

Construction Lien Law

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PROPERTY INTERESTS SUBJECT TO LIEN

- Where the property is held in trust, so legal and equitable titles are separated, the interest of the party contracting for the improvement is subject to the lien
- A lienor working on public property as part of adjoining private construction job may lien the owner's private property for work performed on the public property

PROPERTY INTERESTS SUBJECT TO LIEN

- Singular contracting spouse is deemed the agent of the other to the extent of subjecting the other spouse's interest in property to liens
 - Only where contracting spouse is not separated and living apart
 - Unless spouse, within ten days after learning of contract, gives contractor notice and records objection in public records
 - Statute does not provide personal liability of non-contracting spouse for deficiency decree or on underlying construction contract

PROPERTY INTERESTS SUBJECT TO LIEN

- Lessee Improvements
 - Leasehold interest is subject to liens
 - No lien against lessor's fee interest unless lease **requires** lessee to construct improvements
 - Landlord's filing of notice of commencement or reimbursement to tenant of construction costs do not allow liens against landlord's interest, where landlord is not party to tenant's construction contract and notice of lien prohibition has been filed
 - Lessor can limit its liability by 1) prohibiting liability for liens in lease; and 2) recording the lease, short form, or statutory notice in public records before NOC is recorded
 - Duty on lessee to notify contractor of lien prohibition
 - knowing or willful failure renders contract between lessee and contractor
 - voidable at contractor's option

PROPERTY INTERESTS SUBJECT TO LIEN

- Lessor not subject to liens when lessee is mobile home owner leasing mobile home lot in mobile home park
- Landlord's signature on Notice of Commencement or reimbursement to tenant of construction costs, without more, don't subject landlord's interest to liens

PROPERTY INTERESTS SUBJECT TO LIEN

- Lienor may serve written demand on landlord for copy of lease provision prohibiting liens
 - Written demand must be separate document from NTO & requires statutory warning
 - Landlord must comply under oath within 30 days
 - Failure to comply or serving false copy subjects landlord's interest to liens
 - Lienor's actual notice of lien prohibition precludes lien liability even if landlord fails to comply

PROPERTY INTERESTS SUBJECT TO LIEN

- When a party under contract to buy property contracts for an improvement before the party receives legal title, liens will attach to the extent the party subsequently acquires title.
 - Under Section 713.10, a lienor can reach the property interests of the person contracting for the improvement as they exist at the commencement of the improvement or are thereafter acquired

PROPERTY INTERESTS SUBJECT TO LIEN

- Liens Against Condominium Property Under Section 718.121
 - If lien attaches before declaration of condominium, may be enforced against entire property, including common elements
 - Liens attaching after declaration are enforced against all condominium parcels in proportions for which each are liable for common expenses
 - each individual is entitled to release the lien from unit by paying *pro rata* share
 - includes right to bond off proportionate share

PROPERTY INTERESTS SUBJECT TO LIEN

- May be enforced against individual parcels when unit owners expressly requested work or expressly consented
- Condominium association's lien for unpaid assessments relates back to date of original declaration of condominium

PROPERTY INTERESTS SUBJECT TO LIEN

- If Owner Lacks Property Interest, then No Lien Rights
 - Examples are evicted tenants or prospective purchasers who never bought property
 - Lien attaches to improvement if its removal is practicable
 - Cost for restoring land to its condition before the improvement is paid first out of sale proceeds

PERSONS WITH LIEN RIGHTS

- Contractors
- Subcontractors
- Subsubcontractors
- Laborers & suppliers contracting with any of the above
 - Laborers can't supply materials
 - Suppliers can't do installation

PERSONS WITH LIEN RIGHTS

- Professional Lienors
- Assignees
 - Lien rights are freely assignable other than labor liens
 - Assignments may, but are not required to, be recorded

