

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1196

INTRODUCER: Regulated Industries Committee and Senator Bogdanoff

SUBJECT: Construction Liens on Leased Premises

DATE: April 11, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Fav/CS
2.	Munroe	Maclure	JU	Pre-meeting
3.			CM	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

The construction lien law allows persons who are enhancing an owner's property to file a lien for the value of the improvement. In certain circumstances, a construction lien may be placed against the property of a lessor (he [or she] who grants a lease)¹ for work done on behalf of a lessee. However, a lessor may limit or prohibit such liens provided the lessor includes a prohibition in the lease and records notice thereof in the public records. The bill revises the procedures for protecting a leased premise from a construction lien when the improvement is contracted for by a lessee (tenant) of the property.

The bill provides that a lessor may file a memorandum of the lease, in lieu of a copy of the lease or short form of the lease, in the official records of the county where the leased premises are located. In the alternative, a lessor may file a notice advising that leases for the rental of premises on a parcel of land prohibit liens in the official records of the county where the land is located. The notice must contain the name of the lessor, legal description of the parcel of land, specific language contained in the various leases, and a statement that all or a majority of the leases on

¹ Black's Law Dictionary, 5th Abridged Ed.

the parcel of land expressly prohibit liability. The bill requires the notice or copy of the lease to be filed prior to the filing of a Notice for Commencement.

The bill deletes the provision that specified that the interest of a lessor shall not be subject to a lien when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.

The bill provides that a contractor may serve a demand on the lessor for a verified copy of the provision in the lease. Failure of the lessor to comply with the demand may result in the contractor being able to attach a lien on the property.

The bill also provides that the lessee who contracts for an improvement must be listed on a Notice of Commencement as the owner of the property.

This bill amends sections 713.10 and 713.13, Florida Statutes.

II. Present Situation:

Overview

A construction lien² is an equitable device designed to protect subcontractors, sub-subcontractors, laborers, and suppliers of material 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. Another purpose of lien law 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, and thus construction liens are purely statutory.

Part I of ch. 713, 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 requests be in a statutory form. The following notices are complicated but 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 part I of

² Lien is not defined in ch. 713, F.S., but can be found elsewhere in the Florida Statutes to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." See ss. 726.102(8) and 727.103(9), F.S.

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

ch. 713, F.S., determines whether a payment is proper or improper.⁴ An improper payment could result in the homeowner paying twice for the same improvement.⁵

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement 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 notice of commencement must be recorded with the clerk of the court where the property is located⁶ 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.⁷ A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite.⁸ The notice of commencement must include the legal description of the property, the street address, and the tax folio number, if available.⁹ 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, the anticipated expiration date if different from one year, and other specified information.¹⁰ The form for the notice of commencement 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.¹¹

A notice of commencement is specifically not required prior to issuing a building permit.¹² The building permit must include a "14-point, capitalized, boldfaced type" warning regarding the

⁴ An improper payment is a payment made by a homeowner to a contractor that does not fall within the proper payment defense to a lien under s. 713.06(3), F.S. Improper payments can occur if the homeowner fails to file a Notice of Commencement or fails to obtain a release or waiver of lien after receiving a notice to owner and paying the subcontractor.

⁵ The procedure that a homeowner follows in paying for improvements under part I of ch. 713, 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 because the payment is not credited against the owners' potential liability for payment of liens. *See* Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005). *See also Review of the Florida Construction Lien Law*, Interim Report No. 2009-124, Florida Senate Committee on Regulated Industries, October 2008.

⁶ Section 713.01(4), F.S., defines "clerk's office" to mean the office of the clerk of the circuit court of the county in which the real property is located.

⁷ Section 713.13(1)(a), F.S.

⁸ *Id.*

⁹ *Id.*

¹⁰ Section 713.13(1)(a)-(d), F.S.

¹¹ Section 713.135(1)(d), F.S. However, the requirement to file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit authority does not apply to a direct contract to repair or replace an existing heating or air conditioning system, unless the contract is for an amount equal to or greater than \$7,500.

¹² Section 713.135(1)(d) and (e), F.S.

necessity of filing a notice of commencement.¹³ All liens from persons who do work to improve a property relate back to the filing of the notice of commencement.¹⁴

The notice of commencement is valid for one year, unless otherwise stated in the notice. Any payments made by the owner after the expiration of the notice of commencement are considered to be improper payments.¹⁵ If the improvement described in the notice of commencement is not commenced within 90 days of the recording of the notice, then the notice is void, and any payments made by the owner after that time are improper.¹⁶

Liens on Leased Premises

Section 713.10, F.S., provides that a lien extends only to the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is later acquired in the property. If a lessee contracts for improvements to the real property, in agreement with the lessor, any resulting liens shall also extend to the interest of the lessor.¹⁷ If the lease provides that the lessor is not subject to any resulting liens from contracts of the lessee, the lessee must disclose the terms of the lease to the contractor so that the contractor can act accordingly. If the lessee knowingly or willfully fails to notify the contractor of such a term in the lease, the contract is voidable at the option of the contractor.¹⁸

Section 713.10, F.S., provides two alternatives for lessors to avoid liens. The section provides that the interest of the lessor shall not be subject to liens when:

- The lease or a short form of the lease is recorded in the clerk's office and the terms of the lease expressly prohibit liability for liens;¹⁹ or
- All of the leases entered into by a lessor for the rental of premises on a parcel of land prohibit such liability and a notice that sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located:
 - The name of the lessor.
 - The legal description of the parcel of land to which the notice applies.
 - The specific language contained in the various leases prohibiting the liability.
 - A statement that all leases entered into for premises on the parcel of land contain the language identified above.²⁰

In addition, the interest of the lessor shall not be subject to liens when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.²¹

¹³ Section 713.135(1)(a), F.S.

