lien Law provides that the sections governing the enforcement of liens by action of foreclosure² do not apply to a case where another mode of enforcing a lien upon a chattel is specifically prescribed by law.³

§ 58 Applicability of general enforcement provisions

Research References

West's Key Number Digest, Liens ⇨8, 17, 18

The Lien Law definition of a lienor as any person having a lien upon property by virtue of the provisions of the Lien Law, including a successor in interest,¹ excludes from the operation of the general sale and enforcement provisions any lien that is not declared or created by the Lien Law itself.² Certain statutory liens are expressly excluded

⁹In re Wilson, 12 F. 235 (S.D. N.Y. 1882).

As to the merely passive right of an attorney to hold the subject of the lien until his or her fees are paid or adequate security given, see N.Y. Jur. 2d, Attorneys at Law § 285.

¹⁰Lien Law § 54.

As to enforcement of mechanic's liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

[Section 57]

¹Scott v. Delahunt, 65 N.Y. 128, 1875 WL 10944 (1875), declaring that the statutory remedy is cumulative to the

remedy afforded to him as a common-law lienor.

²N.Y. Lien Law §§ 209 to 211.

³Lien Law § 210.

For discussion of action for foreclosure, see §§ 77 to 103.

[Section 58]

¹Lien Law § 2(1).

²In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941, 131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130 N.E.2d 745 (1955).

from the general provisions for extrajudicial sale,³ while chattel mortgages, conditional sales, and similar security interests created by a security agreement in personal property are expressly included in the general provisions for enforcement by action.⁴ Moreover, by implication at least, the Lien Law provision expressly denominating chattel mortgages, conditional sales contracts, and other security interests as liens for the purpose of making available foreclosure by action negates a narrow construction including only lienors whose liens are created or defined by the Lien Law itself.⁵

B. EXTRAJUDICIAL SALE OF PERSONAL PROPERTY

Research References

West's Key Number Digest

Liens ⇨8, 17 to 23

A.L.R. Library

A.L.R. Index, Liens and Encumbrances

West's A.L.R. Digest, Liens ⇨8, 17 to 23

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 83 to 94

C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Legal Forms 2d §§ 165:34 to 165:39, 165:49, 165:50

Am. Jur. Pleading and Practice Forms, Liens §§ 47, 78, 79, 86, 89, 91, 92

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201 Form 1

West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 202 Form 1 to 202 Form 6

New York Forms Legal and Business § 16A:24

1. In General

§ 59 General provision for extrajudicial sale

Research References

West's Key Number Digest, Liens ⇨19

Am. Jur. Legal Forms 2d § 165:39 (Notice of sale to satisfy lien—Hotelkeeper's lien)

A lien against personal property in the possession of the lienor may

As to the enforcement of mechanic's liens on real property, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

³Lien Law § 200.

⁴Lien Law § 206.

⁵§ 83.

be satisfied by the sale of such property in accordance with law.¹ Expressly excepted are the warehousepersons' or carriers' lien, an innkeepers' lien, and a security interest in goods.² Expressly excluded is the lien of a keeper of a hotel, apartment house, inn, boarding or lodging house except an immigrant lodging house.³ Expressly included in the general provisions for sale of personal property in satisfaction of such lien are common and preferred stocks and bonds, debentures, notes, and other obligations, corporate or otherwise, for the payment of money.⁴

§ 60 Special sales provisions—Self-storage facility lien

Research References

West's Key Number Digest, Liens ⇨8, 19

In addition to the general sale provision for the enforcement of liens,¹ the lien of the owner of a self-storage facility² may be enforced by a public or private sale of the goods that have been removed from the storage space, in block or parcel, at any time or place and on any terms that are commercially reasonable after notice to all persons known to claim an interest in the goods.³

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the lienor is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the lienor either sells the goods in the usual manner in any recognized market therefor or if he or she sells at the current market price, or otherwise in conformity with commercially reasonable practices among dealers in the type of goods sold, he or she has sold in a commercially reasonable manner.

[Section 59]

¹Lien Law § 200.

Where the lien is sought to be enforced against one in military service, the provisions of the New York State Soldiers' and Sailors' Civil Relief Act may apply to prohibit extrajudicial enforcement of mortgages on the personal property of one in military service, within the definition of the statute. For a discussion of this Act, see N.Y. Jur. 2d, Military and Civil Defense §§ 92 to 104.

As to manner, place, and notice of sale, see § 66.

²Lien Law § 200.

For discussion of a security interest as subject of an action for foreclosure,

see § 83.

³Lien Law § 200.

As to enforcement of the innkeepers' lien, generally, see N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 130 to 132.

⁴Lien Law § 202(1).

As to notice of sale of a security, see § 72.

[Section 60]

¹§ 59.

²§ 35.

³Lien Law § 182(7).

As to what constitutes notice, see § 70.

However, a sale of more goods than was apparently necessary to insure satisfaction of the obligation is not commercially reasonable except in the aforementioned circumstances.⁴

§ 61 Special sales provisions—Lien on dies, molds, forms, or patterns

Research References

West's Key Number Digest, Liens ☞8, 19

The Lien Law specifically provides that before enforcing a lien on a die, mold, form, or pattern, notice in writing must be given to the customer and to the holder of a perfected security interest, either delivered personally or sent by registered mail to the last-known address of the customer or holder of a perfected security interest. This notice must state that a lien is claimed for the damages set forth in or attached to such writing for manufacturing or fabrication work contracted and performed for the customer. Notice to the customer must also include a demand for payment.¹

If the molder has not been paid the amount due within 60 days after the notice as provided by statute,² the molder may sell the die, mold, form, or pattern at a public auction.³

However, before a molder may sell the die, mold, form, or pattern, the molder must notify the customer and the holder of a perfected security interest as specified by statute.⁴

§ 62 Proceeding to determine validity of lien

Research References

West's Key Number Digest, Liens ☞19, 22

Am. Jur. Pleading and Practice Forms, Liens §§ 78 (Judgment or decree—Provision—Establishing existence and priority of lien), 79 (Judgment or decree—Provision—Declaring lien void)

Within 10 days after service of notice of sale, the owner or any person entitled to notice may commence a special proceeding to determine the validity of the lien in any court that would have jurisdiction to render a judgment for a sum equal to the amount of the

⁴Lien Law § 182(8).

For discussion of the manner and place of sale under the general sales provisions of the Lien Law, see §§ 75, 76.

[Section 61]

¹Lien Law § 152, discussed further § 71.

at § 38.

²Lien Law § 152.

³Lien Law § 153.

⁴Lien Law § 154(1), discussed at

lien.¹ This provision is permissive and not mandatory; the failure to use the remedy set forth does not estop one from contesting or obtaining relief from the results of a lien sale, or foreclose other available remedies, such as an action for conversion or replevin.² Further, a proceeding to determine the validity of the lien is not moot if the property has already been sold since the propriety of the sale depends upon the validity of the lien.³

If the lienor establishes the validity of the lien, in whole or part, the judgment must fix the amount thereof and provide that the sale may proceed upon the expiration of five days after service of a copy of the judgment, and notice of its entry, upon the owner of the property or any other person entitled to notice of the sale.⁴

◆ **Illustrations:** It was not error for the court to summarily deny a petition to invalidate a lien that was asserted by the respondent as a result of a dispute arising from an oral agreement whereby the respondent had agreed to paint the petitioner's car in exchange for permission to moor his boat in the water adjacent to the petitioner's property for a stated period since it was uncontested that the respondent painted car, as agreed, and that the petitioner sold part of his property, including his dock, before the respondent was able to make full use of it.⁵ However, the court erred in dismissing an action to cancel a lien merely because the matter was improperly commenced as an action rather than a proceeding, and the court should have ordered that the plenary action be converted into a special proceeding⁶ to determine the validity of the lien.⁷ Finally, the New York City Civil Court lacked subject-matter jurisdiction to order injunctive relief staying a lien sale within a special proceeding challenging the validity of lien even though the court had subject-matter jurisdiction over the proceeding itself, and despite the court's inherent power to stay its own proceedings in a pending case, since the lien sale is not a function of the court's own process so that at the time injunctive relief was requested, there was no action pending in

[Section 62]

¹Lien Law § 201-a.

Lien Law § 182(7), governing enforcement of liens of owners of self-service storage facilities, similarly provide such protection and is discussed at § 70.

As to constitutional limitations on statutory liens that provide for summary enforcement, see §§ 24, 25.

For discussion of the statutory requirements of notice, see §§ 66 to 73.

²*Champion v. Wilsey*, 114 A.D.2d 630, 494 N.Y.S.2d 222 (3d Dep't 1985).

As to conversion and replevin of a chattel, generally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 1 et seq.

³*Nachman v. Crawford*, 114 A.D.2d 672, 494 N.Y.S.2d 493 (3d Dep't 1985).

⁴Lien Law § 201-a.

⁵*Jones v. Marcy*, 135 A.D.2d 887, 522 N.Y.S.2d 285 (3d Dep't 1987).

⁶Under Lien Law § 201-a.

