



The Florida Senate

Interim Project Report 2008-149

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Committee on Regulated Industries

REVIEW OF THE FLORIDA CONSTRUCTION LIEN LAW

SUMMARY

The Florida Construction Lien Law was created to prevent unjust enrichment and to ensure payment to subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien on the property receiving the material benefit of the labor. Construction lien statutes set forth a right of action that did not exist at common law,¹ and thus construction liens are purely statutory.² Florida's Construction Lien Law is found in ch.713, pt. I, F.S.

Property owners, especially homeowners, are often confused by the statutory process and still can end up paying twice to contractors and subcontractors despite the statutory protections. The receipt of notices from subcontractors is confusing to many owners because they are unaware that the subcontractors have been working on their property and are unclear as to what a notice means or its 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 with the lien process under the current statutory scheme. Senators Dockery, Saunders, and Jones have all indicated their concerns with the current procedures.

The report provides an overview of the complex components of the Florida Construction Lien Law. The law requires various notices, demands and requests to be provided in writing. The law also requires certain notices, demands and requests to be in a statutory form. The following notices are very important for the owner 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 report reviews the input from interested persons and delineates a series of recommended changes for consideration.

BACKGROUND

A construction lien is an equitable device, designed to protect those enhancing an owner's property who are not in direct privity with the owner,³ such as subcontractors, sub-subcontractors, laborers and suppliers of material⁴ who remain unpaid while the owner pays the contractor directly.⁵ Another purpose of construction liens is to protect owners by requiring subcontractors to provide notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.⁶

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¹ *Fleitas v. Julson, Inc.*, 580 So. 2d 636 (Fla. 3rd DCA 1991)

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

³ *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984)

⁴ For the purposes of this report, these persons will be referred to as subcontractors.

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

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METHODOLOGY

Committee staff conducted interviews with construction industry representatives, representatives of The Florida Bar, consumer advocates, Department of Business and Professional Regulation (DBPR) staff, members of the Building Officials Association of Florida (BOAF), and consumers. The Florida Statutes, rules, relevant case law, treatises and articles concerning construction liens were reviewed. The legislative history of ch. 713, pt. I, F.S., was reviewed and also discussed during these interviews. Committee staff attended conference calls for the legislative subcommittee of the Real Property, Probate and Trust Law Section of The Florida Bar. Committee staff reviewed Florida Bar CLE course materials regarding the construction lien law.

FINDINGS

The Florida Construction Industry, like many other industries, faces various challenges that worsen during the downturn in the housing market. These include increased complaints, construction defects, companies going bankrupt and abandoning projects just to name a few. The Construction Lien Law, while it was put in place to help the industry and to cure unjust enrichment, has become extremely complicated and difficult for attorneys to agree on, if not impossible for owners to understand.

The following is an explanation of selected provisions of ch. 713, pt. I, F.S.

Written Notices, Demands, or Requests in Construction Lien Law

Chapter 713, pt. I, F.S., requires various notices, demands and requests to be provided in writing. It requires certain notices, demands and requests to be in

a statutory form. The following notices are complicated and very important for the owner 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.

Direct Contracts Between an Owner and a Contractor

A "direct contract" is defined in the Construction Lien Law as a contract between the owner and any other person.⁹ Section 713.015, F.S., provides that a contractor who has a direct contract with the owner of the real property must include in the contract a notice to the owner regarding the potential effects of the Construction Lien Law. The notice language states to the owner that, for protection, he or she should stipulate in the contract that before any payment is made the contractor should be required to provide the owner with a written release of lien from any person or company that has provided a Notice to Owner. If the contract is oral or implied, the notice described in this section must be provided in a document referencing the contract. In order to bar enforcement of a lien due to failure to provide this notice, the owner must prove that he or she is adversely affected.

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 lien attached. However, any conveyance, encumbrance or demand recorded prior to the time the lien attaches and any proceeds thereof, regardless of when disbursed, shall have priority over the liens. The notice itself does not constitute a lien, cloud, or encumbrance on real property.

