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I. INTRODUCTION

In New York, exaggerated mechanic's liens[1] impose an undue financial strain on property owners and contractors alike, wasting time and resources defending against frivolous claims. The shortcomings of New York's statutory provision addressing willfully exaggerated mechanic's liens—section 39 of the New York Lien Law[2]—coupled with courts' narrow interpretations of the provision, allow abusive subcontractors, suppliers, and other individuals or entities to file willfully exaggerated liens with small risk of repercussions.[3] New York courts hold that the question whether a mechanic's lien is willfully exaggerated must be determined at a trial or on a motion for summary judgment after the close of discovery.[4] As the high volume of litigation in New York causes the wheels of justice to turn slowly,[5] it can take years before a New York court decides on the merits of a lien claim. The onus is on the lienee to defend against such claims, and to do so the lienee must dedicate time and financial resources throughout a lengthy litigation process to attack the claim and clear the property of the encumbrance.[6]

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1. *Lien: Mechanic's Lien*, Black's Law Dictionary (10th ed. 2014) ("A statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real or personal property, such as a building, an automobile, or the like.").

2. The provision provides as follows:

> In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

N.Y. Lien Law § 39 (McKinney 2017).

3. The legal term used to refer to such an individual is "lienor," and the legal term for a property owner or contractor, for example, whose property is subject to a lienor's encumbrance, is "lienee." *See Lienholder*, Black's Law Dictionary (10th ed. 2014) ("A person having or holding a lien[, a]lso termed *lienor*."); *Lienee*, Black's Law Dictionary (10th ed. 2014) ("One whose property is subject to a lien.").

4. NDL Assocs., Inc. v. Villanova Heights, Inc., 952 N.Y.S.2d 121, 121–22 (App. Div. 2012). A mechanic's lien claim is exaggerated when a lienor intentionally inflates the amount for which she claims a lien on the property; the amount claimed must be more than what is owed by the lienee to the lienor and the lienor must have willfully asserted the overage. *See* Lien § 39; Scott Wolfe Jr., *New York Exaggerated Lien Claims More Difficult to Prove After Recent Appeals Case*, Zlien (Oct. 10, 2012), http://www.zlien.com/articles/new-york-exaggerated-lien-claims-more-difficult-to-prove-after-recent-appeals-case.

5. *See* Stephanie Clifford, *For Victims, an Overloaded Court System Brings Pain and Delays*, N.Y. Times (Jan. 31, 2016), http://www.nytimes.com/2016/02/01/nyregion/for-victims-an-overloaded-court-system-brings-pain-and-delays.html.

6. *See* Brian G. Lustbader, *Understanding Mechanic's Liens Reveals Approaches to Thwart a Developer's Improper Filing*, 73 N.Y. St. B. Ass'n J. 51, 51 (2001).

"A mechanic's lien is as easy and inexpensive for a lienor to file as it is costly and time-consuming for the property owner to discharge."[7] In many circumstances, even if it is obvious on the lien's face that it is exaggerated, the time and expense associated with challenging the value of a mechanic's lien can outweigh the benefit of a favorable ruling in court.[8] The long and complicated litigation process not only discourages lienees from defending themselves, but also empowers and incentivizes lienors to file exaggerated liens.[9] Lienors can use the law to their advantage because they know how difficult it is to challenge exaggerated mechanic's liens and they are aware of the benefit they obtain from the significant title and loan problems these liens create for lienees.[10] Further, lienors know that if they file an exaggerated lien, lienees will often be willing to negotiate a settlement to clear their property of the encumbrance.[11] Because it is easy to file, "a mechanic's lien is a potent weapon in the hands of an unscrupulous individual" or entity.[12] The shortcomings of section 39, coupled with courts' interpretations of it, have led to an environment in which the wrongdoer can financially benefit at the expense of the lienee, and, more broadly, at the expense of the citizens of New York.

This note contends that to promote private and public infrastructure development, New York courts need to broaden their interpretations of section 39 of the New York Lien Law and look to neighboring states for key principles that New York can use to improve its lien law. By improving the law, lienees will be provided with more ways to contest exaggerated mechanic's liens and lienors will be susceptible to more severe penalties.

Part II of this note reviews the history and background of American lien law, from its origins and legislative intentions, to its modern application and importance in the construction industry today. Part II also addresses the issues and economic impact that exaggerated mechanic's liens have on lienees, and how New York currently addresses these issues through statute. Part III discusses the shortcomings of how New York combats willfully exaggerated liens, especially in light of New

7. *Id.* In New York, there is a simple three-step process that property owners must follow to have a mechanic's lien discharged. First, the lienor must produce a signed document that includes basic information such as the name and residence of the lienor, the name of the owner of the real property against whom the lien is claimed, the labor performed or materials furnished, the time the work was performed, and the amount unpaid to the lienor. Lien § 9. The lienor must then serve copies of the mechanic's lien to all affected parties, including the property owner. *Id.* § 11. Lastly, the lien must be filed with the county clerk for the county where the project job site is located. *Id.* § 10.

8. *See* Lustbader, *supra* note 6, at 51.