⁷*El Adawy v. New York Automotive Center*, 131 A.D.2d 722, 516 N.Y.S.2d 911 (2d Dep't 1987).

which the court's proceedings could have been stayed; the statute governing stays of proceedings⁸ is not a substitute for, nor an alternative to, a proper application for injunctive relief, and the statute governing proceeding to determine validity of liens⁹ grants no injunctive jurisdiction to court not already vested with it.¹⁰

§ 63 Redemption before sale; purchase by pledgee

Research References

West's Key Number Digest, Liens ⇨23

At any time before such property is so sold, the owner thereof or any person entitled to notice of sale¹ may redeem the property by paying to the lienor the amount due on account of the lien and whatever legitimate expenses have been incurred at the time of such payment in serving the notice and advertising the sale as required. Upon making such payment, any of such persons are entitled to the possession thereof.²

◆ **Illustration:** Where a sheriff, in a creditor's action, levies upon the debtor's property in the possession of a lienor, the debtor-owner may redeem the property by paying to the sheriff the amount of the lien.³

Unless the pledge agreement otherwise provides, in all cases where a pledgee may lawfully sell pledged property and the property is sold at public sale, the pledgee, or his or her assignee or the legal representative of either, may fairly and in good faith purchase the pledged property or any part thereof at the sale. However, this provision does not apply to a sale of property pawned or pledged with a collateral-loan broker.⁴ Nothing in the statute governing pledgees buying at a public sale⁵ may be construed to invalidate any sale of a security made in accordance with an applicable agreement.⁶

⁸CPLR 2201.

⁹Lien Law § 201-a.

¹⁰Maloney v. Rincon, 153 Misc. 2d 162, 581 N.Y.S.2d 120 (N.Y. City Civ. Ct. 1992).

[Section 63]

¹Pursuant to Lien Law § 201, discussed further at §§ 66, 68.

²Lien Law § 203.

³U. S. Extrusions Corp. v. Strahs

Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

⁴Lien Law § 202-b.

As to the distinction between a lien and a pledge, generally, see § 12.

For discussion of the sale of property by a collateral-loan broker, see N.Y. Jur. 2d, Banks and Financial Institutions § 978.

⁵Lien Law § 202-b.

⁶Lien Law § 202-a.

§ 64 Disposition of proceeds

Research References

West's Key Number Digest, Liens ☞17

Am. Jur. Legal Forms 2d §§ 165:49, 165:50 (Certificate of satisfaction of lien)

Am. Jur. Pleading and Practice Forms, Liens § 89 (Notice—To lienee—Disposition of proceeds of sale of property subject to lien—By clerk of court)

Of the proceeds of such sale, the lienor will retain an amount sufficient to satisfy his or her lien, and the expenses of advertisement and sale. The balance of such proceeds, if any, must be held by the lienor subject to the demand of the owner, or his or her assignee or legal representative, or any person entitled to notice of sale,¹ and a notice that such balance is so held must be served personally or by mail upon all such persons.² Parties enjoying a lien upon real property are entitled to share in surplus proceeds regardless of whether their lien is legal or equitable.³

◆ **Illustrations:** If a lienor and the plaintiff were in dispute as to the former's charges for storage and repair, and if without taking the initiative to afford the plaintiff an opportunity for judicial ascertainment of the asserted debt the lienor authorized a sale by auction of the plaintiff's property, and the auctioneer turned over the proceeds from the sale to the lienor in partial satisfaction of the amount claimed, the plaintiff had a tenable contention that the statute governing the disposition of proceeds⁴ as applied to him was repugnant to the Due Process Clause of the 14th Amendment and that he was entitled to declaratory judgment and perhaps compensatory and punitive damages.⁵

If such balance is not claimed by any of such persons within 30 days from the day of sale, such balance must be deposited with the treasurer or chamberlain of the city or village, or the commissioner of finance in the City of New York, or the supervisor of the town, where such sale was held. There must also be filed a copy of the notice or judgment served upon such persons and the notice of sale published or posted as required.⁶ There must be filed with such deposit the affidavit of the lienor, stating:

[Section 64]

¹Pursuant to Lien Law § 201.

²Lien Law § 204.

As to the general requirements of notice of sale, see § 66.

³Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461

N.Y.S.2d 200 (Sup 1983).

⁴Lien Law § 204.

⁵Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973). (applying New York law).

⁶Lien Law § 204.

For discussion of publication of

- the name and place of business or residence of such persons, if known
- the articles sold
- the prices obtained therefor
- that the notice required was duly served and how served upon such persons
- that such sale was legally and how advertised⁷

The officer with whom such balance is deposited must credit the same to such persons and pay the same to such persons on demand and satisfactory evidence of identity. If such balance remains in the possession of such officer for a period of five years, unclaimed by a person legally entitled thereto, it must be transferred to the general funds of the town, village, or city, and be applied and used as other moneys belonging to such town, village, or city.⁸ It is basic law that surplus money realized upon a sale in foreclosure is not a general asset of the owner of the equity of redemption but stands in the place of the land for all purposes of distribution among persons having liens upon the land.⁹

§ 65 Action for deficiency on extrajudicial sale

Research References

West's Key Number Digest, Liens ⇨8, 19

Am. Jur. Pleading and Practice Forms, Liens §§ 47 (Complaint, petition, or declaration—Allegation—Sale of property to purchaser with notice of lien), 91 (Notice of motion—For deficiency judgment), 92 (Motion—For deficiency judgment)

Where a lien upon personal property or a chattel lien has been duly enforced by an extrajudicial sale, ordinarily, an action at law may be had to recover the amount of any deficiency.¹ A statutory sale to satisfy a possessory lien does not bar the right to recover so much of the debt as is not paid by the proceeds of the sale of the property.²

notice of sale, see § 76.

⁷Lien Law § 204.

⁸Lien Law § 204.

⁹*Mall v. Johnson*, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

[Section 65]

¹*Culver v. Sisson*, 3 N.Y. 264, 1850 WL 5318 (1850) (personal liability on the part of a defendant must be shown).

For discussion of judgment of deficiency for sale of chattel upon action of foreclosure, see § 103.

²Lien Law § 205.

The right to recover a deficiency is not limited to technical liens, extending as well to security interests under the Uniform Commercial Code, including chattel mortgages, conditional sales contracts, and pledges, which provides that

2. Notice, Manner, and Place of Sale

a. General Notice of Sale

§ 66 Requirements of notice**Research References**

West's Key Number Digest, Liens ☞17 to 22

Am. Jur. Legal Forms 2d § 165:38 (Notice of sale to satisfy lien—Personal property—By lienholder)

Am. Jur. Pleading and Practice Forms, Liens § 86 (Notice—Sale of property subject to lien—To owner or other person having interest in chattel—Common-law lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201 Form 1 (Notice to Owner of Sale of Personal Property to Satisfy Lien)

New York Forms Legal and Business § 16A:24 (Notice of sale of personal property)

Before a sale of personal property in satisfaction of a lien is held, the lienor must, with due diligence, serve a notice upon the owner of the property within the county if the owner can be found where the lien arose. If notice cannot be served upon the owner, then it may be served upon the person for whose account the same is then held personally provided that such service can be made with due diligence within the county where such lien arose.¹

◆ **Illustration:** The owners of a garage failed, as matter of law, to exercise due diligence in serving notice of sale to the owners of a stored automobile where only the most perfunctory effort was made to furnish notice, the inadequacy of which totally failed to apprise either automobile owner of the impending auction. The departures of the garage owners from the strict requirements of the Lien Law—including the failure to exercise “due diligence” in serving the notice of sale—constituted conversion as matter of law.²

§ 67 Service by mail**Research References**

West's Key Number Digest, Liens ☞17 to 22

Am. Jur. Legal Forms 2d §§ 165:34, 165:35 (Notice of sale to satisfy lien—To owner and others who claim interest in property)

if the security interest secures an indebtedness, the debtor is liable for any deficiency unless otherwise agreed. See N.Y. Jur. 2d, Secured Transactions § 354.

[Section 66]

¹Lien Law § 201.

As to notice of sale to other persons

with an interest in the property, see § 68.

For discussion of notice of judgment validating lien or amount claimed, see § 62.

²Ingram v. Machel and Jr. Auto Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

In three situations, notice of extrajudicial sale may be served by mail. In the event that the owner or person cannot with due diligence be found within the county where the lien arose, then such notice may be served by mailing it to the owner at his or her last known place of residence, or to his or her last known post-office address, or if the owner's place of residence or post-office address is not known, then to the last known place of residence or last known post-office address of the person for whose account the same is then held personally.¹ Any notice permitted herein to be served by mail must be sent by certified mail, return receipt requested, and by first-class mail.² Proper service by mail of notice of sale of property under lien is not demonstrated by the production of an unsigned receipt from the post office. Additionally, the due diligence required in attempting personal service on the owner before service by mail is authorized is not shown by testimony as to a mere call at the owner's residence and that there was nobody home as far as the witness could remember.³ Notice by mail is also allowed where the property affected, other than a security, is of less than \$100 in value.⁴ Finally, it is allowed where the property affected is a motor vehicle that is to be sold to satisfy a lien for towing and storage under the Lien Law,⁵ and the vehicle has a value of less than \$500.⁶

◆ **Illustration:** A landlord failed to comply with the requirements of the nonjudicial foreclosure statute for service of notice of the sale of shares allocable to a shareholder-tenant's cooperative apartment where the landlord included an affidavit from the process server attesting that he was unable to serve the shareholder-tenant personally at her residence after due diligence and the affidavit of mailing to a cotenant at his address and failed to submit an affidavit to attest to the statutorily required mailing of notice to the shareholder-tenant at her residence by certified mail or with a certificate of mailing.⁷

The sale must be public, to the highest bidder, and held in the city or town where the lien was acquired.⁸

[Section 67]

¹Lien Law § 201.

²Lien Law § 201.

As to the mailing requirements to serve notice of sale to enforce the lien of the owner of self-service storage facility, see § 70.

³Finkelstein v. Hel-Man Garage, 61 N.Y.S.2d 625 (App. Term 1946).

⁴Lien Law § 201.

⁵Lien Law § 202(3), discussed at § 74.

⁶Lien Law § 201.

