Sink or Swim

How to Navigate Florida's Lien Law

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Introduction

Like many areas of the law, Florida's Construction Lien Law poses some serious risks to those who are unaware of its intricacies. Fail to fully appreciate the nuances of this law, and you can quickly find yourself in deep water without a life line. On the flip-side, someone who knows the ins-and-outs of this law can swim ahead of the pack, securing his or her work, and obtain payments due. This e-book addresses the obvious and not so obvious elements of Florida's lien law with the thought that a better understanding of this sometimes complex area will help both owners and lienors avoid the deadly traps from which there may be no rescue.

This e-book is for informational purposes only and is not necessarily representative of the current state of the law. It may not be applicable to the facts of your specific situation and is not intended as legal advice. You are encouraged to consult an attorney before taking any action.

Notice to Owner

A lienor who does not have a direct contract with the owner must serve the owner with a Notice to Owner. This includes a subcontractor, a materialman and even a materialman to a sub-subcontractor and is a prerequisite to perfecting and recording a Claim of Lien. If the materialman to a sub-subcontractor knows the name and address of the subcontractor, it must also serve a copy of the Notice to Owner on the subcontractor as well.

The failure of a subcontractor or a materialman to serve a copy of the Notice to Owner on the owner bars a potential lienor's claim.

The Notice to Owner must be served before commencing work but not later than 45 days after commencing work. However, it must always be served before the date of the owner's disbursement of the final payment after the contractor has furnished the Contractor's Final Affidavit. While this is typically a rare event, it may be of importance to those lienors who appear very late on the job or for jobs of very short duration.