9. *Id.*

10. *Id.* at 51; *see also* Nate Budde, *Why Bonding Off Liens Is Good for Everyone*, Construction Executive (Nov. 10, 2015, 3:41 PM), http://enewsletters.constructionexec.com/riskmanagement/2015/11/why-bonding-off-liens-is-good-for-everyone (discussing the difficulties of discharging a mechanic's lien).

11. Kenneth B. Frank & George W. McManus, Jr., *Balancing Almost Two Hundred Years of Economic Policy Against Contemporary Due Process Standards—Mechanics' Liens in Maryland After* Barry Properties, 36 Md. L. Rev. 733, 737 (1977).

12. Lustbader, *supra* note 6, at 51.

York courts' narrow interpretations of an already toothless exaggerated lien law. Part IV presents a proposed solution to this problem, which includes courts broadening their interpretations of "action or proceeding" as used in section 39 of the New York Lien Law, as well as gaining inspiration from other states, including New Jersey, Connecticut, and Florida.[13] Part V concludes that to rid the system of exaggerated liens, New York needs to adopt a two-pronged approach, which will require New York courts to revise their interpretations of section 39, and the legislature to update section 39 to deter lienors from using the provision as a "potent weapon"[14] against lienees.

II. HISTORY AND BACKGROUND OF AMERICAN LIEN LAW

The U.S. Census Bureau's annual rate estimates from January 2017 indicated that the value of all construction work completed in the United States for both the private and public sector was nearly $1.2 trillion.[15] The U.S. Commerce Department recently ranked the construction industry among the ten largest industries in America by gross domestic product[16] because it employs millions of Americans[17] and contributes to the ever-expanding need for development of infrastructure in this country.[18] This development includes constructing sea walls in New Orleans to protect against another Hurricane Katrina,[19] and a new Tappan Zee Bridge[20] in New York to service the roughly 138,000 cars that cross over the Hudson River Bridge

13. *See infra* Part IV.

14. Lustbader, *supra* note 6, at 51.

15. Press Release, U.S. Census Bureau News, Monthly Construction Spending, February 2017 (Apr. 3, 2017, 10:00 AM), https://www.census.gov/construction/c30/pdf/release.pdf.

16. Jonathan House, *Five Takeaways from New GDP-by-Industry Report*, Wall Street J.: Real Time Econ. (Apr. 25, 2014, 2:30 PM), http://blogs.wsj.com/economics/2014/04/25/five-takeaways-from-new-gdp-by-industry-report.

17. According to the U.S. Bureau of Labor Statistics, in 2015, the Construction Industry employed over 8.2 million Americans. Madison Lau & Kerrie Leslie, U.S. Bureau of Labor Statistics, CES National Benchmark Article: BLS Establishment Survey National Estimates to Incorporate March 2015 Benchmarks 7 tbl.2 (2016), https://www.bls.gov/web/empsit/cesbmart.pdf (combining employment benchmarks for construction, construction of buildings, and heavy and civil engineering construction).

18. *See generally* Elizabeth C. McNichol, Ctr. on Budget & Policy Priorities, It's Time for States to Invest in Infrastructure (2016), http://www.cbpp.org/sites/default/files/atoms/files/2-23-16sfp.pdf (discussing the importance of infrastructure, investment, and expansion).

19. A nearly 133-mile chain of levees, flood walls, gates, and pumps that cost $14.5 billion are now in place in New Orleans to help protect the city from flood-water gushes similar to those of Hurricane Katrina. John Schwartz, *Vast Defenses Now Shielding New Orleans*, N.Y. Times (June 14, 2012), http://www.nytimes.com/2012/06/15/us/vast-defenses-now-shielding-new-orleans.html.

20. Tatiana Schlossberg, *Tappan Zee Bridge Graces Cover of the Federal Budget*, N.Y. Times (Feb. 5, 2015), http://www.nytimes.com/2015/02/06/nyregion/photo-of-tappan-zee-bridge-graces-cover-of-obamas-federal-budget.html. The new Tappan Zee Bridge is expected to be completed by 2018. *Id.* For more on the project, see *About the Project*, New NY Bridge, http://www.newnybridge.com/about (last visited Apr. 6, 2017).

every day.[21] The construction industry's impact on the development of the United States is nothing new, and dates back to this country's infancy when George Washington decided that an area along the Potomac and Anacostia Rivers would be the site of our new nation's capital.[22]

In an effort to help build Washington D.C. into a city worthy of being the capital of the United States, Thomas Jefferson and James Madison helped petition the Maryland legislature in 1791 to enact a first-of-its-kind mechanic's lien statute.[23] Due to the construction industry's reliance on credit, the general principle of early lien laws was "to protect those who furnish work and materials" to specific projects.[24] Specifically, it was enacted to protect those independent contractors from politically and economically powerful landowners and to ensure that they were paid for the agreed upon improvements.[25] The key principle of the mechanic's lien was to declare it inequitable for any lienee to enjoy another's work without paying for it.[26] Jefferson and Madison's efforts proved successful—the threat of filing and enforcing a lien against a lienee was a generally effective tactic in ensuring payment.[27]

Since that time, mechanic's lien laws have spread and been implemented across the country.[28] In all fifty states, the general principle of mechanic's lien law remains the same. The law is intended to promote

> justice and equity in dedicating, primarily, buildings and the land on which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and materials furnished by others, without recompense.[29]

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21. Thomas C. Zambito, *New Tappan Zee: State Windfall Could Limit Toll Hike*, Lohud (Oct. 10, 2015, 4:22 PM), http://www.lohud.com/story/news/investigations/2015/10/07/tappan-zee-toll-hike/72755510.

