



The Florida Senate

Interim Report 2009-124

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Committee on Regulated Industries

REVIEW OF THE FLORIDA CONSTRUCTION LIEN LAW

Issue Description

This report expands on the recommendations and issues addressed in last year's interim project report regarding the Florida Construction Lien Law.¹

Property owners, especially homeowners, are often confused by or unaware of the statutory process for construction liens and can still end up paying twice to contractors and subcontractors despite the statutory protections. The receipt of notices from subcontractors is confusing to many homeowners because they are unaware that the subcontractors have been working on their property and are unclear as to what the notices mean or about their legal impact.

Chapter 713, pt. I, F.S., has been amended several times over the years, most recently during the 2007 Regular Session. Many Senators have received complaints from constituents concerning the complexity and difficulty of the lien process under the current statutory scheme. Senators Dockery, Saunders, and Jones have all indicated their concerns with the current procedures.

Last year's interim project report gave an overview of the Florida Construction Lien Law, how the law works, and about the issues that arise when the law is applied. The report also gave several recommendations to improve the Florida Construction Lien Law. This report expands on several topics from the previous interim report, including homeowner education, issues with the Notice of Commencement and the Notice to Owner, the responsibilities of building officials and lenders, and improper payments.

Background

A construction lien law is an equitable device designed to protect the persons who are enhancing an owner's property that are not in direct privity with the owner,² such as subcontractors, sub-subcontractors, laborers and suppliers of material, and who remain unpaid after the owner has paid the contractor directly.³ The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien, to ensure payment, on the property receiving their services. Florida's Construction Lien Law is found in ch. 713, pt. I, F.S. Another purpose of construction liens is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

Construction lien statutes set forth a right of action that did not exist at common law,⁴ and thus construction liens are purely statutory.⁵

Chapter 713, pt. I, F.S., requires various notices, demands and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and

¹ *Review of The Florida Construction Lien Law*, Interim Report No. 2008-149, Florida Senate Committee on Regulated Industries, November 2007.

² *Hiers v. Thomas*, 458 So. 2d 322 (Fla. 2nd DCA 1984).

³ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995).

⁴ *Fleitas v. Julson, Inc.* 580 So. 2d 636 (Fla. 3rd DCA 1991).

⁵ *Home Elec. of Dade County, Inc. v. Gonas*, 547 So. 2d 109 (Fla. 1989).

requests be in a statutory form. The following notices are complicated and very important for the homeowner to understand during this process: Notice of Commencement, Notice to Owner, Claim of Lien, Notice of Termination, Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that a homeowner follows in paying for improvements under ch. 713, pt. I, F.S., determines whether a payment is proper or improper. Making a payment that is improper could result in the homeowner paying twice for the same improvement.⁶

Methodology

Senate Professional staff conducted interviews with construction industry representatives, representatives of the Florida Bar, consumer advocates, building officials, contractors, lenders, and consumers. The Florida Statutes, rules, relevant case law, treatises and articles concerning construction liens were also reviewed.

Findings and/or Conclusions

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement (NOC) gives constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time the notice is recorded. However, any conveyance, encumbrance or demand recorded prior to the time the notice is recorded and any proceeds thereof, regardless of when disbursed, shall have priority over liens.

The NOC must be recorded with the clerk of the court where the property is located by the owner or the owner's agent before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite. The NOC must include the legal description of the property, the street address and the tax folio number, if available. It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, and the anticipated expiration date if different from one year. The form for the NOC is provided in s. 713.13(1)(d), F.S.

For contracts greater than \$2,500, the applicant for the building permit must file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit authority. The notice must be filed before the first inspection or the property will not be inspected.⁷

A NOC is specifically not required prior to issuing a building permit.⁸ The building permit must include a 14-point capitalized notice regarding the filing of a NOC.⁹ All liens from persons who do work to improve a property relate back to the filing of the NOC.¹⁰

The NOC is valid for 1 year, unless otherwise stated in the notice. Any payments made by the owner after the expiration of the NOC are considered to be improper payments.¹¹ If the improvement described in the NOC is not commenced within 90 days of the recording of the notice, then the notice is "void and of no further effect" which results in any payments after that time also being improper.¹²

⁶ See Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005).

⁷ Section 713.135(1)(d), F.S. However, for a direct contract to repair or replace an existing heating or air conditioning system, the threshold is less than \$7,500.

⁸ Section 713.135((1)(d) and (e), F.S.

⁹ Section 713.135(1)(a), F.S.

¹⁰ Section 713.07(2), F.S.

