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Recent Connecticut Superior Court Case Further Limits the Enforceability of Progressive Mechanics' Lien Waivers

By [Elizabeth K. Wright](#)

A recent Connecticut Superior Court case, *Milone & MacBroom, Inc. v. Winchester Estates*, 52 Conn. L. Rptr. No. 21, 793 (January 23, 2012), recognized a further restriction to the enforceability of mechanics' lien waivers. Connecticut courts have previously held that a mechanics' lien waiver executed in connection with a construction contract is valid if the contractor has commenced and performed the applicable work. In the *Milone* decision, the court looked to both the language and statutory history of Connecticut's Mechanics' Lien Statutes and Connecticut's Fairness in Financing in the Construction Industry Act to hold that a mechanics' lien waiver will only be enforced if it applies to work already performed **and for which payment has already been issued**.

In this recent case, Milone & MacBroom, Inc. (Milone) furnished labor and materials in the repair or improvement of the property by providing surveying and engineering design services for a proposed development. At the conclusion of Milone's work, a substantial outstanding balance remained. To secure the unpaid balance, Milone duly recorded a mechanics' lien against the property.

Milone subsequently sought to foreclose several encumbrances which were subsequent in right to its mechanics' lien, including a commercial mortgage deed held by Southern Connecticut Financial. Southern Connecticut Financial claimed that a certain waiver of mechanics' lien signed by Milone prohibited Milone from foreclosing its lien. Milone argued that Connecticut's Fairness in Construction Financing Act rendered the mechanics' lien void because at the time Milone signed the waiver, an unpaid balance remained for the work performed.

In making its decision, the court analyzed the language and statutory purpose of both Connecticut's Mechanics' Lien Statutes and Connecticut's Fairness in Financing Act. Conn. Gen. Stat. § 49-33 provides the statutory basis for and the priority of a mechanics' lien. Moreover, Conn. Gen. Stat. §49-33(d) provides that "[i]f any lienor waives or releases his lien or claim of precedence to any such encumbrance that lien shall be classed with and have no priority over liens originating subsequent to that encumbrance." Based upon this language, Connecticut courts have upheld the enforceability of mechanic lien waivers. However, Connecticut's Construction Fairness in Financing Act, Conn. Gen. Stat. §42-158i to § 42-158r,

provides certain limitations to the enforceability of such waivers. Specifically, Conn. Gen. Stat. §42-158l provides in relevant part:

Any provision in a construction contract or any periodic lien waiver issued pursuant to a construction contract that purports to waive or release the right of a contractor, subcontractor or supplier engaged to perform services, perform labor or furnish materials under the construction contract...make a claim against a payment bond, for services labor or materials which have not yet been performed or paid for shall be void and of no effect.

Although Connecticut Courts had previously held that Conn. Gen. Stat. 42-158l renders mechanics' lien waivers for work not yet performed void, no court had addressed the issue of whether a waiver for work performed but not yet paid for would be enforceable.

The court noted that because the purpose of Connecticut's mechanics' lien statute is to give contractors who furnish materials or services the security of the building and land for the payment of his claim, Connecticut courts have consistently held that the provisions of the mechanics' lien statute should be liberally construed to implement this remedial purpose. Accordingly, the court noted that, while Conn. Gen. Stat. §49-33 provides for the priority of the mechanics' lien as well as the right to waive the right to file a lien, Con. Gen. Stat. 42-158l provides for certain protective restrictions to this right.

In light of the remedial purpose of the statutory scheme and the plain language of the statutes the court held that Conn. Gen. Stat. 42-158l requires that a mechanics' lien waiver is only valid if it applies to work already performed **and** for which payment has already been issued.

Although this decision has not been reviewed by Connecticut's Appellate or Supreme Court, other courts may rely upon this decision to reach a similar conclusion. Therefore, to enforce a mechanics' lien waiver, one should ensure that the waiver is for work which has been both performed **and** paid for.

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