22. *The History of Washington, DC*, Wash. DC, http://washington.org/DC-information/washington-dc-history (last visited Apr. 6, 2017).

23. Md. Acts 1791, ch. 45, § 10; Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc., 179 A.2d 683, 685 n.1 (Md. 1962); Mitchell S. Cutler & Leonard Shapiro, *The Maryland Mechanics' Lien Law—Its Scope and Effect*, 28 Md. L. Rev. 225, 225 (1968).

24. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 8–9 (1920); *see also* Elec. Supply Co. of Durham v. Swain Elec. Co., 403 S.E.2d 291, 296 (N.C. 1991) ("An adequate lien is necessary to encourage responsible extensions of credit, which are necessary to the health of the construction industry.").

25. Moore-Mansfield Constr. Co. v. Indianapolis N.C. & T. Ry. Co., 101 N.E. 296, 301–02 (Ind. 1913); Michael J. McDermott, *New York's Lien Law: The Nuts and Bolts*, 30 Westchester B.J. 49, 50 (2003).

26. *E.g.*, Le Grand v. Hubbard, 112 So. 826, 829 (Ala. 1927) ("[T]he policy of the statute . . . declares that it is inequitable that one shall enjoy . . . the product of [another's] labor and skill, without making just compensation therefor." (quoting *Ex parte* Schmidt & Smith, 62 Ala. 252, 255 (1878))).

27. McDermott, *supra* note 25, at 50.

28. *Id.*

29. *Moore-Mansfield Constr. Co.*, 101 N.E. at 302.

Mechanic's liens did not exist at common law, and thus are "creatures of [and are dependent on state] statue[s]."[30] By definition, the right to file a mechanic's lien is granted by state statute for a party—usually a contractor or subcontractor—to secure payment for the performance of labor or the supply of materials and it is enforced against the property that was materially improved by such labor or materials.[31] As was the intention of our forefathers, the benefits of American lien law lie in its low barriers to entry, which include its minimal cost and simple procedure, both huge benefits for lienors who might not have the sophistication or financial strength to bring an action through the traditional courts of equity.[32] If a lienor is seeking payment for work performed on a private improvement, all the lienor needs to do is file a one-page form with the county clerk in the county where the improved property is located, and have the form verified by a person with knowledge of the lien.[33] Once filed, "the lien attaches to and encumbers the real property which was improved, making it virtually impossible to pass title until the lien has been discharged, canceled, vacated or satisfied."[34] Liens pose financial difficulties for lienees and can incentivize them to come to terms with the lienors because most construction contract lenders require that the property be kept free of liens.[35]

For public construction projects, such as the new Tappan Zee Bridge, the lien attaches to the public monies that were appropriated for the project, rather than the actual property.[36] "Additionally, the public entity [that is funding the project] typically will withhold one and a half times the amount of the lien to ensure payment to the lienor . . . ."[37] This causes money for the project to be tied up in the lien process, rather than being made available to pay for the project and for the contractor to pay its subcontractors.[38]

Once a lien has been filed, lienees will usually do whatever they can to have the lien discharged, often by settlement, without waiting for a costly and time consuming "lien foreclosure action."[39] Such a simple lien filing can, and usually does, create

30. Thomas B. Becker & Dana Hockensmith, Comment, *Mechanic's Liens—Priority over Mortgages and Deeds of Trust*, 42 Mo. L. Rev. 53, 53 (1977).

31. *Lien: Mechanic's Lien*, Black's Law Dictionary, *supra* note 1.

32. *See* McDermott, *supra* note 25, at 50.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 51; *see* Emily J. Hansen-Brown, *Lien Foreclosures—What Are They and Can They Benefit My Association?*, Orlando Sentinel (July 12, 2012, 8:33 AM), http://articles.orlandosentinel.com/2012-07-12/news/os-lien-foreclosures-what-are-they-and-can-they-benefit-my-association-20120712_1_lien-property-association (defining "lien foreclosure" as "a lawsuit that is filed to foreclose a lien for unpaid assessments" and stating that "[i]f the owner does not pay all amounts secured by the lien, then the property will be sold at public auction").

significant title and loan problems for the lienee.[40] If a settlement is not possible, a lienee will usually procure a lien discharge bond[41] to vacate the lien against real property or the public improvement.[42]

