

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 Regulated Industries Committee

BILL: SB 1196

INTRODUCER: Senator Bogdanoff

SUBJECT: Construction Liens on Leased Premises

DATE: March 25, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	CM	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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 a lessor's property 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. This bill amends when the interest of a lessor of leased premises is subject to a construction lien for an improvement made by a lessee.

The bill provides that a lessor may file a memorandum of the lease, in lieu of a copy of the lease, in the official records of the county where the leased premises are located. The bill provides that a lessor may file a notice in the public records that the leases prohibit liens, if the lessor leases multiple premises on a parcel and all of the leases expressly prohibit the imposition of liens; the notice must contain the name of the lessor, name of the lessee, and a statement that all of the leases prohibit the imposition of liens. In addition, if a lessor leases multiple premises but not all of the leases contain such a prohibition, the bill provides that a notice may be filed in the public records, but the notice must list all of the leases that do allow for the attachment of a lien on the leased property. A creditor or purchaser of the parcel may rely on the notice.

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 substantially amends the following sections of the Florida Statutes: 713.1 and 713.13.

II. Present Situation:

Overview

A construction lien¹ 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.² 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 ch. 713, F.S., determines whether a payment is proper or improper.³ An improper payment could result in the homeowner paying twice for the same improvement.⁴

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

¹ 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.

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

³ 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.

⁴ The procedure that a homeowner follows in paying for improvements under pt. 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.

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.⁵

A NOC is specifically not required prior to issuing a building permit.⁶ The building permit must include a 12-point capitalized warning regarding the necessity of filing a NOC.⁷ All liens from persons who do work to improve a property relate back to the filing of the NOC.⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹²

⁵ 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 contracts greater than \$7,500.

⁶ Section 713.135(1)(d) and (e), F.S.

⁷ Section 713.135(1)(a), F.S.

⁸ Section 713.07(2), F.S.

⁹ Section 713(1)(c), F.S.

¹⁰ Section 713.13(2), F.S.

¹¹ Section 713.10, F.S.

¹² *Id.*

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;¹³ 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 which 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.¹⁴

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.¹⁵

Court Interpretation

In 2010, the Fourth District Court of Appeals held that a lessor who attempted to avail himself of the protection against liens resulting from contracts of tenants filed a defective notice.¹⁶ 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. 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. 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.

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, the lessor 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 amends the procedures for protecting a leased premise from a construction lien when the improvement is contracted for by a tenant of the property.

¹³ Section 713.10(1), F.S.

¹⁴ Section 713.10(2), F.S.

¹⁵ Section 713.10(3), F.S.

¹⁶ *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (4th DCA 2010).

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 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 amends s. 713.10(2), F.S., to provide that a lessor who leases more than one premise on a parcel of land, when all 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 name of the lessee.
- The legal description of the parcel of land to which the notice applies.
- A statement that all of the lessor's leases of premises on the parcel expressly prohibit the imposition of a lien.

The bill provides that if a lessor leases more than one premise on a parcel of land, but only some of the leases expressly prohibit the imposition of a lien, the lessor 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 name of the lessee.
- The legal description of the parcel of land to which the notice applies.
- The identification of each specific premise that may be subject to a lien for improvements made by the lessee, which list may be amended to revise the list of leased premises that may be subject to a lien so long as the recording occurs prior to any notice of commencement being filed.

The bill creates subsection (4) to provide that a creditor that is secured by an interest in a parcel, or a purchaser for consideration of a parcel, may rely on a recorded lease, memorandum of lease, or notice that prohibits the imposition of a lien. There is no duty to inquire into the terms of the lease to verify a memorandum or notice. Any lienor who is materially prejudiced by a willful misstatement of fact by a lessor in a memorandum or notice has a cause of action against the lessor for damages sustained in the amount that the lienor would have otherwise been able to establish as a construction lien.

The bill creates subsection (5) and provides that the identification of a premise in a memorandum of lease or recorded notice does not constitute actual or constructive notice of the lease or the interests of the named lessee. This subsection further provides that this subsection does not affect the rights of lienors against the interest of the lessor or lessee identified in a memorandum of lease or notice. The effect of this provision is unclear.

The bill amends s. 713.10(3), F.S., and renumbers it as a new subsection (6).

The bill creates subsection (7) and provides that a contractor or lienor may serve written demand on a lessor for a verified 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. 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:

WARNING: YOUR PROPERTY MAY BE SUBJECT TO A CONSTRUCTION LIEN
IF YOU FAIL TO SERVE A VERIFIED COPY OF THE LEASE PROVISION
WITHIN 30 DAYS AFTER YOU RECEIVE THIS DEMAND OR IF YOU SERVE A
FALSE OR FRAUDULENT COPY OF THE LEASE PROVISION.

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 July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill creates an additional method for a lessor to protect his property against liens and amends the current procedures. 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.)

None.

B. Amendments:

None.