

FINAL BILL ANALYSIS

BILL #: CS/CS/SB 1196

FINAL HOUSE FLOOR ACTION:

118 Y's 0 N's

SPONSOR: Sen. Bogdanoff (Rep. Moraitis)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/HB 941

SUMMARY ANALYSIS

CS/CS/SB 1196 passed the House on May 4, 2011. The bill was approved by the Governor on June 21, 2011, chapter 2011-212, Laws of Florida, and becomes effective October 1, 2011.

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.

Related to construction liens against leased property, this bill:

- Adds an additional means by which the lessor may record notice in the public records, namely by recording a memorandum of a lease.
- Provides that a blanket limitation on liens need not apply to all leaseholds within the property.
- Requires a lessor claiming that leases prohibit liens to provide a copy of the relevant portions of the lease within 30 days, upon demand of a potential lienor.
- Amends the notice of commencement form to require adding the name of a lessee when the lessee is making improvements.
- Requires a statement on the notice of commencement that the ownership interest is a leasehold interest if the owner listed is a lessee.

This bill does not appear to have a fiscal impact on state or local government.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Construction Liens

Chapter 965, F.S., provides that a record of a conveyance of real property, a mortgage of real property, or any other related document affecting title to real property, is valid when recorded with the clerk of the court (or county recorder) in the county in which the real property lies. These documents are recorded with the clerk in order to provide actual¹ or constructive notice² to the public regarding the status of real property. These documents may include various liens and mortgages that are placed on the real property. One form of a lien is a construction lien.

A construction lien is an equitable device designed to protect a person who has enhanced an owner's property. There are different statutory requirements for lienors that are in privity and those that are not in direct privity³ with the owner⁴ (such as subcontractors, sub-subcontractors, laborers and suppliers of material who remain unpaid after the owner has paid the contractor directly).⁵ The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien on the property receiving their services to ensure payment. 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.

The construction lien statutes set forth a right of action that did not exist at common law,⁶ and thus construction liens are purely statutory.⁷ Florida's Construction Lien Law is found in ch. 713, pt. I, F.S.

Chapter 713, pt. I, F.S., requires various notices, demands and requests to be provided in writing to the owner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and requests be in a statutory form. Notices include: 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 an owner follows in paying for improvements under part I of ch. 713, F.S., determines whether a payment is proper or

¹ Actual notice, "or 'express' notice is based on 'direct information' leading to 'actual knowledge of the fact in question.'" *Winn Dixie Stores, Inc., v. DolgenCorp, Inc.*, 964 So.2d 261, 265 (Fla. 4th DCA 2007)(quoting *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932)). A third type of notice is also recognized called "implied actual notice," which is defined "as notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use." *DolgenCorp, Inc.*, at 265-66.

² Constructive notice has been defined as, "notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes." *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932).

³ Privity of contract is the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. *Black's Law Dictionary* (9th Edition 2009), "privity."

⁴ *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2d DCA 1984).

⁵ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So.2d 623 (Fla. 1995).

⁶ *Fleitas v. Julson, Inc.* 580 So.2d 636 (Fla. 3d DCA 1991).

⁷ *Home Elec. of Dade County, Inc. v. Gonas*, 547 So.2d 109 (Fla. 1989).

improper. Making a payment that is improper may result in the owner paying twice for the same improvement.⁸

Construction Liens and Leased Property

If a lessee contracts for renovations or improvements to the property he or she leased and does not pay, the lessor may be liable for construction liens placed on the property by subcontractors.⁹ A court will look to the lease to see if the improvement was made by the lessee in accordance with the agreement with the lessor. If, "the renovations and improvements contemplated by the parties at the inception of the lease constituted the pith of the lease,"¹⁰ then the lessor is liable and a subcontractor may place a valid construction lien against the lessor's property. Section 713.10, F.S., provides two procedures that a lessor may follow to be exempt from a subcontractor's ability to place a lien on the lessor's property. These procedures include:

1. Recording the lease or a short form of the lease at the clerk's office;¹¹ if the lease terms expressly provide that the interest of the lessor is not subject to liens made for improvements that were authorized by lessee;¹² or
2. 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:¹³
 - The name of the lessor.¹⁴
 - The legal description of the parcel of land to which the notice applies.¹⁵
 - The specific language contained in the various leases prohibiting such liability;¹⁶ and
 - A statement that all leases entered into for premises on the parcel of land contain the language identified.¹⁷

A lessor of a mobile home lot is also not subject to a construction lien if the lessee is a mobile home owner.¹⁸

⁸ See Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005).

⁹ See Section 713.10, F.S.; for purposes of this analysis, "subcontractor" includes sub-subcontractors, laborers and suppliers of material.

¹⁰ See *A.N. Drew, Inc. v. Frenchy's World Famous Cajun Café, Inc.*, 517 So.2d 766, 767 (Fla. 1st DCA 1988).

¹¹ The short form lease must also include the language disclaiming liability. See *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34 (Fla. 1st DCA 2004).

¹² Section 713.10(1), F.S.

¹³ Section 713.10(2), F.S.

¹⁴ Section 713.10(2)(a), F.S.

¹⁵ Section 713.10(2)(b), F.S.

¹⁶ Section 713.10(2)(c), F.S. All leases must contain the exact language in the blanket notice filed with the county clerk. See *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 SO.3d 235 (Fla. 4th DCA 2010).

¹⁷ Section 713.10(2)(d), F.S.

¹⁸ Section 713.10(3), F.S.

The recording of the lease or short-form of the lease in the county records gives actual or constructive notice to any subcontractor that the lessor is not liable for any construction liens that result from the non-payment by the lessee.

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement (NOC) gives actual and 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.

One of the purposes of the NOC is to give subcontractors notification of who owns the property the subcontractor is improving and where that owner is located.

Effect of the Bill

The bill amends s. 713.10(1), F.S., regarding recording of a lease, to add that a lessor may record, in the county that the property is located, a memorandum of a lease that contains the specific language in the lease that prohibits liability for improvements to the property in lieu of filing the actual lease or a short form of the lease. The bill also requires that the recording of the lease, short form 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., regarding recording of a lease, to provide that, where the lessor has multiple tenants and elects to record a statement regarding lease terms prohibiting liens, the lessor need only have the clause in a majority of the leases entered into for premises on the parcel of land.

The bill amends s. 713.10(3), F.S., regarding leased property, to provide that:

- Any contractor or lienor under contract to furnish improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, and

- If the lessor does not serve a verified copy¹⁹ of the lease within thirty days he or she may be subject to a lien by the contractor or lienor if the contractor or lienor is otherwise entitled to a lien and did not have actual notice that the property was not subject to a lien.
- A demand for a copy of the pertinent portion of the lease must contain a warning to the lessor regarding the thirty days to respond. The warning must be 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 amends s. 713.13(1), F.S., regarding the notice of commencement, to provide that a lessee who contracts for the improvement is an owner²⁰ for purposes of the notice of commencement and must be listed as owner on the notice of commencement form together with a statement that the ownership interest is a leasehold interest.

The bill also modifies the statutory notice of commencement provided in s. 713.13, F.S, to conform to the changes made by this bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

¹⁹ Section 92.525, F.S. , provides the methods in which a document may be verified including being notarized.

²⁰ As defined in s. 713.01(23), F.S., "'Owner' means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property. The term includes a condominium association pursuant to chapter 718 as to improvements made to association property or common elements. The term does not include any political subdivision, agency, or department of the state, a municipality, or other governmental entity."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.