PERSONS WITHOUT LIEN RIGHTS

- Sub-sub-subcontractor, including any one contracting with sub-sub-subcontractors
- Supplier to supplier
- Unlicensed contractor
 - exception where contractor complied with licensure prerequisites under Chapter 489, but DBPR misplaced or mishandled documents
 - subcontractors to unlicensed contractor retain their lien, contract and bond rights.
- Sale of goods not designated for any site but simply for customer's shelf
- Lienors working on government property

PERSONS WITHOUT LIEN RIGHTS

- Lienors working on jobs properly bonded under §713.23 other than the contractor
- Laborers other than architects, landscape architects, interior designers, engineers or land surveyors who did no work at the site
- Lienors not in privity with the Owner when direct contract is less than \$2,500.00
- Lienors performing services not permanently improving property
- Lienors performing destructive testing or restoring property from same pursuant to Chapter 558 unless contracting with the owner
- Liens arise from contracts implied in fact, but not contracts implied at law

DESIGN PROFESSIONALS LIENS

- Section 713.01(8) authorizes liens for design services rendered under design/build contract
- Need not serve contractor's final affidavit
- Liens don't relate back to Notice of Commencement

DESIGN PROFESSIONALS LIENS

- If design professional in privity with owner, then may lien property even if the property was not actually improved
 - If no privity with owner, then lien rights only if property is improved
 - Design professionals not engaging in construction activities need not serve a contractor's final affidavit
- Covers design and supervisory work
- Not available for expert witness services

DIRECT CONTRACTS ON RESIDENTIAL PROJECTS

- Contract greater than \$2500 between the owner and the contractor for single or multiple family dwellings up to and including four units
- First page of the contract or on a separate page signed by the owner and dated
- No less than 12 point capitalized, bold-faced type
- If contract is oral or implied, the notice must be provided in a document referencing the contract

DIRECT CONTRACTS ON RESIDENTIAL PROJECTS

- Failure to include statutory disclosure does not adversely affect rights of lienors lacking contract with owner
- Contractor may be barred from enforcing lien if owner was adversely affected by lack of notice
- Not required when owner is licensed contractor or in business of creating and offering parcels of property for sale or lease

NOTICE OF COMMENCEMENT

- Required to be signed by the project owner
 - Lienors have right to rely on accuracy
- Payments owner makes to its contractor after the Notice of Commencement expires are improper
- Permitting authority may not require NOC to be recorded as condition of obtaining permit
- Liens recorded during NOC's duration take effect as of NOC's recording date
- Construction must commence within 90 days of recorded NOC or NOC is void

NOTICE OF COMMENCEMENT

- May be amended within effective period to change erroneous information, add omitted information or extend effective period
 - Amended Notice of Commencement must identify recording book and page number of original and be served upon contractor and all lienors giving notice within 30 days after recording
 - To change contractors, new Notice of Commencement or Notice of Recommencement must be recorded

NOTICE TO OWNER

- Served to addresses on Notice of Commencement
- If no Notice of Commencement, use the addresses in building permit application
- Not required for subdivision site work
 - Any lienor serving Notice to Owner is entitled to protection of proper payments
- Notice to Owner is timely when claimant serves it:
 - **before commencing** to supply services or materials, or
 - **after commencing** to supply services or materials, **but before one of the following events occurs:**
 - 45 days elapse from first furnishing of work, or
 - contractor presents owner with final affidavit and owner disburses final payment

NOTICE TO OWNER

- After owner records new notice of commencement after terminating prior one, lienors must send new notices to owner to perfect their rights under recommenced construction
- Effective upon receipt by owner
- Also effective as of date on which it was mailed, provided it was placed in mail within 40 days of first day of work on the project
 - certified mail log or electronic tracking records must be retained
- Time for service begins running from commencement of special fabrication of materials
- Substantial compliance with statutory form, but mandatory warning language
 - Errors or omissions don't invalidate absent prejudice to owner

NOTICE TO OWNER

- After owner records new NOC following termination of prior one, lienors must send new notices to owner to perfect lien rights on recommenced construction
 - Project is deemed to have begun again