¹¹ Section 713(1)(c), F.S.

¹² Section 713.13(2), F.S.

Notice to Owner

Section 713.06(2)(a), F.S., provides that, prior to filing a lien, a lienor who does not have a direct contract with the homeowner must serve the homeowner with a Notice to Owner that sets forth the lienor's name and address, a description sufficient for identification of the real property, and the nature of services or materials furnished or to be furnished. The Notice to Owner must be served before commencing, or within 45 days of commencing, to furnish the service or materials by the potential lienor. The notice must be served before the owner's final payment to the contractor, after the filing of the contractor's affidavit.¹³ If a Notice to Owner is not served, then a lien cannot be enforced.

Section 713.06(2)(c), F.S., provides the form which should be used for the Notice to Owner. The Notice to Owner includes a warning to the owner that subcontractors may file a lien against the owner's property even if the homeowner has made payment in full.

Under s. 713.06(2)(d), F.S., a Notice to Owner may be served on a lender if designated in the Notice of Commencement as a person to receive the Notice to Owner. After receiving a Notice to Owner, the lender is required to make proper payments under s. 713.06(3)(c), F.S. If the lender fails to do so, it is liable to the owner for "all damages sustained by the owner as a result of that failure."

Notice of Termination

A NOC may be terminated by executing, swearing to, and recording a notice of termination according to the requirements of s. 713.132, F.S. The construction must be completed or ceased before completion and all lienors are paid in full or pro rata in accordance with s. 713.06(4), F.S.

Waiver or Release of Lien

Section 713.20, F.S., provides for the waiver or release of a lien by any lienor giving a Notice to Owner and may be requested by the owner prior to making a payment to the contractor. The provision does not allow the lienor to waive the right to payment in advance of doing the work, but nothing prohibits the waiver prior to receiving payment. These waivers must be obtained by the owner prior to each payment to the contractor if the owner has received a Notice to Owner from a subcontractor. If the owner does not request a Waiver or Release of Lien prior to each payment, the payments become improper. If the owner's payments become improper, he or she may become liable to any lienor who has properly served notice and recorded a lien and therefore may end up paying twice for services or materials. Requiring and obtaining a Release of Lien at each payment for every Notice to Owner filed by a subcontractor "closes the loop" and releases the owner from liability for those payments.

Claim of Lien

To perfect a lien on an owner's property, every lienor must record a Claim of Lien in the form outlined in s. 713.08(3), F.S., including the warning outlined in s. 713.08(3), F.S. Section 713.08(2), F.S., provides that the Claim of Lien must be signed and sworn to or affirmed by the lienor or his or her agent acquainted with the facts. The Claim of Lien is required to be served on the owner under s. 713.08(4)(c), F.S., before recording the lien or within 15 days of recording the lien in the clerk's office. Failure to serve the Claim of Lien on the owner makes the lien voidable "to the extent that the delay is shown to have been prejudicial to any person entitled to rely on the service."¹⁴ Section 713.08(5), F.S., provides that the Claim of Lien may be recorded at any time during the progress of work, but no later than 90 days after the final furnishing of the labor or services or materials by the lienor. If the original contract is terminated under s. 713.07(4), F.S., a Claim of Lien attaching prior to such termination cannot be recorded after 90 days following the termination of the contract or 90 days after the final furnishing of services or material, whichever occurs first. If the Claim of Lien is not recorded properly, the lien becomes invalid.

¹³ The contractor's affidavit indicates who has been paid or not paid pursuant to s. 713.06(3)(d), F.S.

¹⁴ Section 713.08(4), F.S.

Notice of Contest of Lien

A lien is valid for one year after the claim of lien has been recorded or one year after the recording of an amended claim of lien that shows a later date for the final furnishing of work claimed under the lien. Section 713.22(2), F.S., provides that an owner or the owner's agent or attorney can shorten the time that a Claim of Lien is valid by recording a Notice of Contest of Lien in the form outlined in this section. The lienor has 60 days to file a suit after receipt of this notice or the lien will be extinguished automatically.

Contractor's Final Payment Affidavit

Section 713.06(3), F.S., provides that a contractor must give the owner a Final Payment Affidavit substantially in the form provided in this section, stating, if it be the fact, that all lienors that have timely served a Notice to Owner and the contractor has been paid in full, or, if not, showing the name and the amount due for each lienor.

Demands for Copy of Contract and Statements of Account

Section 713.16(1), F.S., requires a copy of the contract of a lienor or owner and a statement of the amount due, or to become due if the amount is fixed or ascertainable, to be furnished by any party to the contract upon written demand of an owner or lienor contracting with or employed by the other party to such contract.