⁷Travis v. 29-33 Convent Ave. HDFC, 19 Misc. 3d 749, 859 N.Y.S.2d 336 (Sup 2008).

⁸Lien Law § 202(1).

§ 68 Notice to interested persons

Research References

West's Key Number Digest, Liens ⇨17 to 22

Am. Jur. Pleading and Practice Forms, Liens § 86 (Notice—Sale of property subject to lien—To owner or other person having interest in chattel—Common-law lien)

The Lien Law requires, in addition to service of notice of sale upon the owner of the lien property or a person for whose account the lien is held,¹ that a like notice be served in the same way upon any person who has given the lienor notice of an interest in the property and upon any person who has perfected a security interest in the property by filing a financing statement pursuant to the provisions of the Uniform Commercial Code or who is listed as a lienholder upon the certificate of title of the property pursuant to the provisions of the Vehicle and Traffic Law.²

The requirement of notice, of the sale of property to satisfy a lien, to any persons who have given the lienor notice of an interest in the property subject to the lien apparently refers only to persons who have given actual notice to the lienor.³ The mere filing of a chattel mortgage has been deemed sufficient notice of the mortgagee's interest in an automobile to require notice to be served.⁴ Additionally, a receipt for a car from the owner is sufficient evidence of notice to the garagekeeper of the owner's interest to require a notice of sale to be given such owner.⁵

§ 69 Content of notice

Research References

West's Key Number Digest, Liens ⇨17 to 22

Notice of sale of personal property by the lienor must contain a statement of the following facts:

[Section 68]

¹§ 66.

²Lien Law § 201.

As to the notice required to all persons with a known interest in the goods, for a sale to enforce the lien of the owner of a self-service storage facility, see § 70.

As to perfection of security interests, generally, see N.Y. Jur. 2d, Secured Transactions §§ 164 to 180.

For discussion of certificates of title

under the N.Y. Vehicle and Traffic Law, see N.Y. Jur. 2d, Automobiles and Other Vehicles §§ 362 to 382.

³Motor Discount Corp. v. Scappy & Peck Auto Body, Inc., 12 N.Y.2d 227, 238 N.Y.S.2d 670, 188 N.E.2d 907 (1963).

⁴National Surety Co. v. Gotham Garage Co., 127 Misc. 422, 216 N.Y.S. 290 (App. Term 1926).

⁵Herschenhart v. Mehlman, 125 Misc. 887, 213 N.Y.S. 48 (App. Term 1925).

- the nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due
- a brief description of the personal property against which the lien exists
- the estimated value of such property
- the amount of such lien, at the date of the notice¹

◆ **Illustrations:** Notice of sale by a motion-picture film laboratory of 12 films in its possession sufficed as an itemized statement of its claim to give notice to the owner of the films of the impending sale.² However, where the notice of sale did not contain a statement of the estimated value of the property, the notice was defective even though the defect was raised or asserted by a person who was the original seller of the property and was alleged to know its value.³

The notice of sale also must require the owner, or any other person, to pay the amount of such lien on or before a day mentioned therein, not less than 10 days from the service of the notice, and the notice must state the time when and the place where such property will be sold if the amount specified is not paid.⁴

◆ **Illustrations:** A nine-day interval, fixed by date in a notice of lien mailed to the owner of an automobile that had accumulated an unpaid storage bill and by the date set for the final opportunity to satisfy the lien, was in violation of the statute⁵ requiring 10 days' notice.⁶

Additionally, the notice must state that the owner or any such person is entitled to bring a proceeding to dispute, within 10 days of the service of notice,⁷ the validity of the lien or the amount claimed.⁸ If the agreement on which the lien is based provides for the continuous care of the property, the lienor is also entitled to receive all sums

[Section 69]

¹Lien Law § 201.

²21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

³Lewis v. Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

⁴Lien Law § 201.

As to service of notice of sale of lien personal property, see §§ 66, 67.

⁵Lien Law § 201.

⁶Ingram v. Machel and Jr. Auto Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

⁷Under Lien Law § 201-a.

⁸Lien Law § 201.

A similar notice provision applies under the specific enforcement statute governing liens of owners of self-service storage facilities, see § 70.

As to proceedings to determine the validity of a lien prior to extrajudicial sale and the time in which to take them, generally, see § 62.

that may accrue under the agreement, subsequent to the notice and prior to payment or a sale of the property, and the notice must contain a statement that such additional sum is demanded.⁹

◆ **Practice Tip:** While the statute¹⁰ does not state that the specific dollar amount of the additional sums for continuous care of the property must be specified in the notice, and a general statement that the publisher of the notice claims an additional lien for whatever sum may be due for storage charges from blank date to blank date is sufficient to comply with the statute, the better practice would be to mention the amount.¹¹

Furthermore, the notice must be verified by the lienor to the effect that the lien upon such property is valid, that the debt upon which such lien is founded is due and has not been paid, and that the facts stated in such notice are true to the best of his or her knowledge and belief.¹²

b. Specific Notice Requirements

§ 70 Notice of sale of self-storage facility goods

Research References

West's Key Number Digest, Liens ⇨8, 17 to 22

The Lien Law expressly provides for the enforcement of the lien of an owner of a self-service storage facility¹ and requires that notice be given to all persons known to claim an interest in the goods. Such notice must be personally delivered to the occupant, or sent by registered or certified mail, return receipt requested, to the occupant to the last address provided by the occupant, pursuant to the occupancy agreement.² The notice specifically must include:

- an itemized statement of the amount due
- the description of the property subject to the lien
- the nature of the proposed sale
- a demand for payment within a specified time, not less than 10 days from the receipt of notice
- a conspicuous statement that unless the claimant pays within that time, the goods will be advertised for sale and sold, at a

⁹Lien Law § 201.

¹⁰Lien Law § 201.

¹¹*Lewis v. Jim's Boat Yard, Inc.*, 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

¹²Lien Law § 201.

[Section 70]

¹§ 60.

²Lien Law § 182(7).

For discussion of the mailing requirements to effect notice under the general sales provision of the McKinney's Lien Law, see § 67.

- public or private sale, in a commercially reasonable manner
- the time and place of any public or private sale
- a statement that any person claiming an interest in the goods is entitled to bring a proceeding hereunder within 10 days of the service of the notice if he or she disputes the validity of the lien or the amount claimed³

§ 71 Notice of sale of dies, molds, forms, or patterns

Research References

West's Key Number Digest, Liens ⇨ 8, 17 to 22

The Lien Law specifically provides that before a molder who has a lien on a die, mold, form, or pattern may sell the die, mold, form, or pattern,¹ the molder must notify the customer and the holder of a perfected security interest by registered mail, return receipt requested.² This notice must include the following information:

- (1) the molder's intention to sell the die, mold, form, or pattern 30 days after the customer's receipt of the notice;
- (2) a description of the die, mold, form, or pattern to be sold;
- (3) the time and place of the sale;
- (4) an itemized statement for the amount due; and
- (5) a statement that if a customer disputes the amount claimed under the lien, the customer is entitled to bring a proceeding within 10 days of the service of the notice of sale to establish the amount of the lien and that the proceeding may be brought in any court that would have jurisdiction to render a judgment for a sum equal to the amount of the lien.³

If there is no return of the receipt of the mailing or if the postal service returns the notice as being nondeliverable, the molder must publish notice of the molder's intention to sell the die, mold, form, or pattern in a newspaper of general circulation in the customer's last known place of business. The notice must include a description of the

³Lien Law § 182(7).

As to advertisement of extrajudicial sale of personal property in satisfaction of lien, generally, see § 76.

For discussion of the content of notice of sale applicable under the general sale provisions, see § 69.

[Section 71]

¹If the molder has not been paid the

amount due within 60 days after the notice of the lien as provided by statute (Lien Law § 152), the molder may sell the die, mold, form, or pattern at a public auction. Lien Law § 153.

²Lien Law § 154(1).

For the definition of a "molder," see § 38.

³Lien Law § 154(1).

die, mold, form, or pattern.⁴

If the sale is for a sum greater than the amount of the lien, the excess will be paid to any other lienholder known to the molder at the time of the sale and any remainder to the customer, if the customer's address is known, or the state treasurer for deposit in the general fund if the customer's address is unknown to the molder at the time of the sale.⁵ A sale may not be made under this statutory provision if it would be a violation of any right of the customer under federal patent or copyright law.⁶

§ 72 Notice of sale of security; description

Research References

West's Key Number Digest, Liens ⇨17 to 22

A description of a security, such as common or preferred stocks or bonds, debentures, notes, and other obligations, corporate or otherwise, for the payment of money, or a description substantially similar to any of the aforementioned securities, in the absence of any agreement to the contrary and unless otherwise provided by statute, is deemed sufficient for the purposes of a notice of sale of such security at public auction to satisfy a lien thereon even though the sale is not made pursuant to the enforcement provisions of the Lien Law.¹ Nothing in this provision is to be construed to invalidate any sale of such securities made in accordance with an applicable agreement.²

In addition to the general requirements for publication of notice of a sale under the enforcement provisions of the Lien Law,³ the description of the security in the published notice must consist of a statement of the name of the issuer or obligor, the state of incorporation or organization of the issuer or obligor, the amount and class of the security, and the address of the issuer or obligor last known to the lienor.⁴

§ 73 Notice of private sale; surplus proceeds

Research References

West's Key Number Digest, Liens ⇨17 to 22

Am. Jur. Legal Forms 2d §§ 165:36, 165:37 (Notice of sale to satisfy lien—To

⁴Lien Law § 154(2).

⁵Lien Law § 154(3).

⁶Lien Law § 154(4).