SERVICE REQUIREMENTS

- Personal delivery, certified mail, and overnight delivery
 - Posting on site only if other methods are unavailable
 - Service effective on date of mailing if served at correct address & returned unclaimed
- Serve upon owner with copy to all non-privity entities within chain of contracts
- Not required for:
 - Direct privity
 - Federal jobs
 - Common identity or agency between owner and contractor
 - Subdivision site work

CLAIMS OF LIEN

- Drafting Claim of Lien and Satisfaction of Lien would constitute unauthorized practice of law if accomplished by unlicensed third parties
 - §713.08(2) provides Claim of Lien may be prepared by the lienor or the lienor's employee or attorney
- Substantial compliance with statutory form, but mandatory warning language
 - Errors and omissions don't invalidate absent prejudice
- Lien may be amended only if time for filing initial Claim of Lien has not already expired
- Must separately identify unincorporated specially fabricated materials

CLAIMS OF LIEN

- Recorded during progress of work or within 90 days of final furnishing of material or labor (excluding remedial work)
- Exception to 90 day rule occurs when direct contract is terminated and owner desires to recommence construction
 - Recording period runs from date of recording affidavit of intention to recommence construction
 - Lien must be filed within 30 days of affidavit to preserve priority against others

CLAIMS OF LIEN

- Deed to subsequent purchaser recorded before lien takes priority
 - exception is if lien was recorded during duration of Notice of Commencement
- If mortgagee or other lienor records notice of lis pendens and commences foreclosure action, lienor must record lien and intervene in foreclosure action within 30 days of lis pendens or be barred
 - even if the lien would otherwise relate back to the Notice of Commencement

CLAIMS OF LIEN

- *Delta Fire Sprinklers, Inc. v. Onebeacon Ins. Co.*, 937 So. 2d 695 (Fla. 5th DCA 2006)
 - final inspection, testing of sprinkler system and completion of punch list did not constitute last day of work
 - lienor had previously submitted pay requisition for fully completed job
- For suppliers of rental equipment, delivery to job site is prima facie evidence of period of actual use
 - through time equipment is last available for use at site or two business days after lessor received written notice from owner or lessee to pick up equipment, whichever occurs first

CLAIMS OF LIEN

- Enforcement of lien requires substantial, rather than full, performance of work
 - Lienor is entitled to lien for contract price less all damages caused by failure to render full performance
 - Substantial Performance is defined in case law (nearly equivalent to what was bargained for)
 - Still requires strict compliance with Lien Law requirements
 - Failure to obtain required permits may be a defense

TIME FOR BRINGING ACTION

- One year from recording of lien
- Year duration of lien is not tolled by subsequent amendment to lien unless amended lien reflects later final day of work
- If the last day of the year is a weekend or holiday, the lawsuit can be filed the next day

TIME FOR BRINGING ACTION

- If Notice of Lis Pendens isn't recorded, owner may sell, or creditor may lien, property & take priority over lien
 - Even if lien is in timely foreclosure

TIME FOR BRINGING ACTION

Transfer Bond

- Same time limitations as for a lien foreclosure
 - However, where lien is bonded off after lien foreclosure is filed, lienor has one year in which to sue the surety
 - If transfer happens while lien foreclosure is pending, lienor must still sue surety within statutory time frame or lien is extinguished, even though foreclosure is still pending

TIME FOR BRINGING ACTION

Owner's Procedures For Shortening Time For Foreclosure

- Order to Show Cause
- Notice of Contest of Lien
 - Notices of Contest of Bond Claim are also available
 - Available on 255 bonds only after claimant has stopped performing work
 - Under 713, Notice of Contest may not be filed until after a Notice of Nonpayment has been served
- A discharge order entered in response to an Order to Show Cause cannot be vacated even if excusable neglect coupled with meritorious claim

