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Construction Liens in Florida – The Timing and Manner of Perfection are Critical

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Among the hottest and most relevant blog and article topics is the subject of construction liens. No matter the quantity or ubiquity of such articles, construction liens are and will always be among the most highly discussed topics in the construction industry. This is because of the tremendous extra-contractual power legislators granted those not in direct privity of contract with property owners – the lower-tiered lien claimants. While contractors also possess the same ability to impress upon an owner's real property a construction lien in the event of non-payment, the strength lower-tiered lienors possess in the event of non-payment is virtually unparalleled when compared to just about every other area of the law. But, in order for lower-tiered lienors to take advantage of such power, they must fully and completely comply with all notice requirements as part of the lien perfection process. The same holds true for contractors, albeit with slightly fewer lien perfection considerations.

Just one seemingly minor mistake could result in the lienor's absolute loss of its right to assert a lien claim in the event of non-payment. For this reason, we periodically provide our clients with updates to the Florida Construction Lien Law, including tips and practice points on how to perfect lien claims while avoiding some of the mistakes and pitfalls that have haunted potential lien claimants over the years.

The following is what we hope to be a succinct and user-friendly overview of the lien perfection requirements, both as to contractors and lower-tiered subcontractors. Although the Lien Law cannot guarantee that lien claimants will receive payment through the use of construction liens, the Lien Law will most certainly increase the odds of receiving payment for labor, services, and materials furnished on construction projects. For this reason, all potential lienors should adhere, without deviation, to the Lien Law's strict, time-sensitive perfection requirements. By following the lien perfection instructions provided herein, potential lienors will effectively be able to mitigate, if not minimize altogether, the odds of non-payment.

A. Lien Notice Requirements

Under the Florida Construction Lien Law, lienors are required to serve the property owner with a variety of notices as part of the lien perfection process. The type and form of notice, as well as the extent to which the lienor must furnish the owner with a particular notice, will vary depending on whether or not the lienor is in direct privity of contract with the property owner.

For general contractors (i.e., those having a direct contract with the property owner), the first step in the lien perfection process can be found in the construction contract with the owner. Specifically, section 713.05 obligates contractors to include a statutory form Lien Law disclosure in the direct contract and is aimed to apprise the owner of their Lien Law obligations. A short summary of this Lien Law disclosure is as follows:

- Applicable only to direct contracts with the owner
- Required in all residential contracts (single or multiple family dwellings up to and including 4 units) in excess of \$2,500
- Not required if the owner is a licensed contractor or creates parcels for sale or lease in the course of his or her business
- If contract is written, disclosure must be on the first page or on a separate page signed and dated by the owner
- If contract is oral or implied, disclosure must be provided in a document that references the contract and is signed and dated by the owner
- Disclosure must be in no less than 12-point capitalized, bold-faced type and provide the following:

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 THAT YOUR CONTRACTOR OR A 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 TO YOU A "NOTICE TO OWNER." FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX, AND IT IS RECOMMENDED THAT YOU CONSULT AN ATTORNEY.

- Failure to include disclosure could bar enforcement of lien if owner has been adversely affected
- Contractor's failure to furnish owner with Lien Law disclosure does not impact lien rights of lienors not in privity with owner

Practice Point: Although not included among the lienors' lien perfection notice requirements, lienors should be mindful of the role the Notice of Commencement plays in the lien perfection process. For lienors not in direct privity with the owner, the Notice of Commencement serves as an invaluable resource for information for such lienors to prepare critical Lien Law documents, such as the Notice to Owner and Claim of Lien, and should be lienors' starting point for preparing all required Lien Law documents. However, since not all owners fulfill their Lien Law obligations, including properly posting and recording the Notice of Commencement, lienors should be prepared to have a back-up plan. Specifically, in the event the owner has failed

to record a Notice of Commencement, lienors may use the information provided by the owner in the permit application for preparation of Lien Law documents. Lienors would be advised not to rely on the information provided in the actual permit since the permit is prepared by someone other than the owner.