Section 713.16(2), F.S., permits an owner to request from a lienor a written sworn statement of his or her account showing the labor or services performed or to be performed, the materials furnished or to be furnished, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the lienor. If the information is not furnished within 30 days, or fraudulent or false information is given, then the lienor is not entitled to a lien, provided the demand is served properly.

Payment Bonds

Section 713.02(6), F.S., provides that an owner can require that a contractor furnish a payment bond so that the owner is exempt from the Construction Lien Law. Any lienor must file against the payment bond for payment rather than filing a lien on the property.

Homeowner Education

There are several ways that the homeowner receives information about the Florida Construction Lien Law. The current statutory process requires three different notifications to the homeowner from three different parties: the county or city building officials, the lender and the contractor. The purpose of these notifications is to educate the homeowner before the lien law can take effect. The order in which the notices are required mirrors the process of building a house. Under most circumstances the contractor would be the first to have contact with the homeowner, followed by the building officials or the lender.

Contractor

Under s. 713.015, F.S., the contractor is required to include in the contract with the homeowner this 12-point boldface typed warning regarding the lien law:

According to Florida's Construction Lien Law (sections 713.001-713.37, Florida Statutes), those who work on your property or provide materials and services and are not paid in full have a right to enforce their claim for payment against your property. This claim is known as a construction lien. If your contractor or a subcontractor fails to pay subcontractors, sub-subcontractors, or material suppliers, those people who are owed money may look to your property for payment, even if you have already paid your contractor in full. If you fail to pay your contractor, your contractor may also have a lien on your property. This means if a lien is filed your property could be sold against your will to pay for labor, materials, or other services your contractor or subcontractor may have failed to pay. To protect yourself, you should stipulate in this contract that before any payment is made, your contractor is required to provide you with a written release of lien from any person or company that has provided you a "Notice to Owner." Florida's

Construction Lien Law is complex and it is recommended that you consult an attorney.

The owner must sign and date the section of the contract that includes this notice. The delivery and initial explanation of this information is dependent on the contractor, and this is normally when the homeowner would have first contact with any information regarding the lien law. Contractors that were contacted for this report claimed that most of the homeowners did not ask any questions regarding the lien law when they signed the contract.

Building Officials

Under s. 713.135, F.S., when a person applies for a building permit, the county or city that issues the building permit (“building officials”) must furnish the homeowner with an explanation of the lien law that is provided by the Department of Business and Professional Regulation (DBPR).¹⁵ The most common method of delivering this information is by mail, but the building officials have the option of electronic mail, facsimile, or personal delivery.¹⁶

There are several issues with this process. The first is that contractors, not homeowners, tend to handle the building permit process, so the building officials have little to no contact with the actual homeowner and have to mail the DBPR lien information to the homeowner. The second issue is that many of these letters are returned to the building officials because the address provided is not correct. The third issue is that some homeowners, who do receive the letters, call the building officials office and ask questions about the lien law, which the building officials, who are not attorneys, may or may not be qualified to answer. Homeowners and building officials have also complained that the explanation provided by DBPR is too complex. According to the building officials, this process has become a financial and time burden on the building officials. It costs them more than the \$5 they are allowed to charge per permit under s. 713.135(4), F.S.

The rationale behind having the building officials distribute the lien law information is that they serve as a central nexus among all the parties that are included in the home building process (homeowner, contractor, lender, sub-contractor, etc). According to representatives from the building officials, the homeowner is rarely included in this process and does not receive the benefit that is intended by the statute.

Lender

The third party that is required to give a notice of the construction lien law is the lender. Section 713.3471(1), F.S., requires the lender, prior to making a loan disbursement on a residential construction loan directly to the owner, to send the owner a notice. The notice warns the owner that the disbursement is directly to him or her and that to protect themselves they need to require the contractor to give them lien releases from each lienor who has sent the homeowner a Notice to Owner each time they make a payment to the contractor.

The notice from the lender also warns the homeowner about the possibility of having to pay twice if they do not follow the statute. The lender is not required to explain the implications of the lien law prior to disbursing funds to the homeowner. The representatives from the building officials estimate that most of the improvements to property are financed through lending institutions, especially if the contract is over \$20,000.