TIME FOR BRINGING ACTION

- Lienor cannot move for an extension of time in which to foreclose in response to Order to Show Cause
 - However, owner can stipulate to extension of time
- Lienor in bankruptcy filed before lien expires gets two years in which to foreclose

TIME FOR BRINGING ACTION

Conditional Payment Bond

- Action against surety must be initiated not later than one year from date lien is transferred to bond
- To the extent bond does not provide coverage, lienor must file lien foreclosure within one year after the recordation of lien

TIME FOR BRINGING ACTION

Computing Duration of Lien

- Action is deemed commenced when filed in court of competent jurisdiction
 - Year is not tolled if claim is brought in court lacking jurisdiction
 - Must be affirmative judicial action. Affirmative defense in mortgage foreclosure raising lien validity isn't enough
 - Filing arbitration doesn't satisfy requirement of suing within year
 - Arbitration isn't brought in court of competent jurisdiction

TIME FOR BRINGING ACTION

- Contractor's final payment affidavit delivered to owner at least five days before instituting action
 - Not clear if required if owner shortened time for action by Notice of Contest or Order to Show Cause
 - There is case law on both sides of this issue
 - Unless type of direct contract is one that, under ordinary business practices, excludes services of subcontractor

PRIVATE BONDED JOBS

- Copy of bond must be attached to Notice of Commencement
 - If payment bond is recorded after work has already begun, it is effective only for lienors seeking payment after it was recorded
 - As to lienors seeking payment before bond was recorded, bond does not exempt project from liens
 - A bond not attached to NOC may be used as transfer bond
 - Notice requirements for bond claim still apply, but run from either time specified in § 713.23 or date Notice of Bond is served on lienor, at lienor's option

PRIVATE BONDED JOBS

- 45 days to serve notice to contractor
 - NTO timely served on contractor satisfies this requirement
- 90 days to serve contractor & surety with notice of non-payment
 - Non-payment of retainage in amount not exceeding 10% of contract price does not constitute non-payment requiring notice of non-payment

PRIVATE BONDED JOBS

- Suit within one year from last day of work
 - Even if lienor was unaware of bond's existence
- If lienor requested copy of bond from contractor or owner and didn't receive one, then lienor may have rights for failure to provide copy
 - Won't excuse failure to timely perfect claim

PRIVATE BONDED JOBS

Provisions in bonds issued after October 1, 2012 restricting class of claimants or venue, limiting or expanding effective duration or adding conditions precedent to claim are unenforceable

DEMANDING ACCOUNT DESIGNATION

- §713.14(2) requires that when any supplier, subcontractor or sub-subcontractor receives a payment for materials, a demand must be made upon the payor for designation of account to which payment must be applied
 - If lienor doesn't demand or fails to apply payment appropriately, lienor will lose lien to extent of misapplied payment
- §713.14(1) makes party making payments who fails to designate or falsely designates to which account payment is to be applied liable for resulting loss

SWORN STATEMENT OF ACCOUNT

- Request must be sent to attention of individual person designated in lienor's Notice to Owner, if any
- Request must include property description & names of owner, contractor & lienor's customer
- 30 days to respond or complete defense to lien
- Lienor not obligated to respond to second demand if second response would contain same information as first
- Failure to respond to demand served after lienor filed foreclosure doesn't give defense to lawsuit
- May only be served by owner
 - Unless § 713.23 bond, in which case served only by contractor and only when owner makes payment

SWORN STATEMENT OF ACCOUNT

- Lienors may demand from owner statement under oath showing accounting of payments under direct contract
 - Failure to comply within 30 days deprives owner of attorney fee award

FRAUDULENT LIENS

Fraudulent lien is any lien in which lienor has:

- willfully exaggerated amount for which such lien is claimed;
 - willfully included claim for work not performed or materials not furnished for property upon which lien is impressed;
 - compiled claim with such willful and gross negligence as to amount to willful exaggeration
- Minor mistake or error in Lien or good faith dispute as to amount due doesn't constitute willful exaggeration
 - advice of counsel may be defense if lawyer told all details
 - Lien can still be fraudulent despite good faith if it includes items that are simply not lienable
 - Ex., work not permanently improving property or lost profits, even if money is due for these items