B. Perfection and Mailing Requirements

For Contractors: After the contractor has furnished the owner with the required Lien Law disclosure, the contractor need not furnish the owner with any other Lien Law notices in order to perfect its lien rights. Rather, the contractor's next step in the perfection process consists of furnishing the owner with a contractor's final payment affidavit pursuant to s. 713.06(3)(d)1, Fla. Stat. Like most Lien Law documents, the contractor's final payment affidavit is a statutory form document and involves of the following:

- Applicable to contractors and lienors in direct privity with owner
- Puts owners on notice as to unpaid lienors
- Must be furnished to the owner at the time of final payment (failure to do so will render the contractor in default, with the ability to cure by furnishing to the owner within one year of the date of recordation of the Claim of Lien)
- Furnishing affidavit to owner is an absolute condition precedent to the enforcement of the lien – must be furnished at least 5 days prior to commencement of foreclosure action
- Affidavit must be furnished regardless of size of project and even if the contractor used no subcontractors, materialmen, or laborers
- Not applicable to design professionals and lienors not in privity with owner

For Lower-Tiered Lienors: Unlike general contractors, the path to lien perfection for lower-tiered subcontractors and suppliers is far more complicated. For those not in direct privity of contract with the owner, the first step in the lien perfection process is the Notice to Owner. The Notice to Owner:

- Gives the owner notice that the lienor is providing labor, services, or materials upon the owner's property
- Is not a recorded document and does not constitute cloud on title
- Must be furnished by all lienors not in privity with the owner
- Statutorily provided form document

- In addition to the owner, the copies of the Notice to Owner must be provided to: (i) the contractor (if not in privity with the contractor); (ii) subcontractor (if lienor is a materialman of a sub-subcontractor); (iii) construction lender; and (iv) all others designated in the Notice of Commencement to receive Lien Law documents
- May be served by personal delivery, overnight mail, certified mail return receipt requested, or, if the foregoing options are unavailable, by posting on the jobsite at a conspicuous, weather protected, location.
- To be timely, Notice to Owner may be served at any time prior to commencement of work or first delivery of materials to the jobsite, or after commencement but before one of the following events has occurred:
 - 45 days after the date of commencement of the lienor's work or first delivery of materials to the jobsite; or
 - the contractor presents the owner with its final payment affidavit and the owner disburses final payment to the contractor
- Not required for underground subdivision/site work improvements
- Failure to timely serve Notice to Owner constitutes an absolute bar to enforcement of lien!

Practice Point: Service of the Notice to Owner is almost universally accomplished by sending via certified mail return receipt requested. If serving the Notice to Owner using this method, service will be effective as of the date of mailing if placed in the mail within 40 days of the date of commencement of the lienor's work or first delivery of the materials. However, if placed in the mail after the 40th day, the effective date of service is gauged by the date of the owner's receipt of the Notice to Owner. Accordingly, it is imperative that lienors desiring to serve the Notice to Owner by certified mail not only place the Notice to Owner in the mail by the 40th day, they should also retain the certified mail log in order to establish the date of mailing.

C. Lien Defects and Amendments Thereto

Unlike the time requirements prescribed under the Lien Law, which are strictly construed, lien notices and the claim of lien itself may contain errors and omissions without necessarily invalidating the lien claim. Section 713.08(3), Fla. Stat. states "the negligent inclusion or omission of any information in the claim of lien which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien."

Section 713.08(4)(a) also permits insubstantial discrepancies by stating the "omission of any of the foregoing details [from the statutory claim of lien form] shall not, within the discretion of the trial court, prevent the enforcement of such lien against one who has not been adversely affected by such omission or error."

While every effort should be made to rectify any errors in the claim of lien prior to recording, the Lien Law recognizes the doctrine of substantial performance. However, errors in the lien will serve to create unwanted distractions should the lienor seek judicial enforcement of the claim of lien, and even worse, should the court find the error somehow prejudiced the property owner, the error could render the lien invalid and unenforceable. Such an example of the court's discretion to invalidate a lien claim on account of seemingly innocuous errors can be found in the case of *Allstar Building Materials, Ltd. v. Donald F. Kronauer*, 724 So. 2d 616 (Fla. 5th DCA 1998). In this case, the court refused to enforce the lien based on errors contained in the lienor's notice to owner. Specifically, the lienor had erroneously reduced the size of the type used in the lien and also failed to include the words, "Important Information for Your Protection" in the notice. Further, the lienor had sent a copy of the lien to the contractor, as well as the owner. Again, while the Lien Law takes into account the potential for errors or omissions in the various Lien Law documents, lienors would be well advised to take extra precautions to avoid against such errors.