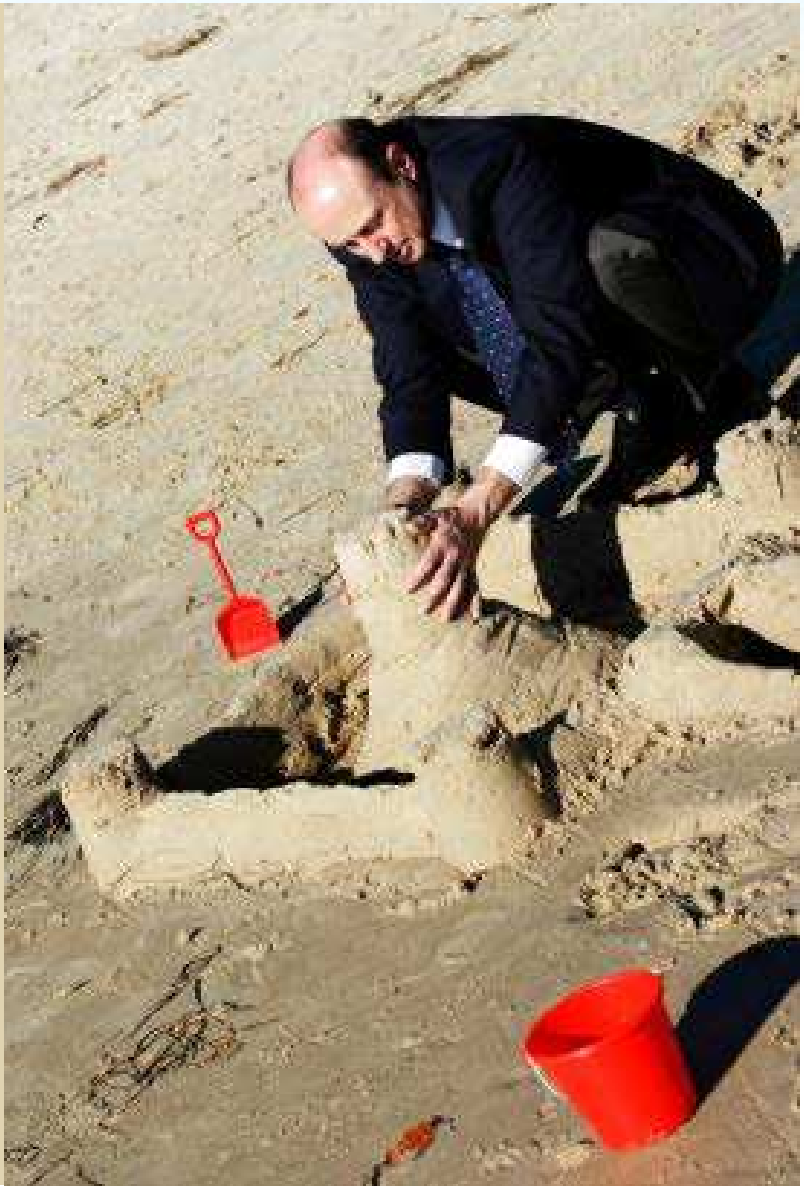
Claims of Lien

A Claim of Lien may be recorded at any time during the progress of the work but never later than 90 days after last furnishing labor or materials. A lienor is also advised to file separate claims of lien for work done under separate direct contracts between the owner and general contractor. As well, there should be a separate Notice of Commencement for every seperate contract between the owner and the contract

As an example, a contractor was required to file two claims of lien against property, once for construction and then for subsequent repair work done on the same property, even though work was done on the same structure. This was because the construction and repairs were done under two separate contracts.

Any recorded Claim of Lien may be amended at any time during the original period allowed for recording the Claim of Lien, as long as the amendment shall not cause any person to suffer any detriment by having relied upon the original Claim of Lien. Any amendment of the Claim of Lien shall be recorded in the same manner as provided for the recording of the original Claim of Lien. Amending a defective Claim of Lien does not necessarily render it enforceable.

More often than not, you will only have one opportunity to record and serve a Claim of Lien (which is too often filed quickly on the 89th or 90th day). Errors or omissions are permanent and remain with you throughout the enforcement process.



Substantial Compliance

An owner may occasionally benefit from shortening the time in which a lienor may file suit to foreclose its lien. One way to accomplish this is to serve a Notice of Contest of Lien. Specifically, the lien of any lienor upon whom such notice is served shall be extinguished automatically unless the lienor institutes a suit to enforce his or her lien within 60 days. The clerk shall mail a copy of the Notice of Contest to the lien claimant at the address shown in the Claim of Lien. Service shall be deemed complete upon mailing. The Notice of Contest acts by operation of law to discharge a lien on 60th day without any intervention of the court. Moreover, the filing of a Notice of Contest of Lien should not violate an automatic stay imposed by the Bankruptcy Code.

A more drastic method for shortening the limitation period of a Claim of Lien is to file a complaint against the lienor demanding that the lienor show cause why the lien in question should not be vacated. Upon the failure of the lienor to show cause why the lien should not be enforced or the lienor's failure to commence such action before the return date of the summons, the court shall immediately order cancellation of the lien.

A lienor's motion for extension of time to respond to the property owner's motion for discharge of lien does not constitute "good cause" as required by the mechanic's lien statute for tolling of the statutory 20-day period. **Strict compliance with statutory provisions is required in order to protect a lien.** The court has no discretion to extend the 20-day period, even if the lienor requests additional time to obtain counsel.

Substantial Compliance

Importantly, if a lienor has substantially complied with the Notice to Owner and Claim of Lien requirements both as to content and time, some errors or omissions should not prevent the enforcement of a Claim of Lien against a person who has not been adversely affected by such omission or error. Complying with all the technical statutory components for filing a claim, although desirable, is neither required nor can it form the basis for denial of the enforcement of an otherwise valid lien. Such liens are valid unless in the discretion of a trial court some prejudice is shown to the owner or another party.

The significance of this is quite obvious for both the lienor and the owner. From the lienor's perspective, a slight error or omission should not invalidate its otherwise valid lien. A lienor, however, should not intend to rely on the equity of a court to overlook an error in a Claim of Lien or Notice to Owner; this would be a gamble with dire consequences.