Notice of Commencement Issues

The Notice of Commencement is the integral part of the lien law. The date the NOC is filed with the Clerk of Court is the date at which liens filed under ss. 713.05 and 713.06, F.S., attach.¹⁷ The NOC is also the document that potential lienors use to find the homeowner in order to send a Notice to Owner. The timing of the NOC also dictates whether a payment by the homeowner to the contractor is considered a proper payment. There are several issues with the NOC that affect homeowners, lenders, contractors, and subcontractors.

¹⁵ See http://www.myflorida.com/dbpr/pro/cilb/documents/florida_lien_law.pdf for a copy of the DBPR explanation of the Florida Construction Lien Law.

¹⁶ Section 713.135(1)(b), F.S.

¹⁷ Section 713.07(2), F.S.

Homeowner Does Not File a NOC

When a homeowner fails to file a NOC, it creates several different problems for subcontractors and the homeowner. A subcontractor needs the NOC for two reasons. The first is to provide the address of the homeowner for the subcontractor to send the Notice to Owner. The second reason is that the NOC creates the date at which the lien attaches. If the homeowner fails to record an NOC, then the lien attaches at the time the subcontractor files the lien. If there are multiple liens, then the priority is determined at the time the lien is recorded.

If the homeowner fails to record a NOC, then all payments made to the contractor would be deemed an improper payment and the homeowner could end up paying twice for the same work, once to the contractor and once again to the subcontractors.

NOC Filed Prior to Recording of Mortgage

Another issue with the NOC is that many homeowners are filing the NOC prior to their lender recording the mortgage. This results in the construction liens taking priority over the mortgage. The reason that many homeowners file the NOC prior to finalizing their mortgage is that contractors mistakenly believe that the NOC is required in order to receive a building permit. The reason that contractors think that the NOC is required is because many county and city building officials include the NOC on their building permit checklist.

Representatives from several building officials indicated that the filing of a NOC at the same time as the application for a building permit is filed streamlines the process. They indicated that if a building inspector inspects a job site and a NOC has not been filed, then the inspection is not approved and construction is delayed. If the NOC has been filed with the building official, then the first inspection goes much more smoothly.

If the NOC is filed before the lender records the mortgage, then the lender or homeowner will have to go through the expense of filing a notice of termination, obtaining waivers or release of liens from all subcontractors, and re-filing the NOC after the lender has recorded the mortgage. This can lead to extra expenses for the lender and the homeowner.

Notice to Owner

Many subcontractors and material suppliers are sending out a Notice to Owner before work has commenced or before the delivery of supplies in order to meet the statutory window. A homeowner may receive a Notice to Owner even though there is not an issue with payment. The subcontractor and material suppliers are only sending the Notice to Owner in order to protect his or her lien rights.

Improper Payments

Improper payments are payments that are made to the contractor by the homeowner that do not fall within the proper payment defense in s. 713.06(3), F.S. There are several different ways that a payment can be considered improper.

Improper Payments- NOC

Improper payments involving the NOC are one of the most common pitfalls for the homeowner. There are various ways a homeowner can make improper payments in regards to the NOC. The first is failing to file an NOC. If the homeowner does not file a NOC then all payments made to the contractor are improper and the owner loses the proper payment defense to the lien.

The second issue is that the NOC expires if construction on the home has not begun within 90 days of the filing of the NOC. If any payments are made after the NOC expires then the payments are improper. Many consumer representatives also believe this is another “trap” for homeowners. The NOC also expires one year from the time it was filed and, again, any payments made after the expiration of the NOC are considered improper. Consumer

representatives and the representatives from The Florida Bar Construction Law Committee of The Real Property; Probate & Trust Law Section indicated this was a “trap” for unwary homeowners.

Improper Payments- Release or Waiver of Lien

Another way an improper payment can be made is when an owner does not get a release or waiver of lien from a subcontractor who has served a Notice to Owner. Once a Notice to Owner is served, the owner must get a release or Waiver of Lien from the subcontractor after a payment is made to the contractor. If this is not done, then the payment is considered improper. According to a consumer advocate, this is a common mistake that homeowners make and can lead to paying twice.

Escrow

Many of the owners who deal with construction projects and might be confused by the number of notices are relieved from those concerns when they utilize a lender in the process. The lender acts as the owner’s agent in disbursing the construction funds and obtaining the necessary documents, including a release of liens and contractors’ affidavits.