¹⁴ Section 713.07(2), F.S.

¹⁵ Section 713.13(1)(c), F.S.

¹⁶ Section 713.13(1)(c) and (2), F.S.

¹⁷ Section 713.10, F.S.

¹⁸ *Id.*

¹⁹ Section 713.10(1), F.S.

²⁰ Section 713.10(2), F.S.

²¹ Section 713.10(3), F.S.

Court Interpretation

In 2010, the Fourth District Court of Appeal held that a lessor who attempted to avail himself of the protection against liens resulting from contracts of tenants filed a defective notice.²² The lessor posted a notice that all of the leases on his property contained language prohibiting liens and the court held that the notice was defective because the notice did not contain the specific language prohibiting the liens from every contract.²³ In this case, every lease for the property contained a prohibition against liens, although with variation in terms, but the notice that was filed contained language different from the language in the lease.²⁴ Even though all leases and notices contained a prohibition against liens, and even though it was not in dispute that the notices were filed in the public records prior to the lessee contracting for the project, the court held that, because the plain language of s. 713.10(2), F.S., requires the notice to contain the “specific language” contained in the various leases, the notice was defective because it contained different language.²⁵

Because of this interpretation, when a lessor seeks to prohibit liens from attaching to his property, a lessor must use the same language in every contract and must use that language in his notice. Otherwise, lessors of properties on a parcel of land cannot avail themselves of s. 713.10(2), F.S., and must instead file a copy of every lease or short form with the clerk’s office in the county where the property is located.

III. Effect of Proposed Changes:

The bill revises the procedures for protecting a leased premise from a construction lien when the improvement is contracted for by a tenant of the property.

The bill amends s. 713.10(1), F.S., to add that a lessor may record a memorandum of the lease that contains the specific language in the lease that prohibits the imposition of a lien in the official records of the county where the leased premise is located, in lieu of filing a copy or short form of the actual lease. The bill also requires that the recording of the lease or memorandum of the lease must be recorded prior to the recording of a notice of commencement to be effective. The bill clarifies that the recording be done in the official records of the county where the leased premise is located.

The bill amends s. 713.10(2), F.S., to provide that a lessor who leases more than one premise on a parcel of land, when some of the leases expressly prohibit the imposition of a lien, may record a notice in the official records of the county where the leased premises are located which includes:

- The name of the lessor.
- The legal description of the parcel of land to which the notice applies.
- The specific language contained in the various leases prohibiting such liability.

²² *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So. 3d 235 (Fla. 4th DCA 2010).

²³ *Id.* at 237-38.

²⁴ *Id.*

²⁵ *Id.*

- A statement that all or a majority of the leases of premises on the parcel expressly prohibit the imposition of a lien.

The bill requires that the recording of the notice in the official records must be complete prior to the recording of a notice of commencement to be effective.

The bill deletes provisions in current s. 713.10(3), F.S., that provide that the interest of a lessor shall not be subject to a lien when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.

The bill amends s. 713.10(3) to provide that a contractor or lienor may serve written demand on a lessor for a copy of the provision in the lease between such lessee and lessor which prohibits the imposition of a lien for an improvement made by the lessee. The copy must be verified under s. 92.525, F.S.²⁶ A demand for a copy of the pertinent portion of the lease must contain a warning to the lessor in conspicuous type and be in substantially the following form:

YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30
DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR
PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON
REQUESTING THE VERIFIED COPY.

The bill provides that the lessor must serve a copy of the provision of the lease, which must be verified, on the contractor or lienor within 30 days after receipt of the demand. If the lessor fails to comply, the lessor's property is subject to a lien if the party demanding the verified copy is otherwise entitled to a lien and did not have actual notice that the interest of the lessor is not subject to liens for improvements made by the lessee.

The bill amends s. 713.13(1)(a), F.S., to provide that a lessee who contracts for the improvement is an owner for purposes of the notice of commencement and must be listed as owner on the notice of commencement form.

The bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁶ See s. 92.525, F.S., which specifies requirements for the verification of documents

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill amends the current procedures for a lessor to protect his property against liens. The bill appears to make it easier for a lessor to protect his property from contracts of his or her lessees.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Regulated Industries on March 29, 2011:**

The committee substitute amends the types of notice that a lessor must file in the official records where the lessor's property is located. The committee substitute provides only two methods, instead of three, for the lessor to prohibit liens on his leased property. First, the lessor may file a copy of the lease, memorandum, or short form of the lease that contains the prohibition against liens in the official records of the county. Second, the lessor may file a notice that provides that some of the liens on a parcel of land contain a prohibition against liens. The notice must contain a statement that all or a majority of the leases on the parcel of land expressly prohibit liens. The committee substitute removes the prohibition against liens for leased mobile home property. The committee substitute requires the lease, memorandum, short form, or notice to be filed in the official records prior to the filing of a notice of commencement. The committee substitute amends the warning for the written demand that may be served on a lessor by a contractor. The committee substitute changes the effective date to October 1, 2011.

B. Amendments:

None.