A Notice of Commencement must be recorded in the clerk's office 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. Currently, s. 713.13(1)(a), F.S., provides that the Notice of Commencement should include the legal description of the property, the street address, and the tax folio number, if available. It should also include a general

⁹ Section 713.01(9), F.S.

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 making a loan for the construction, the name and address of any person designated to receive notices, and the anticipated expiration date if different than one year. A form is included in s. 713.13(1)(d), F.S.

There are provisions in s. 713.13(5)(a) and (b), F.S., regarding the ability of an owner to amend a Notice of Commencement, and outlining what can be amended and what should be included.

Notice of Commencement and Applicability of Liens

When a person applies for a building permit, s. 713.135, F.S., requires that the building permit contain a warning in 14 point type concerning the need to file a Notice of Commencement. It requires the building permitting authority to provide the owner with a statement explaining that the right, title and interest of the person who has contracted for an improvement to real property may be subject to the Construction Lien Law. The DBPR has prepared the statement for distribution and a copy is also available at the bottom of the Construction Industry page on the DBPR website.

The Notice of Commencement is required to be filed with the Clerk of the Court and a certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the job site. For contracts greater than \$2,500, the applicant for a building permit must file a certified copy of the recorded notice or notarized statement of filing and a copy with the building permitting authority. The notice must be filed before the first inspection and if it is not filed, the property may not be inspected until it is filed. A Notice of Commencement is specifically not required prior to issuing a building permit. The building permitting authority is also required to verify that the information contained in the notice is consistent with the information in the building permit.

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 owner must serve the owner 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 services or materials by the potential lienor. The notice must be served before the owner's final payment to the contractor. If a Notice to Owner is not served then a lien cannot be enforced.

Section 713.06(1)(c), F.S., provides the form which should be used for the Notice to Owner which includes a warning to the owner that subcontractors may file a lien against the owner's property even if they 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 Notice of Commencement 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 lien by any lienor giving a Notice to Owner and may be requested by the owner prior to making payment to the contractor. This 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. Section 713.20(4) and (5), F.S., contain the forms to use for the Waiver or Release of Liens. These waivers must be obtained by the owner prior to each payment to the contractor if the owner has been served with a Notice to Owner. If the owner does not request a Waiver or Release of Lien prior to each payment, the payments become improper payments. 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

A Claim of Lien must be recorded and in the form 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 failure or delay is shown to have been prejudicial to any person entitled to rely on the service."¹⁰

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 can not be recorded after 90 days following the termination of the contract or 90 days after the final furnishing, whichever occurs first. If the Claim of Lien is not recorded properly, the lien becomes invalid.

Notice of Contest of 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)(d)1., F.S., requires 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 have 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 under oath 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. This demand must be served using the information given in the Notice to Owner. If the information is not furnished within 30 days, or fraudulent or false information is given, then the lienor is no longer entitled to a lien. In order for the lienor to lose his or her lien rights in this instance, the demand must be served properly. If this is a second or subsequent request and the information has not changed, then a response is not required. The negligent inclusion or omission of any information in the demand deprives the lienor of his or her lien rights to the extent that the owner can demonstrate prejudice from such act or omission by the lienor.

Section 713.16(5), F.S., permits a lienor to request from the owner a sworn statement as to the amounts of all direct contracts, presumably even direct contracts that the lienor is not performing work under. The apparent intent of s. 713.16(5), F.S., is for a lienor to have information relevant to the direct contract under which it is performing work or supplying materials.

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.

Payment and Performance Bonds for Public Contracts

Under current law, contractors cannot place a lien on public or state owned lands or buildings to secure payments for construction performed on the public buildings or public lands. However, s. 255.05, F.S., provides for payment or performance bonds as an alternative to filing a lien to secure payment for work done by contractors on publicly owned land.

Section 255.05(1), F.S., requires a contractor constructing a public work for state or local government valued in excess of \$200,000 to post a

¹⁰ Section 713.08(4), F.S.

payment and performance bond. Payment and performance bonds protect state and local governments from default by a contractor, and they protect subcontractors who cannot file a construction lien because the project involves public property. A “payment bond” is a bond that guarantees payment of money from the contractor to persons who furnish labor, material equipment and/or supplies for use in the performance of the contract. A “performance bond” is a bond that guarantees that the contractor will perform the contract in accordance with the bond’s terms.