Because of the leverage created for the lienor by the simplicity of a mechanic's lien filing, the lien can be "a potent weapon in the hands of an unscrupulous individual."[43] Each situation varies, but the underlying question remains the same: What should lienees do when they are faced with a mechanic's lien against the project's real property that they believe has been wrongfully or improperly recorded?[44] The lienee might have already made full payment to the lienor, or the lienor might have filed a lien for an amount greater than the amount owed—an exaggeration.[45] This exaggeration could be a mere inaccuracy or honest mistake in calculating the amount of a lien, such as an accounting error, or something that the lienor did intentionally.[46] There are many reasons why a lienor would intentionally exaggerate a lien. Some lienors do so to gain leverage when negotiating a settlement or to increase the chances of quick payment.[47] Others file the willfully exaggerated mechanic's lien "simply to irritate and infuriate the person that owes the money and refuses to pay."[48]

Regardless of the reason, exaggerated liens—both intentional and unintentional—are an everyday problem within the construction industry, specifically for private landowners.[49] Since the state law where the property is located governs the mechanic's lien,[50] states have tried to address exaggerated liens through statute; and although the

40. Lustbader, *supra* note 6, at 51.

41. Also known as "bonding off" a lien, a lien discharge bond is a qualified bond (which is set by statute in New York at 110 per cent of the amount of the lien) that may be substituted as collateral for the real property that is subject to the lien. Budde, *supra* note 10. The benefit of "bonding off" the lien is that the lienor still has security from which to recover payment, but the lien no longer ties up the property. *Id.*

42. Lustbader, *supra* note 6, at 51. *See generally* Yonkers Builders Supply Co. v. Petro Luciano & Son, 199 N.E. 45 (N.Y. 1935); Axinn & Sons Lumber Co., Inc. v. Northwood Projects, Inc., 385 N.Y.S.2d 487 (Sup. Ct. 1976).

43. Lustbader, *supra* note 6, at 51.

44. *See* John-Patrick Curran & Kenneth M. Block, *Options Available for Owners to Challenge Mechanic's Liens*, 248 N.Y. L.J. 51 (2012).

45. *Id.*; Jay Romano, *Your Home; Tying Up a House with a Lien*, N.Y. Times (Jan. 20, 2002), http://www.nytimes.com/2002/01/20/realestate/your-home-tying-up-a-house-with-a-lien.html.

46. Vincent T. Pallaci, *Contractors Beware: Exaggerating a Mechanic's Lien Can Cause Big Trouble*, NY Construction L. Update (Oct. 9, 2010, 10:29 AM), http://newyorkconstructionlawupdate.blogspot.com/2010/10/contractors-beware-exaggerating.html.

47. *Id.*

48. *Id.*

49. *See generally* Romano, *supra* note 45 (discussing mechanic's liens and difficulties they cause for property owners).

50. Sunderland v. United States, 266 U.S. 226, 232–33 (1924) ("The general rule is not to be doubted, that the tenure, transfer, control and disposition of real property are matters which rest exclusively with the state where the property lies . . . ." (citing United States v. Fox, 94 U.S. 315, 320–21 (1876))).

key principles of the laws of mechanic's liens are consistent, the statues vary in substance from state to state.[51]

New York has a long-standing statutory provision that specifically addresses exaggerated liens.[52] Section 39 aims to supply additional protection to lienees against "fictitious, groundless and fraudulent liens by unscrupulous lienors,"[53] in the form of damages.[54] The damages awarded to lienees would include interest on any money deposited to discharge the lien, reasonable attorney's fees in attempting to discharge or void the lien, and most importantly, the amount of the exaggeration.[55] In addition, the entity filing the exaggerated lien would lose the right to enforce the lien or file and foreclose on any future lien on the property.[56]

III. THE PROBLEM

The problem with exaggerated liens in New York is that there is no method in place that enables a lienee to discharge an exaggerated mechanic's lien without investing significant time and money into the process. The difficulty lies both in the drafting of section 39, and New York courts' narrow interpretations of the provision. The situation exists with respect to both willfully exaggerated mechanic's liens and unintentionally exaggerated liens. Owing to the lack of statutory checks and balances and prompt judicial oversight regarding the dismissal of exaggerated liens in New York, lienors can use the cost and delayed procedure to their advantage by taking what is intended to be a shield for lienees and turning it into a sword for themselves.

A. Three Ways to Discharge an Exaggerated Mechanic's Lien in New York

In New York, there are three ways a lienee can discharge an exaggerated mechanic's lien to free her property of the encumbrance. Each method can be costly, time consuming, or both.

The first option is for the lienee to "bond" the lien.[57] Bonding the lien requires that the lienee apply to the county clerk in the state where the liened property is located and file a bond in an amount equal to 110 per cent of the lien.[58] The bond would replace the liened property as the security interest in the debt allegedly owed on the property and would then be used for payment if a judgment were rendered against the property to enforce the lien.[59] The problem with this solution is that the lienee must often post

51. Newport Sand & Gravel Co. v. Miller Concrete Constr., Inc., 614 A.2d 395, 397 (Vt. 1992).

52. N.Y. Lien Law § 39 (McKinney 2017).

53. Durand Realty Co. v. Stolman, 94 N.Y.S.2d 358, 360 (Sup. Ct. 1949).

54. Lien § 39-a.

55. *Id.*

56. *Id.* § 39.

57. *Id.* § 19(4).