²Lien Law § 202-a.

³§ 76.

⁴Lien Law § 202(1).

[Section 72]

¹Lien Law § 202-a.

be posted in public place)

In particular circumstances, the Lien Law provides that lien property may be sold at a private sale, as in the case of the lien of a self-service storage facility owner,¹ or generally, where the property is of a certain monetary value.² Where the property is of a certain monetary value, notice of such sale must be posted at least 20 days prior in a conspicuous place on the premises where the personal property was left or delivered by the owner.³ The notice must specify the time and place of sale and contain either the name and address of the owner and a brief description of the property⁴ or provide that all property left on or before a specified date will be subject to sale.⁵

Additionally, where there are surplus proceeds after the sale of lien property, a notice that such proceeds are held by the lienor must be served upon the owner, or his assignee or legal representative, or upon any person entitled to notice of the sale.⁶

§ 74 Notice of private sale; vehicle to be dismantled or scrapped

Research References

West's Key Number Digest, Liens ☞ 17 to 22

Am. Jur. Legal Forms 2d §§ 165:36, 165:37 (Notice of sale to satisfy lien—To be posted in public place)

Notwithstanding the provisions for notice of sale of personal property,¹ the sale of a motor vehicle having a wholesale value, taking into consideration the condition of the vehicle, of less than \$500 to satisfy a lien for towing and storage under the Lien Law² may be made directly to a registered vehicle dismantler or licensed scrap processor on the condition that the motor vehicle may never be titled again and must be dismantled or scrapped.³ Such sale may not occur prior to 30 days after notice is mailed pursuant to the Lien Law,⁴ or 60 days after

[Section 73]

¹§ 60.

²§ 75.

³Lien Law § 202(2).

⁴Lien Law § 202(2)(a).

⁵Lien Law § 202(2)(b).

⁶§ 64.

[Section 74]

¹Lien Law § 202(1), (2), discussed at §§ 72, 73.

²Lien Law § 184, discussed at N.Y. Jur. 2d, Garages, Parking, and Filling Stations § 79.

³Lien Law § 202(3).

⁴Lien Law § 201, discussed at §§ 66 to 69.

the date of the initial tow, whichever is later.⁵

c. Manner and Place of Sale

§ 75 Generally; allowance for private sale

Research References

West's Key Number Digest, Liens ⇨17 to 22

Each sale of personal property, in satisfaction of a lien thereon, of a value of \$100 or more, or of any security, must be at a public auction to the highest bidder in the city or town where the lien was acquired.¹

Personal property, except securities, of a value less than \$100 may be sold at a bona fide private sale in the city or town where the lien was acquired, no sooner than six months after the time payment to discharge the lien was required by the notice served.²

§ 76 Publication of notice of sale; waiver

Research References

West's Key Number Digest, Liens ⇨17 to 22

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 1 (Notice to Public of Sale of Personal Property to Satisfy Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 2 (Complaint by Rightful Possessor of Auto Against Possessory Lienholders for Wrongful Conversion)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 3 (Complaint by Owner of Auto Against Possessory Lienholders for Wrongful Conversion)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 4 (Attorney's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Automobile)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 5 (Rightful Possessor's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Automobile)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 6 (Owner's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Auto-

⁵Lien Law § 202(3).

[Section 75]

¹Lien Law § 202(1).

As to what constitutes a security, generally, under the sales provisions of the McKinney's Lien Law, see § 59.

As to the manner of sale of goods subject to the statute governing liens of owners of self-service storage facilities, see § 60.

²Lien Law § 202(2).

As to service of notice of private sale, see § 73.

mobile)

The Lien Law provides that after the time for the payment of the amount of the lien specified in the notice required to be served,¹ a further notice of such sale, describing the property to be sold, and stating the name of the owner or person for whose account the same is then held and the time and place of such sale, must be published once each week, for two consecutive weeks, in a newspaper published in the town or city where such sale is to be held, and such sale must be held not less than 15 days from the first publication.² Notice of a sale that is published in a newspaper having circulation in the town where the lien attaches complies with the statute even though the newspaper is published elsewhere.³

◆ **Illustrations:** A notice of lien and sale, first published on September 19, and the subsequent sale, held on October 3, violated the applicable statute⁴ that states that such sale may be held not less than 15 days from the first publication, inasmuch as excluding the first day and including the last, the sale took place 14 days from the first publication.⁵ Additionally, garage owners violated the applicable statute⁶ when they sold an automobile for unpaid storage bills at an auction sale only 14 days after their first publication of sale.⁷

If there is no newspaper published in such town, the notice must be posted at least 10 days before such sale in not less than six conspicuous places therein.⁸

A notice of sale or advertisement by publication may be expressly waived,⁹ but a provision in a pledge contract for public or private sale is not a waiver.¹⁰

[Section 76]

¹§ 66.

²Lien Law § 202(1).

³*Lewis v. Jim's Boat Yard, Inc.*, 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

⁴Lien Law § 202(1).

⁵*Lewis v. Jim's Boat Yard, Inc.*, 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

⁶Lien Law § 202(1).

⁷*Ingram v. Machel and Jr. Auto*

Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

⁸Lien Law § 202.

⁹*In re Kiamie's Estate*, 309 N.Y. 325, 130 N.E.2d 745 (1955).

Jacobs v. National Bank of Far Rockaway, 208 Misc. 923, 13 N.Y.S.2d 60 (Sup 1939).

¹⁰*Jones v. National Chautauqua County Bank of Jamestown*, 272 A.D. 521, 74 N.Y.S.2d 498 (4th Dep't 1947).

As to the distinction between a pledge and a lien, see § 2.

V. ACTION TO FORECLOSE CHATTEL LIEN

A. IN GENERAL

Research References

West's Key Number Digest

Liens ⇨7, 8, 11, 22

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Mortgages

West's A.L.R. Digest, Liens ⇨7, 8, 11, 22

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 82 to 94

C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Pleading and Practice Forms, Liens § 50

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 206 Form
1

1. Nature of Action; Equity Foreclosure

§ 77 Generally

Research References

West's Key Number Digest, Liens ⇨7, 22

A chattel-lien foreclosure action is in the nature of an action in rem insofar as the object of the suit is the application of the chattel security to the payment of the debt.¹ However, since a personal judgment for a deficiency is sought therein, it is an action in personam.² The twofold aspect of the action bears upon the questions of who are necessary and proper parties to the action and what form the service of the summons may take.³ While at common law there was no remedy for the enforcement of a common-law lien beyond retaining possession,⁴ equity foreclosure was generally allowed to cut off the owner's right of redemption.⁵ Foreclosure of a lien may be either an equitable or a statutory proceeding.⁶

[Section 77]

¹§ 56.

²§ 103.

³§§ 84 to 88.

⁴Chatfield v. Campbell, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), aff'd, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

As to the creation and attachment of common-law liens, generally, see § 11.

⁵§ 79.

⁶Chatfield v. Campbell, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), aff'd, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

For discussion of foreclosure of mortgages upon real property, see N.Y.

§ 78 Contractual right to foreclose; default

Research References

West's Key Number Digest, Liens ☞22

Where the lien is a creature of contract and upon principles of substantive law, the debt or obligation that is secured must be due and payable.¹ The right to foreclose upon a chattel lien accrues upon the failure of the owner of the chattel to pay the debt or perform the obligation secured according to the terms of a contract² unless a security agreement otherwise provides.³ Since the extent of the lien must be measured by the amount due at the time the foreclosure action is commenced, if there is nothing then due, there is no lien that can be foreclosed.⁴ An action is prematurely brought as to money loaned on the security of chattels where the loan was to be repaid only when the borrower obtained payment on certain contracts that he or she had not yet received.⁵

If the contract, or security agreement, clearly confers a right on the lienor to take possession and to foreclose upon default of an installment payment, he or she may do so.⁶ However, if the condition is to pay the indebtedness, the lienor must wait until default in the final installment.⁷

Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

As to foreclosure of liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 338.

[Section 78]

¹Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900) (chattel mortgage).

As to the plaintiff's burden of proof on foreclosure, see § 98.

²Bloomingtondale v. Braun, 80 Misc. 527, 141 N.Y.S. 590 (App. Term 1913) (conditional sale).

Independent Brewing Co. v. Durston, 55 Misc. 498, 106 N.Y.S. 686 (County Ct. 1907) (chattel mortgage).

³Mitchell v. Dane, 129 N.Y.S. 404 (App. Term 1911).

⁴Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

⁵Stultz v. Gamble, 180 N.Y.S. 424

(App. Term 1920).

⁶Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

Furman v. Melnick, 154 N.Y.S. 100 (App. Term 1915) (chattel mortgage).

⁷Earle v. Gorham Mfg. Co., 2 A.D. 460, 37 N.Y.S. 1037 (1st Dep't 1896) (chattel mortgage).

Carter v. Phillips, 127 Misc. 903, 217 N.Y.S. 621 (Sup 1926) (chattel mortgage).

Corrigan v. Sammis, 65 Misc. 473, 120 N.Y.S. 69 (App. Term 1909) (chattel mortgage).