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. Section 255.05(2)(a)(2), F.S., provides that a claimant on a payment bond must give a contractor notice that they intend to make a claim against the bond for payment. Current law does not specifically provide whether the notice must be in writing.

Manner of Serving Process and Other Instruments

Section 713.18, F.S., provides procedural requirements for service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required in the Construction Lien Law. Since the enactment of ch. 713, F.S., the limited liability type of business entity has become more widely used. However, the Construction Lien Law does not specifically address how one could obtain service of the statutorily permitted or required notices on this relatively new form of business entity.

Section 713.18, F.S., also provides that, if an instrument that is served as provided in this section is returned as being “refused,” “moved, not forwardable,” “unclaimed,” or is otherwise undeliverable through no fault of the person serving the item, then service is effective on the date the notice was sent.

Defenses to a Lien

The following are examples of some defenses which may be asserted by the owner to overcome a lien against his or her property:

- The owner has requested and obtained a signed waiver or release of lien pursuant to s. 713.20, F.S., from each lienor serving a Notice to Owner each time a payment is made to the contractor.

- The owner has maintained proper payment throughout the contract period and therefore has a proper payment defense pursuant to s. 713.06(3), F.S. The owner’s payments become improper if construction does not begin within 90 days of recording the Notice of Commencement causing it to expire; the Notice of Commencement expires at the end of the year or stated period without being amended; the owner receives a properly served Notice to Owner and does not obtain a Release or Waiver of lien every time payment is made to the contractor; and if the owner does not require the Final Payment Affidavit from the contractor.
- The lienor has failed to issue a Notice to Owner pursuant to s. 713.06(2)(a), F.S., before commencing the services or within 45 days after commencing the services. The Notice to Owner must be substantially similar to the form in s. 713.06(2)(c), F.S.
- The Claim of Lien has not been filed and recorded in the form, 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. Section 713.08(5), F.S., requires that the Claim of Lien must be recorded at any time during the progress of work but not 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 must be recorded within 90 days following the termination or 90 days after the final furnishing, whichever occurs first. If this process is not followed, the owner can challenge the lien.

Remedies for Fraud

Section 713.31(2)(c), F.S., provides that an owner has a right of action against a lienor for a fraudulent lien. This right of action can be in the form of:

- an independent action;
- in connection with a summons to show cause under s. 713.21, F.S.; or
- a counterclaim or cross-claim to any action to enforce or to determine the validity of the lien.

Attorney's Fees

Section 713.29, F.S., provides that in any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable attorney's fee for trial and appeal or for arbitration in an amount to be determined by the court. This fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

In contrast, s. 713.31(2)(c), F.S., provides for a damages claim and allows the prevailing party to collect reasonable attorney's fees and costs if it is successful in demonstrating that the lien was fraudulent and caused damage.

Lender Responsibilities With Regard to Construction Loans

Section 713.3471, F.S., outlines the lender responsibilities to the owner and the contractor. The lender is responsible for providing the written notice in s. 713.3471(1), F.S., to an owner prior to making any loan disbursement to the owner on any construction loan secured by real property. The notice warns the owner that the disbursement is directly to him or her and to protect themselves, they need to require the contractor to give them lien releases from each lienor who has sent the owner a Notice to Owner each time they make a payment to the contractor.

If the lender decides to cease further advances on a construction loan, written notice must be given to the contractor, or any lienor giving notice to the lender, within five business days of making the decision. Failure to give the contractor notice renders the lender liable to the contractor to the extent of the actual value of the materials and direct labor costs furnished by the contractor plus 15 percent for overhead, profit and other costs from the date the notice should have been served.