Similarly, an owner should not expect that a technical oversight on the part of a lienor will necessarily result in an invalid lien. This is especially true if the owner was aware of the error early on and chose to do nothing about it. While there are many cases which have invalidated liens for technical omissions in the content of the lien, it is very possible that a court sitting in equity may find that the lien, overall, substantially complies with the lien law.

Improvement Defined

"Improve" means build, erect, place, make, alter, remove, repair, or demolish any improvement over, upon, connected with, or beneath the surface of real property, or excavate any land, or furnish materials for any of these purposes, or perform any labor or services upon the improvements, including the furnishing of carpet or rugs or appliances that are permanently affixed to the real property and final construction cleanup to prepare a structure for occupancy; or perform any labor or services or furnish any materials in grading, seeding, sodding, or planting for landscaping purposes, including the furnishing of trees, shrubs, bushes, or plants that are planted on the real property, or in equipping any improvement with fixtures or permanent apparatus or provide any solid-waste collection or disposal on the site of the improvement.

Some improvements, however, are not lienable. A lienor was not entitled to lien shopping mall property for a kiosk where the trial court found that such structure was not a permanent benefit to the mall. A maintenance landscaping service consisting of mowing a lawn and cutting shrubbery did not bestow a "permanent benefit" upon the land within the mechanic's lien statute and thus, did not entitle the laborer to a mechanic's lien. It is not the duty of the court to weigh the relative advantage to the owner of each structure erected on the land to determine whether there has been an improvement of the land sufficient to support a lien.

Because there is no bright line rule, a lienor is advised to serve a timely Notice to Owner at the outset of any work. Careful consideration can then be given to the validity of any lien that may be recorded and served for the work in question. But be careful, the risk of filing a lien on non-lienable work may be a judicial finding that the lien was improper and possibly fraudulent, subjecting the hopeful lienor to attorney's fees – not a good result.

Proper and Improper Payments

If an owner fulfills all of its duties under the mechanic's lien law, then its liability for all lien claims will not exceed the contract price. While an owner is not required to comply with the notice requirements of the lien law, it does so at the risk of paying twice for improvements where the contractor may not have paid certain lienors.

An owner should not make a final payment unless it has received the Contractor's Final Affidavit. A final payment under a building contract, made by the owner to the general contractor without first securing sworn statements from the contractor, is not considered "properly made". As a result, the owner becomes responsible to the contractor's unpaid subcontractors and materialmen in the amount of the final payment.

In addition, the owner must file a Notice of Commencement. A materialman's lien was found to be enforceable against a homeowner where the homeowner, without knowledge of unpaid materials, paid a contractor in full upon completion of the contract and the homeowner had neither filed a Notice of Commencement nor obtained a contractor's affidavit. This was the case even though the materialman did not serve a Notice to Owner until after the homeowner had paid the contractor in full.

An owner must pay careful attention if the contractor abandons the project or is terminated. Specifically, the owner must comply with the re-commencement procedures so that all future payments to the new contractor are considered proper. Following the abandonment of a construction contract by a general contractor, liability of the owner to subcontractors may be limited to the contract price remaining after deducting payments properly made.

Payments on Account

The misapplication of a partial payment for materials may result in the invalidity of a lien and the burden is then on the party receiving the payment to clarify how the payment is to be applied. Specifically, when a payment for materials is made to a subcontractor, sub-subcontractor, or materialman, then the subcontractor, sub-subcontractor, or materialman **shall demand** from the person making the payment **a designation for which account the payment is to apply**.

It is a complete defense (up to the amount of the payment) if the owner can prove: one, that a payment made by the owner to the contractor for materials has been paid over to the subcontractor, sub-subcontractor, or materialman; and two, that when such payment was received by such subcontractor, sub-subcontractor, or materialman, he did not demand a designation of the account to which the payment was to be applied (or if he did note a designation, he failed to apply the payment in accordance with those instructions).

Notice of Re-Commencement

There is typically much confusion during the termination of or abandonment by a contractor on a job site. A lawyer's concern is usually directed at the contract issues surrounding the termination of the old, and the engagement of a new, contractor. However, the service and recording of the necessary documents should also be of paramount importance.