Under a chattel mortgage given to secure a certain sum payable in installments represented by a number of notes that were payable at a designated place, the mortgagor is not in default so as to authorize the foreclosure where at the time of the maturity of a note he had on deposit with the trust company, designated as the place of payment, an amount exceeding the sum due on the note and had instructed the trust company to pay

§ 79 Equity foreclosure

Research References

West's Key Number Digest, Liens ⇨7, 22

Since equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious in doing justice to the parties interested.¹ In general, any lienor, except in the case of purely possessory common-law liens not defined by statute,² including a statutory lienor, may foreclose in equity when equitable grounds are found unless an exclusive statutory remedy exists.³ The Lien Law provisions governing extrajudicial sale⁴ do not preclude any other remedy by action or otherwise, now existing, for the enforcement of a lien against personal property.⁵ Similarly, those sections of the Lien Law governing foreclosure by action do not affect any existing right or remedy to foreclose or satisfy a lien upon, or security interest in, a chattel without action.⁶

2. Statutory Foreclosure

§ 80 Generally

Research References

West's Key Number Digest, Liens ⇨8, 22

Am. Jur. Pleading and Practice Forms, Liens § 50 (Answer—Running of statute of limitations as bar to action for foreclosure)

In most instances, foreclosure under the general provisions of the Lien Law¹ is available, and most of the former common-law liens are within the scope of the Lien Law.² An action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where

the note upon presentation, the note, however, never having been presented for payment. *Wazen v. Duggan*, 186 N.Y.S. 394 (Sup 1921), *aff'd*, 197 A.D. 922, 188 N.Y.S. 956 (4th Dep't 1921).

If no time for payment of the debt secured by a chattel mortgage is fixed, it is payable immediately upon execution of the mortgage, no demand for payment is requisite, and the mortgage may be foreclosed at any time. *Stearns v. Oberle*, 47 Misc. 349, 94 N.Y.S. 37 (App. Term 1905).

[Section 79]

¹Am. Jur. 2d, Liens § 82.

²§ 11.

³*Chatfield v. Campbell*, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), *aff'd*, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

As to enforcement of equitable liens, generally, see § 54.

⁴§§ 57, 58.

⁵§ 56.

⁶§ 58.

[Section 80]

¹Lien Law §§ 206 to 211.

²§ 23.

such a lien exists at the commencement of the action.³ However, the general foreclosure provisions do not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.⁴ The fact that a common-law statutory or possessory lien may be enforced by the general provisions of the Lien Law for extrajudicial sale does not exclude enforcement by a foreclosure action.⁵ An action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where such a lien exists at the commencement of the action.⁶ If the lien is in existence at the time of the commencement of the action, it may be enforced under this law even though an action on the debt is barred by the statute of limitations.⁷

§ 81 Jurisdiction of court

Research References

West's Key Number Digest, Liens ⇨22

An action to foreclose a lien upon a chattel may be brought in any court of record, or not of record, that would have jurisdiction to render a judgment, in an action founded upon a contract, for a sum equal to the amount of the lien.¹

◆ **Illustrations:** The statute governing actions to foreclose a lien² permits a justice court to entertain a counterclaim properly before it to the extent of \$1,000, and any excess above that sum is deemed waived.³

As in other actions, the court, assuming that it has the power to foreclose a chattel lien, must have jurisdiction of the chattel.⁴

§ 82 Applicable procedure

Research References

West's Key Number Digest, Liens ⇨22

The procedure in an action to foreclose a mortgage on real property,

³Lien Law § 206.

⁴Lien Law § 210.

⁵§ 56.

⁶§ 77.

⁷Hutson v. Title Guarantee & Trust Co., 118 Misc. 795, 195 N.Y.S. 316 (Sup 1922).

²Lien Law § 206.

³Harlee-Mitchell Camp Corp. v. Granite Lake Camp, Inc., 35 A.D.2d 551, 313 N.Y.S.2d 184 (2d Dep't 1970).

⁴Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

[Section 81]

¹Lien Law § 206.

insofar as it may apply, is applicable in actions to foreclose mortgages or other liens on chattels or other personal property.¹ When a chattel lien is foreclosed in an equitable action, the form of the pleadings, the mode of procedure, and the jurisdiction of the courts are necessarily the same as in actions to foreclose a mortgage on real property² except as modified by the Lien Law.³

§ 83 Property subject to chattel-lien foreclosure

Research References

West's Key Number Digest, Liens Ⓒ11, 22

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 206 Form 1 (Complaint to Foreclose Security Interest Created by a Security Agreement in Personal Property)

For purposes of the provisions governing foreclosure by action of a lien upon chattel, the following are deemed liens upon chattel, enforceable by a foreclosure action:

- a chattel mortgage to secure the payment of a loan of money or other debt, or the purchase price of chattels
- a contract of conditional sale of personal property¹
- a hiring of personal property, where title is not to vest in the person hiring until the payment of a certain sum
- a security interest created by a security agreement in personal property²

B. PROCEDURE

Research References

West's Key Number Digest

Liens Ⓒ9, 12, 16, 22

[Section 82]

¹Lien Law § 206.

As to mortgage foreclosure on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 491.

²*Lembeck & Betz Eagle Brewing Co. v. Sexton*, 184 N.Y. 185, 77 N.E. 38 (1906).

³Lien Law §§ 207 to 211.

[Section 83]

¹Lien Law § 206.

²Lien Law § 206.

Where a chattel mortgage is executed as security for notes covering farm equipment, crops, and cattle, and the mortgagees take a bill of sale upon default on the notes, they may be compelled to account for income received and proceeds derived from a resale of the property; the bill of sale will be construed as merely additional security and the excess over the indebtedness will be returned to the mortgagor. *Kelley v. Farmers Production Credit Ass'n*, 88 N.Y.S.2d 872 (Sup 1948).

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Mortgages
 West's A.L.R. Digest, Liens ⇨9, 12, 16, 22

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 83 to 94
 C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Pleading and Practice Forms, Liens §§ 26, 27, 45, 46, 49 to 51, 64, 66, 68, 69, 75, 76, 81, 87, 88, 93 to 95
 West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1

1. Commencement of Action; Parties and Pleading

§ 84 Generally; summons**Research References**

West's Key Number Digest, Liens ⇨22
 Am. Jur. Pleading and Practice Forms, Liens § 64 (Summons—In action to foreclose lien)
 West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

In view of the express provision of the Lien Law that the procedure to foreclose a mortgage on real property, insofar as applicable, applies in actions to foreclose a chattel lien,¹ the lien foreclosure action is commenced in the usual manner by service of process and does not differ materially from the commencement of a foreclosure of a real property mortgage.² As with the real property foreclosure, the action may be in personam, and require personal jurisdiction, insofar as a personal judgment is sought³ and in rem insofar as foreclosure alone is concerned.⁴

In general, the process in an action to foreclose a lien upon a chattel is governed by the rules applicable in an ordinary civil action.⁵ The Lien Law expressly requires personal service of the summons upon a defendant against whom it is sought to obtain a judgment awarding

[Section 84]¹§ 82.

²As to mortgage foreclosure on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 8914.

³§ 103.⁴§ 56.

⁵As to service of process, generally, see N.Y. Jur. 2d, Process and Papers §§ 1 et seq.

payment of the lien.⁶

§ 85 Parties

Research References

West's Key Number Digest, Liens ⇨22

The rules applicable to parties in an ordinary civil action apply generally in an action to foreclose a lien upon a chattel; in general, all parties interested in the property should be joined in a foreclosure action,¹ but a lienor need not join those persons who are not named in the notice of lien and have no interest in the property at the time of the suit for foreclosure thereon.² The owner of the chattel is a necessary party in a foreclosure action³ as is one having a right to the possession thereof subject to the plaintiff's lien.⁴ Defendants claiming a lien and defending an action to establish and foreclose an equitable lien on the same property are proper parties to the action, where they claim an interest therein subsequent to the plaintiff's lien.⁵ Likewise, a third person in possession of a chattel sold on contract of conditional sale is a proper party to a foreclosure in order that the third party's rights, if he or she claims under the conditional buyer, may not be prejudiced.⁶

So far as joining a person as a defendant for the purpose of obtaining a deficiency judgment, it cannot be said that he or she is a necessary party as it is optional with the plaintiff whether he or she will elect the relief.⁷

The rule that to bind a person by a judgment foreclosing a lien, he or she must be made a party to the action has no application to a party who acquires some interest or claim in or to the property during the pendency of the foreclosure action, particularly if such person had

⁶Lien Law § 208.

As to deficiency judgments, see § 103.

[Section 85]

¹Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

²Melniker v. Grae, 82 A.D.2d 798, 439 N.Y.S.2d 409 (2d Dep't 1981).

³Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

A.L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 191 A.D. 580, 181 N.Y.S. 883 (1st Dep't 1920), aff'd, 229 N.Y. 596, 129 N.E. 922 (1920) (subsequent transferee of bonds).

⁴Mathushek & Son Piano Co. v. Weld, 94 Misc. 282, 158 N.Y.S. 169 (App. Term 1916).

⁵Deering v. Schreyer, 171 N.Y. 451, 64 N.E. 179 (1902).

⁶Singer Sewing Mach. Co. v. Leipzig, 113 N.Y.S. 916 (App. Term 1908).

⁷§ 56.

notice of the pending action.⁸

§ 86 Complaint

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 26, 27 (Complaint, petition, or declaration—To foreclose lien), 46 (Complaint, petition, or declaration—Allegation—Notice of lien filed)

The pleadings in an action to foreclose a chattel lien are governed by the rules relating to pleadings in an ordinary action.¹ The complaint is similar in form to that in an action to foreclose a mortgage on real property² but should allege all facts necessary to establish the lien claimed.³ Facts necessary to establish the line claim include:

- if the lien is a statutory compliance with the statute⁴
- the amount of the indebtedness⁵
- the failure of the defendant to pay the indebtedness⁶
- that the plaintiff is the holder of the lien
- an assignment of a chattel mortgage to the plaintiff⁷
- a description of the chattel in question with sufficient definiteness to identify it⁸

Where interests have subsequently accrued, the complaint should allege that certain named defendants have, or claim to have, some title, lien, or interest in the chattel that is subsequent and subordinate

⁸Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

[Section 86]

¹N.Y. Jur. 2d, Pleading §§ 1 et seq.

²Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

As to mortgage foreclosures on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

³A.L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 191 A.D. 580, 181 N.Y.S. 883 (1st Dep't 1920), aff'd, 229 N.Y. 596, 129 N.E. 922 (1920).

Battery Place Commercial Corp. v. Willis, 183 A.D. 569, 170 N.Y.S. 772 (1st Dep't 1918).

⁴Simpson Crawford Co. v. Knight, 130 N.Y.S. 236 (App. Term 1911).

⁵Beers v. Waterbury, 21 N.Y. Super. Ct. 396 (1861) (chattel mortgage).

⁶Conkling v. Weatherwax, 181 N.Y. 258, 73 N.E. 1028 (1905).

Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900).

Bellom v. Schindler, 130 Misc. 503, 224 N.Y.S. 429 (Mun. Ct. 1927).

For discussion of immaturity of obligation or want of default in defense to action of foreclosure, see § 78.

⁷Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

⁸General Electric Co. v. Wightman, 3 A.D. 118, 39 N.Y.S. 420 (4th Dep't 1896).

to the plaintiff's lien. A general allegation to such effect will suffice.⁹ Additionally, where an action is brought by a mortgagee in his or her own name and the chattel mortgage is executed to him or her under an assumed name, the complaint should allege that the mortgage was made to the plaintiff doing business under such assumed name.¹⁰

§ 87 Answer

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens § 50 (Answer—Running of statute of limitations as bar to action for foreclosure)

In response to the complaint in an action of foreclosure upon a chattel lien, the answer, as in an ordinary civil action,¹ should deny each material allegation controverted by the defendant or any knowledge or information thereof sufficient to form a belief. Allegations of complaint in a foreclosure of a chattel mortgage are conclusively admitted by failure to deny them.² The answer may also contain a statement of new matter constituting a defense, such as the invalidity of the chattel mortgage, or a counterclaim.³ Affirmative defenses must be pleaded as such in the answer,⁴ and the defendant in a chattel-mortgage foreclosure must allege facts constituting a setoff.⁵

§ 88 Cross-claim and counterclaim

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens § 49 (Counterclaim—For recovery of property in lienor's possession—For damages—Demand by lienor in excess of amount due as constituting waiver of lien)

A defendant in an action to foreclose a lien upon a chattel may in

⁹Albany City Nat. Bank v. Hudson River Brick Mfg. Co., 29 N.Y.S. 793 (Gen. Term 1894).

¹⁰Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

[Section 87]

¹N.Y. Jur. 2d, Pleading §§ 118 to 155.

²McCrea v. Hopper, 35 A.D. 572, 55 N.Y.S. 136 (1st Dep't 1898) aff'd, 165

N.Y. 633, 59 N.E. 1125 (1901).

³Blake v. Corbett, 120 N.Y. 327, 24 N.E. 477 (1890).

As to defenses in actions to enforce a lien, generally, see §§ 93 to 96.

For discussion of counterclaims, see § 88.

⁴Ostrander v. Weber, 114 N.Y. 95, 21 N.E. 112 (1889).

⁵Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905).

his or her answer demand affirmative relief as respects a cause of action against the plaintiff.¹ No affirmative judgment can be awarded to the conditional buyer where no counterclaim is pleaded.² Similarly, cross-claims are allowed. The broad policy of the Civil Practice Law and Rules favoring cross-claims should not be frustrated unless the procedures for foreclosing liens would be disrupted by so doing or some provision of the Lien Law so requires.³

2. Seizure of Chattel

§ 89 Generally; warrant of seizure

Research References

West's Key Number Digest, Liens ⚭22

Am. Jur. Pleading and Practice Forms, Liens §§ 66 (Order—For warrant of seizure of chattel upon which plaintiff seeks to foreclose lien), 68, 69 (Warrant of seizure—Commanding sheriff to seize chattels on which lien is claimed)

If the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff, or such enforcement officer as is provided by law to execute the mandates of the particular court, to seize the chattel and safely keep it to abide the final judgment in the action.¹ The issuance of a warrant of seizure is justified if the plaintiff in a proceeding for the foreclosure of a chattel mortgage is out of possession. No further condition is imposed.² The provisions of the Civil Practice Law and Rules, and the provisions of the court act governing practice in the particular court, relating to an order of attachment, apply to warrants of seizure, to the proceedings to procure it, and after it has been issued except as otherwise expressly provided by the enforcement provisions of the Lien Law.³ However, compliance is not required with those provisions that apply

[Section 88]

¹McCrea v. Hopper, 35 A.D. 572, 55 N.Y.S. 136 (1st Dep't 1898), aff'd, 165 N.Y. 633, 59 N.E. 1125 (1901).

P. & M. Motor Car Co. v. Paris, 185 N.Y.S. 835 (App. Term 1921) (damages for fraud against chattel mortgagee).

²Studebaker Corporation of America v. Silverberg, 199 N.Y.S. 190 (App. Term 1923).

³Vogel Bros. Contracting Corp. v. Town of Oyster Bay, 50 Misc. 2d 401, 270 N.Y.S.2d 431 (Sup 1966).

[Section 89]

¹Lien Law § 207.

²Coiro v. Baron, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913).

³Lien Law § 207.

Where the undertaking given to obtain a "warrant of foreclosure" provided for the payment by the plaintiff to the defendants of costs and damages that the defendants might sustain by reason of the foreclosure, but failed to provide that the plaintiff would indemnify them from damages suffered from the vacating of the

peculiarly to a warrant of attachment.⁴ An affidavit for a warrant of seizure need not state that the claim is due over and above all counterclaims known to the affiant as required in the case of warrants of attachment.⁵ In passing upon the sufficiency of the affidavit, the statute should be construed with reasonable liberality.⁶

§ 90 Action in inferior court

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 68, 69 (Warrant of seizure—Commanding sheriff to seize chattels on which lien is claimed)

Where the action is brought in a court, other than one of those statutorily specified,¹ if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel and safely keep it to abide the judgment, may be issued in like manner as a warrant of attachment may be issued in an action founded upon a contract brought in the same court.² The law applicable to attachment in that court applies to the warrant of seizure, to the proceedings to procure it, and after it has been issued except as otherwise specified in the judgment.³

§ 91 Discharge or vacation of warrant

Research References

West's Key Number Digest, Liens ⇨16, 22

Notwithstanding the power of the court to issue a warrant of seizure

warrant of seizure, the undertaking was insufficient and justified the refusal of the warrant. *People ex rel. Paul G. Mehlin & Sons Piano Co. v. Lauer*, 80 Misc. 438, 141 N.Y.S. 296 (Sup 1913).

For discussion of courts in which a foreclosure action may be maintained, see § 81.

As to foreclosure actions in inferior courts, see § 90.

⁴*Coiro v. Baron*, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913), following *Wuertz v. Braun*, 113 A.D. 459, 99 N.Y.S. 340 (2d Dep't 1906).

⁵*Coiro v. Baron*, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913).

People ex rel. Paul G. Mehlin & Sons Piano Co. v. Lauer, 80 Misc. 438,

141 N.Y.S. 296 (Sup 1913).

⁶*Lomin Corp. v. Kohlhepp*, 151 Misc. 545, 271 N.Y.S. 709 (Mun. Ct. 1934).

[Section 90]

¹Lien Law § 209, probably referring to former Lien Law § 207, repealed by 1964 N.Y. Laws Ch. 960 § 1.

²Lien Law § 209.

As to grounds for an order of attachment, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 35 to 44.

³Lien Law § 209.

For discussion of judgment of foreclosure in an action in inferior court, see § 101.

of chattel in proceedings to enforce a lien thereon,¹ the defendant in an action to foreclose a lien may, under the appropriate statute, and upon the security required, apply for the discharge of a warrant of seizure.²

A warrant of seizure void on its face may be vacated.³ On the other hand, if the warrant of seizure is sufficient on its face, the disposal of the warrant must await the trial of the action.⁴

§ 92 Receivership

Research References

West's Key Number Digest, Liens ⇨22

In a proper case, a receiver may be appointed in a foreclosure action¹ in lieu of seizure of the chattel.² If a receiver is already in possession and can fully protect the plaintiff's interests, such receivership should be extended.³

3. Defenses

§ 93 Generally

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 50 (Answer—Running of statute of limitations as bar to action for foreclosure), 51 (Answer—Defense-Lien extinguished by unaccepted tender of payment)

An action to foreclose a lien upon a chattel is open to any defense

[Section 91]

¹§ 89.

²Quon Kee v. Hip Sing Tong Soc., 25 Misc. 320, 54 N.Y.S. 570 (City Ct. 1898).

As to annulment, vacation, or modification of attachment order and discharge of property upon substitution of security, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 156 to 182.

³Grossman v. Weiss, 129 Misc. 234, 221 N.Y.S. 266 (App. Term 1927).

⁴Karp v. Bass & Bass, 107 Misc. 217, 177 N.Y.S. 462 (City Ct. 1919).

[Section 92]

¹Ostrander v. Weber, 114 N.Y. 95, 21 N.E. 112 (1889).

Hof v. Mager, 168 A.D. 318, 154 N.Y.S. 60 (2d Dep't 1915).

²Marcus v. Sherr, 132 Misc. 734, 230 N.Y.S. 425 (City Ct. 1928).

For discussion of warrant of seizure, see § 89.