FRAUDULENT LIENS

Complete Defense to Enforcement of Lien

Statutory Action for Damages

- Owner or other party may recover:
 - Actual damages, including:
 - reasonable attorneys' fee for securing discharge of lien,
 - amount of bond premium or interest on money deposited to discharge lien, and
 - court costs and clerk's fees
 - Mandatory punitive damages in amount not exceeding difference between amount claimed by lienor and amount actually due
 - Prevailing party attorney's fees and costs

FRAUDULENT LIENS

Criminal prosecution

- Third degree felony, punishable by up to five years imprisonment and up to \$5,000 fine
- State attorney required to notify DBPR, who is required to investigate and, if probable cause, provide state attorney and owner with investigative report
- No personal liability for person who signed lien on behalf of corporate lienor

FAILURE TO APPORTION CLAIM OF LIEN

- §713.09 authorizes single Claim of Lien on separate lots when amount demanded is for work furnished under same direct contract
- Owner under direct contract must own all of them
- If more than one direct contract or owner, lienor must apportion lien amount

REQUEST FOR LIST OF SUBCONTRACTORS AND SUPPLIERS

- §713.165 entitles owner to request from contractor a list of all subs and suppliers
 - contractor must respond within ten days or risk forfeiture of lien to the extent owner was prejudiced

RELEASES OF LIEN

- Lien or bond claims cannot be waived in advance
 - Releases that provide otherwise are not enforceable
- Unconditional release exchanged for check that bounces is binding as to owner if owner relied thereon to its detriment
 - release lacks consideration and is non-binding as to customer

RELEASES OF LIEN

- § 713.20 contains only forms for releases that can be compelled against lienor's wishes
 - lienor may add provision that release is conditioned upon clearance of funds
 - in that case, owner may withhold payment from contractor in amount of unpaid check until condition is satisfied
 - releases apply to private & public bonded jobs
 - Although release language specifies only liens, sect. 713.23(5) provides it applies to unconditional bonds as well

RELEASES OF LIEN

- Criminal offense to furnish release of lien or other document containing false statement
 - representations that all lienors have been paid in full
 - False payment affidavits misrepresenting status of subcontractor payments don't invalidate lien rights

MISAPPROPRIATION OF CONSTRUCTION FUNDS

- Statutorily created permissive inference that person knowingly and intentionally misapplied construction funds whenever:
 - valid lien has been recorded against property
 - person who ordered work has received sufficient funds to pay for same
 - person failed for at least 45 days from receipt of funds to pay lienor
 - imposes criminal liability
 - Doesn't provide basis for invalidating lien

PAYMENTS BY CONSTRUCTION LENDER

- Before disbursement to owner on residential property, lender must give written notice to borrowers
 - Advising of importance of obtaining releases
 - Via mail, email, fax or personal delivery
 - Doesn't apply if borrower is not natural person, is licensed contractor, or creates or offers parcels for sale or lease in ordinary course of business

PAYMENTS BY CONSTRUCTION LENDER

- When bank ceases funding construction loan
- Diversion of construction funds to another purpose
 - Notice to contractor & lienors giving notice
 - Lender must serve notice if funding ceases / owner serves it if funds are diverted
 - Lender is liable in either scenario for lack of notice
 - Lack of notice creates liability of actual costs plus 15% for overhead & profit
 - From date on which notice was due to date on which it was finally served

CONDITIONAL PAYMENT BOND

- Must be titled as conditional payment bond, have statutory language on first page in 10 point type, be identified as conditional in notice of commencement & recorded with NOC before commencement of project
- Incorporate “pay if paid” clause into bond
- Require “pay if paid” clause in lienor’s subcontract
 - If not, bond will be deemed unconditional bond under sect. 713.23