If construction ceases before completion of the project and the owner desires to recommence construction, he or she may pay all lienors in full or pro rata prior to recommencement. If this occurs, all liens for the recommenced construction shall take a priority position.

Alternatively, the owner may record an affidavit in the clerk's office stating his or her intention to recommence construction. The affidavit must state that all lienors who have served a Notice to Owner have been paid in full. The owner must then list any and all unpaid lienors in the affidavit. Thirty days after recording the affidavit, the rights of any person acquiring any interest, lien or encumbrance on the property (including any lienor on the recommenced construction) will be superior to any lien on the prior construction. This will be the case unless a prior lienor records a Claim of Lien within the thirty day period. However, before recommencing construction, the owner must also record and post a new Notice of Commencement for the recommenced construction project.

The effect of an owner's failure to record and serve an affidavit of intention to recommence construction and a new Notice of Commencement is threefold. **First**, the owner loses his right to set off costs of completing the project from the amount of the initial contract price. **Second**, the owner is unable to defeat claims of lienors arising from the original construction based on a proper payments defense. And **third**, where the owner's affidavit is not recorded, the thirty day shortened time for filing a Claim of Lien does not apply.

The effect on the attorney is more severe. An attorney hired to assist in the termination of a general contractor has an obligation to insure that the affidavit of intention to recommence construction and a new Notice of Commencement are filed. At a minimum, the attorney must specifically advise his or her client of the necessity of these actions. An attorney's failure to see that these requirements of the mechanics' lien law are complied with may result in a claim of malpractice.

Right to Repossess Materials

If for any reason the completion of an improvement is abandoned or though the improvement is completed, materials delivered are not used, a lienor who has delivered materials for the improvement which have not been incorporated and for which he has not been paid may peaceably **repossess** such materials. That lienor however, will then no longer have a lien on the real property or improvements and shall have no right against any person for the price of the materials.

This right to **repossess** the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site, except if the materials have been transferred to a bona fide purchaser. The right of repossession and removal shall extend only to materials whose purchase price does not exceed the amount remaining due to the repossessing lienor. If the materials have been partly paid for, the person delivering them may **repossess** the materials as allowed upon refunding the part of the purchase price which has been paid. The recovery of materials under Florida's lien law should not be considered a preferential transfer under the Bankruptcy Code and should not be voided. As well, materials on a construction site which are about to be incorporated into the realty are immune from levy, execution, or attachment by the material supplier's creditors. This is true even if the creditor holds a security interest in the payments from the general contractor to the debtor.

Special Rules for Specially Fabricated Materials

Specially fabricated materials are materials which by their nature are not generally suited for, or readily adaptable to, use in a similar improvement. An example of a specially fabricated material is a roof truss for a uniquely designed roof. Once the wood is cut for that truss, it cannot be readily adaptable for use in another type of truss or roof.

A Notice to Owner must be served within 45 days from the commencement of construction of the specially manufactured goods, either on or off site. In contrast, a Notice to Owner for all other types of construction materials must be served 45 days from the date of first delivery of said materials to the job site. Most importantly, actual delivery of the specially fabricated materials to the job site is not required.

A court may disagree with the lienor's classification that certain goods are in fact specially fabricated. As such, a lienor should always comply with the earlier of the notice requirements, be it as a fabricator of specialty materials or as a supplier of standard construction materials.

Laborers vs. Labor Pools

Sometimes those performing work on a job site don't easily fall into the category of a subcontractor or materialman. For example, a laborer, generally defined as any person other than an architect, landscape architect, engineer, surveyor and mapper, is someone who, under a properly authorized contract, personally performs on the site of the improvement labor or services which benefit the real property; he is not one who furnishes materials or labor service of others.

A laborer is generally extended the greatest protection under the lien law while having to comply with the least amount of statutory prerequisites to enforce a lien. As an example, a laborer need not serve a notice to owner to perfect his or her lien. The rationale for exempting laborers from certain notice requirements is that an individual laborer will not work long without pay and consequently will not have a large claim unknown to the owner or general contractor.