D. Time Limit for Recording the Claim of Lien

Whether a contractor or lower-tiered subcontractor or supplier, the lien perfection process ultimately culminates in the recordation of the claim of lien and the filing of a lawsuit to foreclose the claim of lien. In short, the claim of lien, which is a statutory form document, details the lienor's involvement on the project and the value of the labor, services, and/or materials for which the lienor is unpaid. From a timing standpoint, the lien may be recorded at any time during the course of the work but must be recorded within 90 days of the date of final furnishing labor or material.

Over the years, the issue of the date of "final furnishing" has been hotly litigated. In particular, a frequently litigated issue has been the extent to which punch list items, corrective work, and demobilization constituted "final furnishing" for purposes of triggering the lienor's 90-day lien recordation period. The long-standing test courts applied in determining when the lien recordation had commenced was

articulated in *Aronson v. Keating*, 386 So. 2d 822 (Fla. 4th DCA 1980), which applied a four-prong test consisting of whether the work was done: (1) in good faith; (2) within a reasonable time; (3) in pursuance of the contract; and (4) necessary to a finished job. Fortunately, in 2007, the Florida legislature clarified the Lien Law to expressly state that “final furnishing” does not include work performed on account of punch list or remedial work. However, “final furnishing” does include cleaning up debris and demobilization. Furthermore, in the event the underlying direct contract is terminated, the lienor is required to record its claim of lien within 90 days of such termination or 90 days after the final furnishing of labor, services, or materials by the lienor, whichever occurs first.

Practice Point: For lower-tiered lienors, the lienor’s receipt of either: (i) an owner’s affidavit of intention to recommence construction, or (ii) notice of termination of the notice of commencement could significantly impact such lienor’s lien claim. More specifically, where a lienor has been served with either of the owner’s affidavit of intent to recommence or notice of termination of the notice of commencement, such lienor must record its lien claim within 30 days of service in order to maintain “relation back priority” to the original notice of commencement (which is necessary to maintain the lienor’s priority position). The lienor’s failure to timely record its lien claim within this 30-day period does not impact the enforceability of the lien claim (provided it is recorded within the 90-day recordation period), but rather only impacts the priority of the lienor’s claim. For this reason, lienors that have yet to be paid for their services should err on the side of caution and record their lien claims immediately upon receipt of the affidavit of intention to recommence construction or notice of termination of the notice of commencement.

E. Filing Suit

An action to foreclose a claim of lien must be commenced within one year of the date on which the lien was recorded, and in the case of an amended claim of lien (amending the date of final furnishing), within one year of the date on which the amended claim of lien was recorded. If the last day of the one-year foreclosure period falls on a weekend or holiday, action may be filed on the following business day.

Equally as important, an owner’s unfulfilled promise to make payment (in an effort to induce the lienor to hold off filing its lien foreclosure action within the one-year period) does not relieve the lienor from having to timely commence its action, and in fact, the owner’s unfulfilled promise will not serve as a defense to a motion to dismiss in litigation.

In most cases, the one-year anniversary of the lien recordation serves as the applicable deadline by which the lienor’s foreclosure action must be filed. However, in certain instances, this one-year period may be significantly shortened. Specifically, an owner may reduce the lien foreclosure period by either: (1) recording and serving a notice of lien contest; or (2) filing of complaint for order to show cause. Where a lienor has been served with a recorded notice of lien contest, the lien foreclosure period is shortened to a period of 60 days from the date on which lienor was served with the notice of lien contest.

By contrast, where the owner has filed a complaint for order to show cause (requiring the lienor to “show cause” as to why its lien should not be discharged), the lienor is required to respond to the show cause complaint within 20 days of service of the complaint; otherwise the lien will be discharged. It should be noted that in situations where the owner has filed a show cause complaint, the lienor’s commencement of an action to foreclose its claim of lien will satisfy the show cause requirement. However, the lienor’s failure to timely respond to the complaint for order to show cause will result in a discharge of the lien, which is not subject to appeal, even when the lienor may be able to assert excusable neglect and a meritorious defense.

As noted in the outset of this article, while the Lien Law cannot guarantee that lien claimants will receive payment through the use of construction liens, the Lien Law is an effective method of increasing the odds of obtaining payment. If you have concerns or questions about the Florida Construction Lien Law, please contact Chris Staine, Board Certified Construction attorney with Shumaker, Loop & Kendrick, LLP, at cstaine@slk-law.com or 941.366.6660.

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