58. *Id.*

59. *See id.*

the cash equivalent of 110 per cent of the lien's value, which in construction projects can be hundreds of thousands of dollars.[60] And the lienee's collateral is tied up under the bond until the lien is satisfied or litigated, which can take many years to resolve.[61] Lienees might not have the working capital to tie up that much money into the bonding process, especially when the amount of the lien is exaggerated.

Another option available to lienees is to demand that the lienor commence a foreclosure action on the lien within thirty days.[62] "[I]f the lienor does not comply [with the demand], the lien will be discharged [by court order]."[63] The benefit of this option is that if the lien is exaggerated on its face, and there are no grounds to justify it, the lienor will be unlikely to bring a foreclosure action, and the lien can be discharged.[64] If the lienor is not scared off by the foreclosure demand, the lienee must wait for the legal process to play itself out—pretrial discovery, interrogatories, depositions, and a full trial—before the lien can be discharged.[65] This option, too, can take many years to resolve, which results in the lienee accumulating legal fees during the process.[66]

The final option available is specifically intended for those liens that the lienee believes the lienor intentionally exaggerated. If the lienee feels that the amount of a lien filed against her was intentionally overstated, the lienee can file a counterclaim against the lienor for willful exaggeration of the lien.[67] As discussed above, if the countersuit proves successful, the lienee may have the lien reduced or discharged in its entirety. Further, the lienor can be required to pay interest to the lienee on any money deposited to discharge the lien, as well as reasonable attorney's fees in attempting to discharge or void the lien, and the lienee can recover the amount of the exaggeration.[68]

The goal for this type of counterclaim is to encourage lienors to be reasonable with their demands and hopefully settle the dispute without further litigation.[69] This consequential effect of a willful exaggeration counterclaim makes sense in theory, but more often than not, because of New York courts' interpretations of the law, the

60. Lustbader, *supra* note 6, at 51.

61. *Id.*

62. *Id.* at 52. Demanding that the lienor commence a foreclosure action involves the property owner serving notice on the lienor, and requiring the lienor to commence an action to enforce the lien within a specified time, but no less than thirty days from the time of service. Lien § 59. If the property owner shows proof of such service and the lienor has not commenced the action to foreclose the lien in the specified time, the lien will be discharged by the court. *Id.*

63. Lustbader, *supra* note 6, at 52.

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.* at 51–52; *see, e.g.*, Guzman v. Estate of Fluker, 641 N.Y.S.2d 721 (App. Div. 1996) (involving a counterclaim for willful exaggeration of a lien that the defendants filed against a contractor who commenced a foreclosure action).

68. N.Y. Lien Law § 39-a (McKinney 2017).

69. Lustbader, *supra* note 6, at 52.

lienor is not "frightened off by the counterclaim,"[70] and is emboldened to proceed with the lien because of the low risk of repercussions.[71]

B. Issues Regarding New York Courts' Interpretations of the Lien Law

The issue with New York courts' interpretations of section 39 is twofold. First, the lienee has the burden of proving that the lienor willfully exaggerated the lien amount.[72] The lienee must show that the lien claim was fictitious, groundless, and fraudulent.[73] For the court to declare that the willfully exaggerated mechanic's lien is void, the lienee must also offer evidence that proves that the lien amount was willfully exaggerated, which is difficult for the lienee to prove.[74] Even if the lienee meets the challenging burden of obtaining evidence that proves the lienor deliberately and intentionally exaggerated the lien, the issue then becomes the length of time it will take for the exaggerated lien to be adjudicated.[75]

This second issue lies in courts' interpretations of "action or proceeding."[76] The assertion that a lien has been willfully exaggerated may only be made "[i]n any action or proceeding to enforce a mechanic's lien . . . or in which the validity of the lien is an issue."[77] New York courts have interpreted this to mean that the determination of whether a mechanic's lien was willfully exaggerated should only be determined at trial or on a motion for summary judgment after the close of discovery.[78] "The right to [argue] that a lien is void for willful exaggeration is always reserved for trial."[79]

Thus, if lienees were to bring a counterclaim of willful exaggeration, they must prove their case by a preponderance of the evidence at trial, and may not establish their case on a prior motion on the basis of an affidavit alone.[80] With the time and significant

70. *Id.*

71. *See id.* at 52 & n.5.

72. *See* Goodman v. Del-Sa-Co Foods, Inc., 205 N.E.2d 288, 289 (N.Y. 1965); Lustbader, *supra* note 6, at 52; Wolfe, *supra* note 4.

73. *See* John H. Reetz, Inc. v. Stackler, 201 N.Y.S.2d 54, 58 (Sup. Ct. 1960); Durand Realty Co. v. Stolman, 94 N.Y.S.2d 358, 360 (Sup. Ct. 1949).