A labor pool, however, is not a laborer. An employer, on behalf of its employees, cannot file and foreclose a mechanic's lien as a laborer, where the employer provides the labor services of individuals with whom it contracts. Florida law clearly distinguishes between those who personally perform work and those who merely furnish persons to do the work. A business entity does not come within the general classes included in the definition of laborer.

For all practical purposes, a labor pool or temporary labor supply firm is a subcontractor or a sub-subcontractor and as such must comply with all of the notice requirements of that class of lienor.

Requests for Information

A lack of privity between parties to a construction project often results in a lack of information. This is easily overcome by requesting the needed information pursuant to Florida's lien law.

The owner may serve in writing a demand to the lienor for a written statement under oath of his or her account. The Statement of Account will include, if requested, the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known. The failure or refusal to furnish the Statement within 30 days after the demand or the furnishing of a false or fraudulent statement will deprive the lienor of his or her lien.

The demand must be served on the lienor at the address and to the attention of any person who is designated in the notice to owner. **If the demand is not served upon the designated persons and at the address as set forth in the notice to owner, then the failure or refusal to furnish the statement will deprive the lienor of his or her lien.**

The demand must prominently display the following (or similar) warning: WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT, SIGNED UNDER OATH, WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR LIEN.

The failure to notarize an otherwise accurate and timely Statement of Account is fatal to a mechanics' lien claim. This is in light of the strict compliance required within the mechanic's lien statutes, even in absence of any showing of prejudice to the owner.

Requests for Information

This method of gathering information should not be reserved for pre-litigation. It is a very useful tool during litigation to obtain specific information very quickly. In addition, such a request will usually prompt the opposition to more closely review their position, understanding they may lose their lien right if they fail to file a timely or accurate response. Unfortunately (or fortunately), however, the failure to furnish a response to a demand for Statement of Account will not affect the validity of a claim of lien being enforced through a foreclosure case which was filed prior to the date the demand for the statement is received by the lienor.

Privity and non-privity lienors are also afforded a means to obtain information from the owner. **Any lienor who has filed a claim of lien may make a written demand on the owner for a written statement under oath.** The statement, if so requested, shall show the amount of all direct contracts, the amount paid by or on behalf of the owner for all labor, services, and materials furnished pursuant to the direct contracts, the dates and amounts paid or to be paid by or on behalf of the owner for all improvements described in any direct contracts, and the reasonable estimated costs of completing any direct contract under which construction has ceased. If known, the actual cost of completion must be provided by the owner in the statement.

The written demand must include the following warning in conspicuous type in substantially the following form: WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR RIGHT TO RECOVER ATTORNEY FEES IN ANY ACTION TO ENFORCE THE CLAIM OF LIEN OF THE PERSON REQUESTING THIS STATEMENT.

An owner who does not provide the statement within 30 days after the demand, or who provides a false or fraudulent statement, will not be the prevailing party for purposes of an award of attorney's fees under the applicable law.