³Farmers' Loan & Trust Co. v. Hotel Brunswick Co., 12 A.D. 626, 42 N.Y.S. 350 (1st Dep't 1896) (where a receiver had been appointed in voluntary dissolution proceedings of the defendant corporation).

tending to show that no lien ever existed¹ or that, if it once existed, a lien no longer exists.² If the obligation or debt upon which the lien is based is not due and payable, or if the right to foreclose is contractually conditioned upon a default that has not occurred, there is no lien to foreclose.³ However, neither the partial failure of consideration on a contract creating a lien⁴ nor the defendant's failure to execute the chattel mortgage when its possession of the chattel and default under the mortgage are undisputed⁵ is a defense to foreclosure.

◆ **Illustration:** The fact that a corporation, to which the plaintiff bank made loans secured by a security agreement covering restaurant equipment, had not yet filed its certificate of incorporation at the time the security agreement and the first cash advance were made does not constitute an affirmative defense to the plaintiff's action to recover on its security interest from the defendants, the purchasers of the equipment at a mortgage foreclosure sale.⁶

The voluntary surrender of a chattel by the lienor, where continued possession is essential to the existence of the lien, is clearly a defense.⁷

§ 94 Unperfected security interest

Research References

West's Key Number Digest, Liens ⇨9, 22

For purposes of enforcement of chattel liens by action of foreclosure under the Lien Law, security interests in personal property, created by a security agreement, are treated as liens upon the chattel.¹ While the Uniform Commercial Code does not require filing of all security interests, failure to perfect a security interest may be a defense to an

[Section 93]

¹Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Ament v. Zaharion, 206 A.D. 143, 200 N.Y.S. 595 (1st Dep't 1923).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

²Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905).

As to burden of proof in foreclosure actions, see § 98.

³§ 78.

⁴Saltzman v. Neuman, 263 A.D. 832, 31 N.Y.S.2d 528 (2d Dep't 1941).

As to liens created by contract, generally, see § 17.

⁵Wuertz v. Braun, 122 A.D. 433, 107 N.Y.S. 429 (2d Dep't 1907).

⁶Bankers Trust Co. of Western New York v. Zecher, 103 Misc. 2d 777, 426 N.Y.S.2d 960, 29 U.C.C. Rep. Serv. 323 (Sup 1980) (doctrine of de facto corporation applicable).

⁷Gage v. Callanan, 128 A.D. 752, 113 N.Y.S. 227 (3d Dep't 1908).

For discussion of surrender of possession, see § 48.

[Section 94]

¹§ 83.

action of foreclosure. Insufficient compliance with a statute requiring the filing of a conditional sales contract is a defense of a purchaser of the chattel in good faith and for value without notice.² It is not a defense to a purchaser of mortgaged chattels, who had notice of the mortgage at the time of the purchase, that the mortgagee neglected or omitted to file the mortgage.³

§ 95 Waiver of default

Research References

West's Key Number Digest, Liens ⇨16, 22

In general, the right to foreclose upon a chattel lien accrues upon the failure of the owner of the chattel to pay the debt or perform the obligation secured according to the terms of a contract.¹ An extension of the time of payment is a valid defense to an action of foreclosure provided that it is founded upon a legal consideration. However, the right of a conditional vendor or mortgagee of chattels to foreclose upon default is not waived by having accepted payments that were waivers of prior defaults.² Additionally, it is no defense to an action to foreclose a chattel mortgage that the time of the defendant has been extended, where the extension was made after it was due and on the mere promise of the mortgagor to pay the debt at a later date, since such promise is without consideration.³ While there may be a waiver of the right, without notice and demand of payment, to exercise the privilege conferred by a default clause in a mortgage making failure to pay an installment a breach of the entire contract and authorizing the mortgagee to declare the whole sum then remaining unpaid immediately due and payable, the fact that the mortgagor defaults in making payments, making them in amounts and at times other than

²Ament v. Zaharion, 206 A.D. 143, 200 N.Y.S. 595 (1st Dep't 1923).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

Filing of a conditional bill of sale was not essential to the plaintiff's cause of action where defendant, a subsequent purchaser of the chattel, did not claim to have brought it without notice of the existence of the bill of sale. Equitable Auto Sales Co. v. Sherman, 170 N.Y.S. 948 (App. Term 1918).

³Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Where a purchaser of an automo-

bile took it for a past-due debt, he was not in the position of a subsequent purchaser in good faith and for fair consideration, who could take advantage of the fact that the mortgage had not been filed. Gray v. Brasee, 14 N.Y.S.2d 687 (Sup 1939).

[Section 95]

¹§ 78.

²Bloomingtondale v. Braun, 80 Misc. 527, 141 N.Y.S. 590 (App. Term 1913) (conditional sale).

³Repelow v. Walsh, 98 A.D. 320, 90 N.Y.S. 651 (2d Dep't 1904) (chattel mortgage).

as provided for in the mortgage, does not preclude the mortgagee, upon a subsequent default, from invoking the default provision and maintaining an action to foreclose his lien without first making a demand on the mortgagor for the return of the property.⁴

§ 96 Subordination of lien

Research References

West's Key Number Digest, Liens ☞12, 22

A chattel mortgage foreclosure action cannot be maintained for the purpose of attacking title to the property covered by a first mortgage, or lien, in effect denying the validity of the first mortgage.¹ It is a valid defense to such action that the plaintiff is seeking to litigate the validity of paramount or hostile claims to the chattel.² Nevertheless, there may be instances in which the very question to be decided is whether the rights of a defendant in a foreclosure suit are superior or subordinate to those of the lienor, and in such cases, a court must logically have the right to decide the question upon which its jurisdiction depends.³

4. Trial

§ 97 Generally; jury trial

Research References

West's Key Number Digest, Liens ☞22

In an action for the enforcement of a lien, there should be a hearing on the issues of fact raised by the pleadings that is conducted under the rules governing trials generally.¹ A proceeding for the foreclosure of a lien is ordinarily regarded as one of equitable cognizance in which, in the absence of statute, neither party has a right to demand a jury

⁴Kraus v. Black, 56 Misc. 641, 107 N.Y.S. 609 (App. Term 1907).

[Section 96]

¹Niccloy v. Treasure, 115 N.Y.S. 1030 (Sup 1909).

²Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

Strong v. Dahm, 39 N.Y.S.2d 266 (Sup 1942).

A junior mortgagee of chattels is entitled to foreclose his or her mortgage in equity where he or she also seeks to

redeem from a foreclosure by the holder of the senior mortgage by the exercise of a power of sale incorporated in the mortgage, the sale not having been fairly conducted. Fleischmann v. Clausen, 222 A.D. 7, 225 N.Y.S. 288 (1st Dep't 1927).

³Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

As to priorities among competing liens, generally, see §§ 39 to 44.

[Section 97]

¹Am. Jur. 2d, Liens § 92.

trial, notwithstanding that the plaintiff seeks a deficiency judgment.²

§ 98 Burden of proof

Research References

West's Key Number Digest, Liens ⇨22

The burden of establishing the facts constituting the cause of action of foreclosure to enforce a lien is on the plaintiff.¹ Where a lien is founded on possession, the burden of proving lawful possession is upon the lienor.² Until the plaintiff in the foreclosure action has established his or her debt, the plaintiff has no standing to maintain an action for a judgment of foreclosure.³ On foreclosure of a conditional sale contract against a third party alone, the plaintiff must prove a devolution of interest, an acquisition in some way of the interest of the plaintiff's vendee in the property, or possession of the property by him or her and a refusal after demand either to surrender possession or to pay the balance of the purchase price due thereon in order to sustain a judgment against him or her for the value of the property.⁴

The plaintiff need not prove such facts alleged in the complaint as are not denied,⁵ and the burden of proving any affirmative defenses in actions of foreclosure rests upon the defendant.⁶ If a defendant claims a setoff, he or she must prove the same.⁷

²Jamaica Sav. Bank v. M. S. Investing Co., 274 N.Y. 215, 8 N.E.2d 493, 112 A.L.R. 1485 (1937).

As to deficiency judgments, see § 103.

[Section 98]

¹Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903) (attorneys' lien).

Weisl v. James, 120 N.Y.S. 47 (App. Term 1909) (chattel mortgage).

²Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911).

For discussion of possessory liens, generally, see § 11.

As to the requirement, to foreclose upon a lien, that the debt be due and payable, see § 78.

³Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900).

⁴Rosenthal v. Cristal, 45 Misc. 649,

91 N.Y.S. 15 (App. Term 1904).

⁵§ 87.

⁶Tannenbaum v. Schaffer, 122 N.Y.S. 180 (App. Term 1910).

In an action to foreclose a conditional bill of sale against a purchaser from the buyer, if the buyer claims that he or she purchased in good faith for value without notice of the existence of the bill of sale, the buyer must give proof thereof. Equitable Auto Sales Co. v. Sherman, 170 N.Y.S. 948 (App. Term 1918).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

As to defenses to action of foreclosure, generally, see § 93.

⁷Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905), holding that where defendant admits default in the mortgage, but defends on the ground of breach of warranty of title, he is not entitled to

§ 99 Reference on default or admission

Research References

West's Key Number Digest, Liens ⇨22

By virtue of the Lien Law, providing that the procedure in an action foreclosing a mortgage on real property is generally applicable in actions to foreclose a mortgage or other lien on chattels or other personal property,¹ it would appear that the statute authorizing a reference on default or admission in a mortgage foreclosure on real property² might under some circumstances be applicable in an action to foreclose a lien upon a chattel.³

5. Judgment

§ 100 Generally

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 75 (Judgment or decree—Foreclosing lien), 81 (Order—For sale of property seized under warrant), 87 (Return or report of sale—By auctioneer), 88 (Return or report of sale—By sheriff)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

In an action to foreclose a chattel lien, other than an action brought in an inferior court,¹ final judgment, in favor of the plaintiff, must specify the amount of the lien or the monetary obligation secured by the security interest.² The plaintiff in a mortgage foreclosure is entitled to enter judgment only for the amount due at the time of the decree³ and, in the absence of an acceleration clause in the contract under which the lien arises, is not entitled to have included in the

judgment without proof of damages, and the mere proof that the goods, or part of them, were seized by a paramount lien claimant is not sufficient, where the existence of a paramount lien is not established.