74. *See* AJ Contracting Co. v. Farmore Realty Inc., 849 N.Y.S.2d 546 (App. Div. 2008); J. Sackaris & Sons, Inc. v. Terra Firma Constr. Mgmt. & Gen. Contracting, LLC, 788 N.Y.S.2d 424 (App. Div. 2005); Lustbader, *supra* note 6, at 52 n.5 ("Only a handful of [exaggerated lien] cases has resulted in any severe penalty, as it is very difficult to demonstrate that the lienor has acted 'willfully.'"); Wolfe, *supra* note 4 ("[I]t is very difficult to prove that someone had an intent to defraud or a malicious intent. It's a state of mind, and unless the lienor admits to having the state of mind or memorializes it in writing, it's going to be difficult to prove.").

75. *See* Lustbader, *supra* note 6, at 52.

76. N.Y. Lien Law § 39 (McKinney 2017).

77. *Id.*

78. *E.g.*, NDL Assocs., Inc. v. Villanova Heights, Inc., 952 N.Y.S.2d 121, 121 (App. Div. 2012).

79. *In re* T.A. Maloney Contracting Corp. v. William E. Blume, Inc., 380 N.Y.S.2d 585, 586 (Sup. Ct. 1976).

80. *In re* Lustbader Contracting Corp., 259 N.Y.S. 103, 104 (Sup. Ct. 1932); Schenectady Homes Corp. v. Greenside Painting Corp., 37 N.Y.S.2d 53, 55 (Schenectady Cty. Ct. 1942).

legal expense of taking an exaggerated lien counterclaim to trial, and burden of proving, by a preponderance of the evidence, that the lien was willfully exaggerated, challenging an exaggerated mechanic's lien claim is often not worthwhile.[81]

As discussed above, because the lienee is burdened with the standard of evidentiary proof, there is little chance that the lienor will be "frightened off" by the willfully exaggerated counterclaim, and look to settle or withdraw without further litigation.[82] Additionally, if the lienor is liable for a willful exaggeration, the remedies available to the lienee under the New York statute, which include monetary damages, are only available when the lienor seeks to enforce the lien.[83] For the unscrupulous lienor, this is even further incentive to try to extend the lien as long as possible, even years, without foreclosing on it to obtain an adjudication.[84] For example:

> [I]f the lienor simply files the willfully exaggerated lien and lets it sit there (even if [the lienor] renews it for a couple of years), there is little the owner can do to obtain damages for willful exaggeration so long as the lienor chooses not to start a foreclosure action and proceed to trial.[85]

Thus, the lienee must either force the commencement of a foreclosure action, as discussed above, or wait until the lienor initiates the foreclosure action, which may not occur until years after the filing.[86] This potential delay in seeking remedies for the lienee, coupled with the high legal expense, makes it difficult for lienees to use section 39 for their protection.

The legislative intent of section 39 was to "supply an additional protection to the [lienee] from fictitious, groundless and fraudulent liens by unscrupulous lienors."[87] Unfortunately, because of the heightened burden that New York courts have put on lienees facing an exaggerated lien, the law provides no timely or cost-effective solution to combat a willfully exaggerated lien that is encumbering their property.

The key similarities in all three methods of discharging exaggerated liens—both intentional and unintentional—are the significant time they take and the high cost to the concerned lienee. Though exaggerated liens are simple and inexpensive for the lienor to file—a one-page mechanic's lien document—their repercussions on the lienee can be felt for years.[88] The ease of filing a willfully exaggerated mechanic's lien, coupled with the lack of any timely solution for its discharge in New York, enables lienors to game the system to their advantage and push for the most favorable

81. Wolfe, *supra* note 4.

82. Lustbader, *supra* note 6, at 52.

83. Pyramid Champlain Co. v. R.P. Brosseau & Co., 699 N.Y.S.2d 516, 520–21 (App. Div. 1999); *In re* B. Schiavo & Sons Steel Corp. v. Acworth, 528 N.Y.S.2d 252, 253 (Sup. Ct. 1987).

84. Lustbader, *supra* note 6, at 52.

85. Randy J. Heller, *The Perils of Filing a Willfully Exaggerated Mechanic's Lien*, Gallet Dreyer & Berkey LLP (Dec. 9, 2014), http://www.gdblaw.com/perils-of-filing-a-willfully-exaggerated-mechanics-lien.

86. Lustbader, *supra* note 6, at 52.

87. Durand Realty Co. v. Stolman, 94 N.Y.S.2d 358, 360 (Sup. Ct. 1949).

88. Lustbader, *supra* note 6, at 51.

settlement with the lienee. Having no timely recourse, lienees are also incentivized to settle at terms less favorable to them. The process for disposing of exaggerated liens should be a shield to protect lienees against the dishonest lienors, so lienees are able to, in good faith, deal with contractors to develop their property. This in turn creates jobs and fosters infrastructure development within communities. Instead, the procedure for attacking exaggerated liens in New York has become a sword for deceitful lienors looking to take advantage of an outdated statutory provision and courts' narrow construction of that provision.

IV. THE SOLUTION

For too long now, section 39 and courts' interpretations of it have favored unscrupulous lienors, rather than the lienees whom the law is intended to protect, by making it too easy to file an exaggerated lien either intentionally or unintentionally.[89] A lienee should not be dissuaded by the time and expense it takes to challenge an exaggerated lien. There should be a process in place that decides the merits of the lien faster than a full-blown trial. Additionally, there must be preventive measures put in place to dissuade people from filing exaggerated liens.