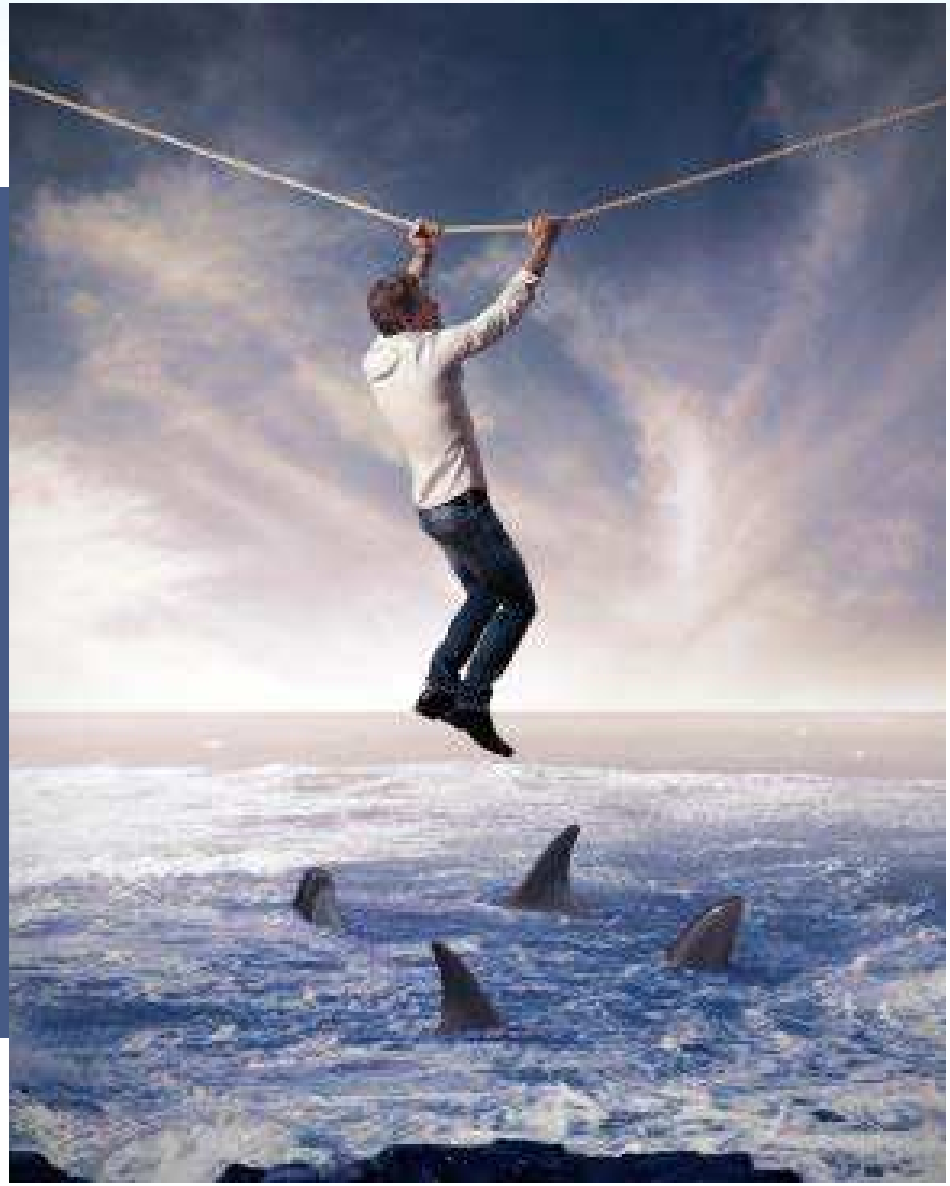
Request for List of Subcontractors

An owner may request from the contractor a list of all subcontractors and suppliers who have any contract with the contractor to furnish any material or to perform any service for the contractor with respect to the owner's property. The request must be in writing and delivered by registered or certified mail to the address of the contractor shown in the contract or on the recorded Notice of Commencement.

The contractor must then, within 10 days after receipt, furnish to the property owner or the property owner's agent a list of the subcontractors and suppliers who have a contract with the contractor as of the date or receipt of the request. If the contractor fails to furnish the list, the contractor forfeits the contractor's right to assert a lien against the owner's property to the extent the owner is prejudiced by the contractor's failure to furnish the list or by any omissions from the list.

Criminal Penalties

It is a **felony** for a person, firm, or corporation, or an agent, officer, or employee thereof, who receives any payment on account of improving real property **to not apply** such portion of any **payment** to the payment of all amounts then due and owing **for services and labor** which were performed on, **or materials** which were furnished for, such improvement prior to receipt of the payment. This does not, however, prevent any person from withholding any payment, or any part of a payment, in accordance with the terms of a contract or pursuant to a bona fide dispute regarding the amount due. There is no private right of action for the misappropriation of construction funds.