CONDITIONAL PAYMENT BOND

- Owner may record Notice of Bond within 90 days of recorded lien
 - Must include sworn Certificate of Payment to Contractor to extent of lienor's claim
 - Contractor has 15 days in which to record Notice of Contest of Payment
 - Otherwise, lien is transferred to bond
 - If contractor timely records Notice of Contest, then lien is subject to judicial determination

CONDITIONAL PAYMENT BOND

- After 90 day period following recorded lien, owner may transfer lien to bond only if contractor and surety sign Joinder in Certificate of Payment
- Part of Lien may be transferred to bond if owner paid contractor for only part of claim
 - remaining claim is secured by lien

CONDITIONAL PAYMENT BOND

- Third degree felony to materially misstate status of payments
- Owner won't be prevailing party for fee award if lien is transferred to bond after foreclosure is filed

PROPER PAYMENTS

- Owner's complete defense against lien claims
- Obtaining current releases from contractor and all lienors serving notice
 - Owner is under no obligation to pay or ensure payment to any non-privity lienor who did not serve notice to owner at time of payment to contractor
- Owner should require progress payment affidavit from contractor before any payment is made

PROPER PAYMENTS

- Owner must obtain contractor's final payment affidavit
 - contractor not entitled to final payment until affidavit is provided
 - required even if final payment is not due because of contract termination
 - must list lienors who served Notice to Owner or for whom service time has not yet run
 - owner may not rely on affidavit as to lienors serving timely Notice to Owner

PROPER PAYMENTS

- Owner may pay unpaid lienors directly
 - Owner must send 10 day Notice of Intent to Pay Lienors to contractor
 - Except with contractor's written consent
 - Owner may not pay any lienor whose Notice to Owner time has expired
- If insufficient final balance to distribute to lienors, then payment must be disbursed to: 1) laborers, 2) lienors serving timely Notices to Owner, 3) contractor
 - All entities within class of payees must be paid in full before second class receives payment
 - If insufficient funds to pay all claimants within a class, then claimants within that class paid *pro rata*
- Proper payments not required if project is properly bonded, unless bond is conditional

PROPER PAYMENTS

- Payments made after NOC expires are improper
- Payments made when NOC incorrectly describes property to detriment of lienor are improper
 - Except for clerical errors when description still covers property where improvements are located

ASSIGNMENTS OF LIEN

- Liens and prospective liens are freely assignable at any time before their discharge
 - Only exception is labor liens
 - Assignments may be recorded in the public records, but not mandatory

INTERPLEADER ACTIONS

- Must be dispute between lienors regarding amount due or to become due
- Liens are transferred away from property and over to interpled funds
- Interpleading party may still be liable for prevailing lienor's attorney's fees

TRANSFER BONDS

- May only be transferred by someone with interest in property or contract
 - Condo unit owners have right to pay or bond off lien in amount of owner's pro rata interest in overall units
- Bond amount is lien amount plus interest for three years plus greater of \$1,000 or 25% of lien amount
- Cash deposit in court registry is alternative
- Party with interest in security may move court to increase or reduce bond amount or change sureties

TRANSFER BONDS

- Mandatory for court to increase bond if insufficient to pay attorney's fees & costs
 - Case law dilutes enforceability of this
 - Applies only to fees incurred rather than future fees

INSURANCE PROCEEDS

- May be liened after owner or lienor have been reimbursed for paid premiums
- Recipient is deemed trustee & funds are trust funds for one year from receipt
- Doesn't apply to proceeds paid to mortgagee or lienholder perfected before NOC or Notice of Resumption

ATTORNEY FEES

- Not awarded in every action since *Trytek*
- Voluntarily dismissed defendant without prejudice is entitled to award
 - Even where plaintiff subsequently refiled identical lawsuit & prevailed
 - 713.29 governs bond claims, rather than Chapter 627
 - Significant issues standard applies in 713, but not 627's net judgment rule

Thank you!