To solve this problem, New York courts need to broaden their interpretations of section 39 and look to neighboring states for key principles to update the provision. New York needs to provide lienees with more ways to challenge exaggerated mechanic's liens, help reduce the number of liens that are filed through updated processes, and impose more severe penalties on those who willfully file them.

A consistency in New York with respect to challenging an exaggerated lien is that a lienee needs to be prepared in terms of both time and money to see the matter through to trial. As discussed above, in New York the lienee must serve a demand to foreclose on the lien to move the lien discharge process forward.[90] Additionally, the lienee must counterclaim for willful exaggeration and then wait until trial for the exaggerated lien to be discharged, where she has the burden to prove that the lien was exaggerated.[91]

To provide a more efficient system for lienees to challenge exaggerated liens, New York's lawmakers should look at case law and statutory law in other states. For example, in Connecticut, the judicial interpretation of an "action or proceeding" as used in its lien statute is not limited to a trial and includes judiciary hearings, where applicable.[92] In addition, New York courts also need to revisit their allocation of the burden of proof, from solely on the lienee to a shared model similar to that of Connecticut.

89. *Id.*; Vincent T. Pallaci, *Will Filing a False Mechanic's Lien on a Public Project in New York Be a Class E Felony Soon?*, N.Y. Mechanic's Lien (Feb. 25, 2013, 3:23 PM), http://nymechanicsliens.blogspot.com/2013/02/will-filing-false-mechanics-lien-on.html.

90. Lustbader, *supra* note 6, at 52.

91. *Id.* at 51–52.

92. Conn. Gen. Stat. § 49-35a (2015).

In Connecticut, a lienee may make an application to the superior court for a hearing to determine whether a mechanic's lien should be reduced or discharged.[93] The application and proposed order are filed in the judicial district where the lien may be foreclosed.[94] The court then sets a date for the hearing, giving the lienor at least four days' notice.[95] This is a far faster, cheaper, and more effective system for resolving the validity of a mechanic's lien than that in New York, where the lienee must wait an inordinate period after the lien is filed.

Also in Connecticut, the lienor must establish probable cause to sustain the validity of the lien.[96] If the lienor establishes probable cause, the burden then shifts to the lienee to prove, by clear and convincing evidence, that the lien should be discharged or that the amount of the lien claimed is excessive and should be reduced.[97] Connecticut, unlike New York, does not put the entire burden on the lienees or third parties to establish their defense to the exaggerated claim, but rather it shifts some of the responsibility to the lienor to first prove that her lien is valid.[98] If on its face there is no question that the lien has been inflated, the lien will quickly be invalidated.[99]

At the conclusion of the hearing, the court can choose to deny the application, order that the lien be discharged, reduce the amount of the lien, or order that the lien be discharged or reduced on the condition that a surety bond is posted.[100] Similar to New York courts, Connecticut courts have the discretion to award reasonable attorney's fees to a property owner or third party who successfully reduces or discharges a mechanic's lien.[101]

By New York courts modifying their interpretations of "action or proceeding" within section 39 to include abbreviated court hearings for deciding a case on its merits, speed in resolving these matters will vastly improve, and costs for all parties

93. *Id.*; Henry F. Raab Conn., Inc. v. J.W. Fisher Co., 438 A.2d 834, 837 (Conn. 1981) ("The only party who can bring an application under § 49-35a is 'the owner of the real estate' and the relief available is a determination 'whether the lien or liens should be discharged or reduced. . . .'" (quoting § 49-35a)).

94. § 49-35a.

95. *Id.*

96. *Id.* § 49-35b(a); *see also* Pero Bldg. Co. v. Smith, 504 A.2d 524, 526 (Conn. App. Ct. 1986) (discussing the probable cause standard).

97. § 49-35b(a); *see also* Johnson v. De Toledo, 763 A.2d 28, 31–32 (Conn. App. Ct. 2000) (presuming that the trial court applied the proper standard of proof when determining that the lien was invalid, even though the trial court failed to state which standard it applied).

98. § 49-35b(a).

99. *Id.* § 49-35b(b).

100. *Id.*

101. *Id.* § 49-51(a); *see also* Torrance Family Ltd. P'ship v. Laser Contracting, LLC, 893 A.2d 460, 466–67 (Conn. App. Ct. 2006) (stating that before awarding damages to a lienee who successfully reduces or discharges a mechanic's lien, a court must: (1) "make a separate determination of whether the [lienor] had just cause to file the certificate of mechanic's lien," *id.* at 466; (2) determine that the "[lienee] properly requested voluntary discharge of the lien before invoking the machinery of the court and seeking associated damages for its efforts," *id.* at 467; and if these two prerequisites have been met, (3) determine the reasonable amount of attorney's fees to which the lienee is entitled).

involved—including the state—will be reduced. In addition, exaggerated lien claims will be discharged more promptly if New York adopts a model that requires a lienor to first establish probable cause to sustain the validity of her lien.