[Section 99]

¹§ 82.

²N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 651 to 656.

³Berkowitz v. D.D. Holding Corp., 229 A.D. 443, 242 N.Y.S. 615 (1st Dep't 1930).

The procedure in an action to foreclose a chattel mortgage is necessarily the same as in an action to foreclose a mortgage upon real property except as modified by statute. *Lembeck & Betz Eagle Brewing Co. v. Sexton*, 184 N.Y. 185, 77 N.E. 38 (1906).

As to references, generally, see N.Y. Jur. 2d, References §§ 1 et seq.

[Section 100]

¹§ 101.

²Lien Law § 208.

³*Simpson Crawford Co. v. Knight*,

judgment any sum not due upon commencement of the action.⁴ Final judgment in favor of the plaintiff must also direct a sale of the chattel to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution, and the application by him or her of the proceeds of the sale, less fees and expenses, to the payment of the amount of the lien or the monetary obligation secured by the security interest and the costs of the action.⁵ Where a chattel mortgage with priority covers more property than was included in a conditional bill of sale, a judgment for the foreclosure of the mortgage should limit the mortgagee to costs payable out of the property and require a sale of all the property covered by the mortgage; otherwise, there would be less chance for a surplus from the chattels that were covered by the conditional bill of sale.⁶ The decree of foreclosure of a chattel mortgage or lien should describe the property to be sold thereunder sufficiently to identify it.⁷ It must also provide for the payment of the surplus to the owner of the chattel and for the safekeeping of the surplus, if necessary, until it is claimed by the owner.⁸ If a defendant, upon whom the summons is personally served, is liable for the amount of the lien or the monetary obligation secured by the security interest, or for any part thereof, a final judgment may also award payment accordingly.⁹

The law allows the molding of a judgment to conditions existing at the time of the judgment. For example, if the plaintiff in an action to foreclose a lien for storage and repairs has possession when the action is commenced, a money judgment will be proper if thereafter the chattel is lawfully taken from him or her by virtue of a prior lien.¹⁰ Similarly, where, pending an action to establish a lien, the property is sold, the lien claimant has a right to a judgment for the amount of his

130 N.Y.S. 236 (App. Term 1911).

⁴Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

Where in renewal of a chattel mortgage the mortgagee understates the amount remaining unpaid, as to subsequent purchasers, he is bound by the amount stated, and as to them the judgment will be rendered for this amount, and it is immaterial that the understatement was due to mistake or misapprehension. Beers v. Waterbury, 21 N.Y. Super. Ct. 396 (1861).

⁵Seeger & Gross Co. v. MacLaire, 165 N.Y.S. 423 (App. Term 1917).

For discussion of judgment in foreclosure upon real property, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 667 to 719.

⁶Seeger & Gross Co. v. MacLaire, 165 N.Y.S. 423 (App. Term 1917).

⁷MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N.Y. 92, 85 N.E. 801 (1908).

⁸Lien Law § 208.

⁹Lien Law § 208.

¹⁰Gage v. Callanan, 128 A.D. 752, 113 N.Y.S. 227 (3d Dep't 1908).

or her lien.¹¹

§ 101 Inferior court judgment

Research References

West's Key Number Digest, Liens ⇨22

Where the action of foreclosure upon a chattel lien is brought in an inferior court, the Lien Law provides that a judgment in favor of the plaintiff must correspond to a judgment rendered as otherwise prescribed by the Lien Law¹ except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed, and the payment of the surplus, if its safekeeping is necessary, to the county treasurer, for the benefit of the owner.²

§ 102 Sale under judgment of foreclosure

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 45 (Complaint in federal court—Diversity of citizenship—For declaration of lien priority and for foreclosure on real property), 76 (Judgment or decree—Foreclosing lien and establishing its priority)

If a lien is enforced by a foreclosure action, the defendant's interest and title in the property subject to the lien can be divested only by a foreclosure sale, and the judgment should order the sale to satisfy all the liens established in their just order of priority and equality.¹ A chattel mortgagee owes a junior mortgagee the duty to see that a sale on foreclosure is conducted fairly and honestly in such a manner that the reasonable value of the chattel will be realized.²

◆ **Illustration:** Upon confirmation of a foreclosure sale, the court was to determine whether the amount owing to the plaintiff under a security agreement should have been increased by the reasonable expenses of the foreclosure action and counsel fees, whether the defendants should be credited for the reasonable value of any use of the chattels by the plaintiff since the latter obtained possession

¹¹Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

[Section 101]

¹§ 100.

²Lien Law § 209.

As to the courts, generally, in which such action may be brought, see § 81.

For discussion of execution of judgments, generally, see N.Y. Jur. 2d, Enforcement and Execution of Judgments §§ 1 et seq.

[Section 102]

¹Am. Jur. 2d, Liens § 94.

²Fells v. Globe Candle Co., 253 A.D. 729, 300 N.Y.S. 659 (2d Dep't 1937).

thereof, whether a deficiency judgment should have been allowed against the defendants in the light of the alleged delay by the plaintiff in proceeding with the foreclosure sale and the possible resultant depreciation of the value of the chattel or because of any other reasons that the defendant properly might assert, and for the amount to be allowed for deficiency judgment or surplus, if either, and who would be entitled thereto.³

Where the mortgagee purchases the chattel for an inadequate price at an unfair sale, he or she is accountable to a junior mortgagee for the value of the property at the date of the sale.⁴ Additionally, where the amount realized is much less than the value of the chattel, because of collusion between the mortgagor and the mortgagee, such amount will be treated as a voluntary payment on the debt, and the lien of the junior mortgage will remain unimpaired.⁵

§ 103 Deficiency on foreclosure sale; defense

Research References

West's Key Number Digest, Liens ⇨22

Am. Jur. Pleading and Practice Forms, Liens §§ 93 (Affidavit—In support of motion for deficiency judgment after lien foreclosure sale—By attorney for plaintiff), 94, 95 (Judgment or decree—Granting deficiency judgment after lien foreclosure sale)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

The Lien Law, in providing for judgment of foreclosure and sale of chattel in enforcement of lien, provides that if a defendant, upon whom personal service is made, is liable for the amount of the lien, or for the monetary obligation secured by the security interest, or for any part thereof, the court may award payment accordingly.¹ A personal judgment for any deficiency may be rendered in the action² even in some cases,³ against a subsequent purchaser of the chattel.⁴ However, such a judgment presupposes that the court has obtained

³Sidco Distributing Co., Inc. v. Milco Food Corp., 43 A.D.2d 844, 351 N.Y.S.2d 175 (2d Dep't 1974).

⁴Ever-Ready Label Corp. v. Stuyvesant Photo Engraving Corp., 36 N.Y.S.2d 468 (Sup 1942).

⁵Fells v. Globe Candle Co., 253 A.D. 729, 300 N.Y.S. 659 (2d Dep't 1937).

[Section 103]

¹Lien Law § 208.

Lien Law § 208 does not contain restrictions similar to those governing real property foreclosures limiting deficiency judgments. See, for discussion thereof, N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 786 to 817.

²Cottone v. Spivach, 159 N.Y.S. 241 (Sup 1916).

³Singer Sewing Mach. Co. v. Leipzig, 113 N.Y.S. 916 (App. Term 1908).

personal jurisdiction, that a proper cause of action has been alleged, and that a personal judgment has been demanded in the complaint against those defendants who are to be held personally liable.⁵ The defendant must be credited with the value of the seized chattels where a judgment of deficiency is sought following a foreclosure where no deficiency judgment was entered because of the invalidity of the sale.⁶

If in an action to foreclose a chattel lien the plaintiff seeks a personal judgment for any deficiency arising upon the foreclosure sale, any defendant against whom such a deficiency judgment is sought may interpose any defense tending to show the absence of any personal obligation on his part to pay the debt secured by the lien.⁷

⁴Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

To sustain a deficiency judgment against third persons, based upon their receipt of the property and inability to return it, the value of the property must be established. *Anderson v. A.H. Sickinger, Inc.*, 235 A.D. 735, 256 N.Y.S. 228 (2d Dep't 1932).

⁵*Singer Sewing Mach. Co. v. Leipzig*, 113 N.Y.S. 916 (App. Term 1908).

⁶*Sachs Quality Furniture v. Nadborne*, 183 Misc. 778, 51 N.Y.S.2d 503 (Mun. Ct. 1943), order aff'd, 183 Misc. 781, 54 N.Y.S.2d 535 (App. Term 1944).

The burden is on the mortgagor to prove the reasonable value of the seized chattels, where the sale was invalid. *Sachs Quality Furniture v. Nadborne*, 183 Misc. 778, 51 N.Y.S.2d 503 (Mun. Ct. 1943), order aff'd, 183 Misc. 781, 54 N.Y.S.2d 535 (App. Term 1944).

⁷Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Hamill v. Gillespie, 48 N.Y. 556, 1872 WL 9837 (1872).

Consumers' Brewing Co. of Brooklyn v. Braun, 147 A.D. 171, 132 N.Y.S. 87 (2d Dep't 1911).

As to defenses in action of foreclosure, generally, see §§ 93 to 96.