Payment of Undisputed Sums

Most construction claims are made up of sums that are in dispute and sums which are undisputed. More often than not, the party holding the undisputed sum is holding it for no other reason than to exert leverage. Under Florida's Construction lien law, this need not be tolerated.

Any person who receives a payment for constructing or altering a permanent improvement to real property **must pay,** in accordance with the contract terms, the undisputed contract obligation. The **failure to pay** the undisputed obligation within 30 days after the date the labor, services, or materials are furnished, and payment for same became due, **shall entitle any person** providing such labor, services, or materials **to certain extraordinary procedures and remedies**.

The complainant must first file and serve a verified complaint alleging: the existence of a contract to improve real property, a description of the labor, services, or materials provided and allege that the labor, services, or materials were provided in accordance with the contract, the amount of the contract price, the amount, if any, paid pursuant to the contract, the amount that remains unpaid pursuant to the contract, the amount thereof that is undisputed, that the undisputed amount has remained due and payable pursuant to the contract for more than 30 days after the date the labor or services were accepted or the materials were received, and that the person against whom the complaint was filed has received payment on account of the labor, services, or materials described in the complaint more than 30 days prior to the date the complaint was filed.

After service of the complaint, the court will conduct an evidentiary hearing on the complaint, upon not less than 15 days written notice. The complainant is entitled to the following remedies up to the undisputed amount and upon proof of each allegation in the complaint: an accounting of the use of any such payment from the person who received such payment, a temporary injunction against the person who received the payment, subject to the bond requirements specified in the Florida Rules of Civil Procedure, prejudgment attachment against the person who received the payment, in accordance with each of the requirements of Florida's lien law, and such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

These remedies must be granted without regard to any other remedy at law and without regard to whether or not irreparable damage has occurred or will occur. The remedies, however, do not apply to the extent a bona fide dispute exists regarding any portion of the contract price or in the event the complainant has committed a material breach of the contract. The prevailing party in any proceeding under this section is entitled to recover costs, including a reasonable attorney's fee, at trial and on appeal.

Work on Leased Property

It is of crucial importance to determine if the party contracting for the work is the real owner – the one holding a recorded title. If not, then what interest does that contracting party have in the property? When an improvement is made by a tenant in accordance with an agreement between such tenant and her or his landlord, the lien shall extend to the interest of the landlord. However, when the lease expressly provides that the interest of the landlord shall not be subject to liens for improvements made by the tenant, the tenant is under an obligation to notify the contractor of said provision in the lease.

While the willful failure of the tenant to provide such notice to the contractor shall render the contract between the tenant and the contractor voidable at the option of the contractor, it is usually too late for the contractor. **A contractor almost always learns that the true owner is not the contracting party after some or all of the work is done and payment is not forthcoming.**

The law is very unforgiving. As an example, a landlord does not subject his property to a mechanic's lien for work done by a contractor for the tenant merely because he knows the work is taking place and fails to take action to stop it. In another case, where the parties to a lease contemplated that the tenant would renovate the space, including certain electrical work, the tenant's interest was not subject to a lien by the electrical contractor where the lease did not require such improvements. The improvements were for the benefit of the tenant and the landlord did not desire the renovations as they tended to convert the building from a general use property to a special use property thereby reducing its marketability.

In order for the contractor to be entitled to a lien on improved realty as against the landlord when work is done for the tenant, the lease must by its terms require the work to be done or by its terms make it obvious that the improvements were essential to the lease. Where the terms of the lease contemplated improvements, the landlord's interest may be subject to a mechanics' lien unless the landlord records the necessary disclaimer.

Conclusion

There is no substitute for actually knowing the law in this area. The rights and obligations of an owner, contractor, materialman, subcontractor and laborer are quite specific and distinct, and all are time sensitive. Miss a deadline, fail to send the right form, or ignore a request for information, and you could literally sink your entire claim. Take the time to carefully manuever through the applicable provisions of Florida's Construction lien law and you'll likely collect monies you're rightly due.

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