These same principles can also be applied to the unintentional exaggerated lien in New York. Instead of demanding the lienor to foreclose on the lien and wait for the legal process to play itself out before the lien can be discharged,[102] a court can hold a hearing and decide within days whether the lien should be reduced or vacated in its entirety.

In addition to New York courts revising their interpretations of section 39, the state legislature should take action to update and revise the provision to help prevent the filing of exaggerated mechanic's liens. The first step is to look to New Jersey's lien law and narrow the type of construction contracts that permit the filing of mechanic's liens. While section 39 of the New York Lien Law allows a contractor to file a lien on the basis of an oral contract, New Jersey's lien law requires a written contract.[103] "The contract can be written on the back of a napkin, but it must be in writing."[104] New Jersey law states that a mechanic's lien is "limited to the amount that [the lienee] agreed in writing to pay, less payments made . . . prior to the filing of the lien."[105] The reason New Jersey's lien law requires that construction contracts be in writing before a lienor can file a mechanic's lien is "to insure that no lien . . . can be placed on the owner's property without a reasonable basis in fact, and to discourage false claims."[106]

Adding the requirement of a written contract to New York's mechanic's lien law will help reduce the amount of exaggerated liens that are unintentionally filed because the writing requirement will provide a ceiling—the written contract price—for the amount that a lien can encumber a property. This will also dissuade lienors from intentionally filing an exaggerated lien because they must have written proof of any amount owed, rather than just creating an exaggerated amount.

Another step that the New York legislature should take to help combat the filing of exaggerated liens is to increase the severity of the punishment against willful violators. As discussed above, the potential damages that a lienor would be responsible for if found guilty of willfully exaggerating a lien should be the interest on any money deposited to discharge the lien, reasonable attorney's fees in attempting to discharge or void the lien, and the amount of the exaggeration.[107] Although these potential damages can dissuade a lienor from exaggerating liens, New York should consider taking a next step, similar to Florida, and criminalize a willful lien exaggeration.[108] In Florida, the willful filing of an exaggerated lien is a crime punishable as a third-

102. Lustbader, *supra* note 6, at 52.

103. Romano, *supra* note 45.

104. *Id.*

105. N.J. Stat. Ann. § 2A:44A-3(f) (West 2017).

106. Legge Indus. v. Joseph Kushner Hebrew Acad., 756 A.2d 608, 621 (N.J. Super. Ct. App. Div. 2000).

107. N.Y. Lien Law § 39-a (McKinney 2017).

108. Fla. Stat. § 713.31(3) (2017).

degree felony.[109] The Florida statute "makes it a crime to file, or to direct someone else to file, with the intent to defraud or harass another, any instrument containing a materially false, fictitious, or fraudulent statement or representation that purports to affect an owner's interest in the property described in the instrument."[110] By taking this next step, New York would send a clear message of the heavy price to pay to those who maliciously use the lien law against New York lienees.

IV. CONCLUSION

Mechanic's liens have been a part of American jurisprudence for centuries, and they continue to be an effective remedy for contractors to ensure that they are paid for the work they have performed. Our founding fathers created the idea of a mechanic's lien for the purpose of promoting the development of our nation's capital.[111] However, as the mechanic's lien law is currently constructed, particularly in New York, there are those who use the law's protection perfidiously for their own economic benefit. Because of the ease and low cost of the filing process, lienors can file mechanic's liens against property in exaggerated amounts to induce overpayment or a settlement on unfavorable terms by the lienee.

In New York, exaggerated mechanic's liens present serious problems that need to be addressed by the courts and the legislature. Unfortunately, New York's statute addressing willfully exaggerated mechanic's liens and courts' narrow interpretations of the statute allow abusive lienors to file willfully exaggerated liens with little risk of repercussions.

To address this problem, New York needs to revise section 39 and look to other states, such as New Jersey, Connecticut, and Florida, for guidance. New York should use key provisions from these states to update its lien law, which would provide lienees with additional means of challenging exaggerated mechanic's liens, and impose more severe penalties on lienors who willfully file them.

New York courts and the legislature must make these changes. The issue of dealing with exaggerated mechanic's liens can be meaningfully addressed and serve as one less stumbling block for developers and contractors in both the private and public sector. A revision to the lien law is critical if New York wants to continue to foster real estate development and infrastructural growth through private and public projects.

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109. *Id.*

110. 8 Larry R. Leiby, Florida Construction Law Manual § 8:81, Westlaw (2016–2017 ed., database updated Nov. 2016). The Florida statute defines "instrument" as:

> [A]ny judgment, mortgage, assignment, pledge, lien, financing statement, encumbrance, deed, lease, bill of sale, agreement, mortgage, notice of claim of lien, notice of levy, promissory note, mortgage note, release, partial release or satisfaction of any of the foregoing, or any other document that relates to or attempts to restrict the ownership, transfer, or encumbrance of or claim against real or personal property, or any interest in real or personal property.

§ 817.535(1)(c).

111. *See* Cutler & Shapiro, *supra* note 23, at 225; Scott Wolfe Jr., *A Short History of the Mechanic Lien*, Zlien (Nov. 15, 2010), http://blog.zlien.com/construction-payment/a-short-history-of-the-mechanic-lien.

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