There are many instances throughout the Florida Statutes that require funds to be maintained by an agent for disbursement. These funds are placed in escrow¹⁸ and are disbursed by an escrow agent. For example, under s. 501.1375, F.S., deposits for a one or two family dwelling, up to 10 percent of the purchase price, are automatically placed in escrow unless the owner waives this right. For all offers to purchase, sales agreements, or written contracts made between a building contractor or a developer and a prospective buyer of a one-family or two-family residential dwelling unit, the contractor or developer must notify the buyer that any deposit (up to 10 percent of the purchase price) will be deposited in an escrow account. The account must be with a savings and loan association, bank or trust company, an attorney who is a member of The Florida Bar, a licensed Florida real estate broker, or a title insurance company authorized to insure title to real property in Florida. The funds are allowed to be commingled with other escrow or trust accounts. This requirement may be waived in writing by the buyer. Notice of the escrow is required to be in conspicuous type in the contract document.

The funds are withdrawn from the account with the signatures of both the building contractor or developer and the buyer or the buyer’s agent, except as otherwise provided in that section. The section also provides for alternative releases of the funds, including loan and bond requirements.

Section 718.202, F.S., also requires that in a situation in which a condominium is not substantially completed, the developer is required to pay into an escrow account all payments received up to 10 percent of the sales price received by the buyer. It allows a surety bond, an irrevocable letter of credit, or other assurance in place of the escrow account if approved by the Director of the Division of Condominiums, Mobile Homes and Timeshares in the Department of Business and Professional Regulation. It provides for maintaining funds in excess of 10 percent, withdrawal from escrow, and notice in the contract document. The escrow account must be established with a “bank; a savings and loan association; an attorney who is a member of The Florida Bar; a real estate broker registered under chapter 475; a title insurer authorized to do business in this state, acting through either its employees or a title insurance agent licensed under chapter 626; or any financial lending institution having a net worth in excess of \$5 million.”

Options and/or Recommendations

The Senate Professional Staff recommends the following changes regarding homeowner education:

- Increase education and disclosure through the availability of information to the owner both in written and electronic form.

¹⁸ “Escrow” or “to place in escrow” is defined by s. 501.1375(1)(e), F.S., to mean “the delivery to or deposit with a third party, the escrow holder, of money or documents to be held and disbursed by such escrow agent consistent with the provisions of this section.”

- Require the contractor to include the DBPR explanation of the lien law in the contract with the homeowner. This would allow the homeowner to receive the DBPR published information regarding the lien law at the initial contact point of the home building process. Failure to include this information should also have a penalty, such as loss of lien rights.
- Revise the explanatory information supplied to the owner by making it a checklist that could be given with the building permit application advising the owner on what he or she should do at each stage of the construction payment process. A complaint from consumer advocates and building officials is that the current information provided by the DBPR is too complex for the homeowner to understand. A checklist would allow the homeowner to see the way the lien law works.
- Require subcontractors to provide the one page information sheet to the homeowner with each Notice to Owner. Failure to include this information should also have a penalty, such as loss of lien rights.
- Attach the explanatory information to the building permit on 8 1/2 x 11 sheet of paper with the most basic and important information regarding the lien law.

The Senate Professional staff recommends the following regarding the Notice of Commencement:

- Require the recording of the Notice of Commencement before a building permit will be issued, but with provisions to protect the lender. Building officials have suggested that requiring the NOC with the building permit application would streamline the process. It would be necessary to protect the lender because the subcontractors would have priority over the lender if the NOC is filed prior to the mortgage being filed. (Adding a provision to protect the lender would also correct the problem of the NOC being filed too early.)

The Senate Professional staff recommends the following regarding improper payments:

- Change the provisions requiring payments to become improper payments when a Notice of Commencement expires because work did not commence within 90 days of recordation or because the time runs out. Consumer advocates and Florida Bar representatives suggest that this is a consumer “trap.” By eliminating the improper payment provisions, the “trap” can be eliminated.
- Require, as a mandatory provision of the direct contracts, that before any payment is made the contractor must provide the owner with a written Release of Lien from any person or company that has provided the owner with a Notice to Owner. The mandatory provision would allow the homeowner to avoid making an improper payment because he or she did not get the release of lien from the subcontractor. It is the contractor that has the business relationship with the subcontractor and it would be more practical for the contractor to obtain the release.

The Senate Professional Staff recommends the following regarding escrow accounts:

- To assist homeowners to keep track of the requirements of the construction lien law, an escrow system could be set up for construction loans. A disinterested third party, similar to those in s. 501.1375(2), F.S., or s. 718.202, F.S., could be designated as the escrow agent and could handle all transactions involving construction loan proceeds. The escrow agent could be responsible for the disbursement of funds, receiving notices to owner, obtaining releases of lien, and closing out the construction transaction for the property owner.