Section 713.3471(3), F.S., provides procedures when the lender and the borrower have designated a portion of the construction loan proceeds. The borrower may not authorize the lender to disburse the designated funds for any other purpose until the contractor and any other lienor who has filed a Notice to Owner is given written notice of the decision and the amount to be disbursed. This section does not apply to a residential project of four units or less or construction loans of less than \$1 million. It appears that the only reference for lender disbursements to contractors on a residential construction is in s. 713.06(2)(d), F.S.

Issues

During the numerous interviews with various industry professionals and agency staff, committee staff received information regarding issues which could be improved and suggestions for changes to help educate owners and simplify the process. It is generally agreed by the various parties that these issues need to be addressed.

The following issues were identified:

- Many times owners do not get the necessary forms required by statute. Building Officials are required to give out explanatory information on the Construction Lien Law at the time of permit application. If owners do receive the forms, the explanatory information is often not appropriately included according to statute.
- When a lender is involved through a mortgage or construction loan, it is often unclear what the lender's role is regarding the Construction Lien Law. The owner and lender both need to clarify what the lender's responsibility is and the lender's role in the process. Some banks release money to the contractor without verifying that the money is actually being paid to the subcontractors or that construction is progressing, even after a Notice to Owner has been filed with the bank.
- If the Notice of Commencement expires, it causes payments to become improper payments and the owner loses the proper payment defense to a lien. Work has to begin within 90 days of issuance or the Notice of Commencement expires. The owner cannot always control whether or not the work begins in 90 days yet the owner loses the proper payment defense if it does not. The Notice of Commencement also expires one year from the date of issuance unless amended or otherwise stated in the notice. If the notice is amended, it must be done before it expires. Many owners are not familiar with these provisions or do not receive the information required by statute.
- The Notice of Commencement is often not obtained. It has been suggested that, in order to ensure that this notice is always obtained, it should be made part of the building permit checklist so that a building permit will not issue until a Notice of Commencement is recorded. It is important, however, to ensure that mortgage provisions are

protected when making this change because liens attach and take priority at the time the Notice of Commencement is recorded. It is not the intention to make liens always have priority over the mortgages, so this issue would need to be addressed as well.

- According to “Left in the Lurch,” a *Florida Trend* article written by Cynthia Barnett,¹¹ Florida has seen a large increase in the number of contractor-abandonment cases. Since the housing market has stalled over the last two years, hundreds of homes have been abandoned before completion. This usually occurs after receiving part, if not all, of the payment for the construction. When the contractor leaves with the money and does not pay the subcontractor, many times the owner has to pay the subcontractor in order to keep their home. In one particular instance cited in this article, the contractor had previously filed bankruptcy three times.
- There are numerous instances, as reported in the press and interviews with consumers, in which contractors have received payments for numerous contracts, placed the money in their personal bank accounts, and then filed bankruptcy while hiding the assets. There is some question as to whether or not the criminal provisions in s. 713.345, F.S., are being enforced. There have been complaints of violations that would seem to fit the prohibitions in this section of the statute, but the violations are not being prosecuted. For example, in the Second Circuit, only one case has been prosecuted under the provisions of s. 713.345(1)(b)3., F.S., between 2000 and 2005. There is speculation as to the reasons for the lack of prosecution. The possibilities include:
 - The owner does not know to go to law enforcement and file formal charges.
 - The legal standard of knowingly and intentionally is too difficult to prove, so the charge ends up being reduced to a lesser crime under a different statute, if charged at all.
 - Law enforcement refuses to investigate the incident because these types of construction issues are viewed as civil matters.

- The State Attorney’s Office has very limited resources and has many more cases to prosecute than it has prosecutor’s that can do the job. Some cases just simply are less of a priority and the consumers are viewed to have other remedies.
- Criminal prosecutors tend to leave abandonment cases in the hands of civil prosecutors for state agencies like the DBPR. The DBPR can only proceed administratively and revoke a contractor’s license and encourage victims to apply for relief through the state’s Construction Recovery Fund which requires a civil judgment.¹²

RECOMMENDATIONS

During the discussions with the various stakeholders we received the following suggestions for improvements to the process:

- Increase education and disclosure through the availability of information to the owner both in written and electronic forms.
- 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.
- Change the provisions requiring payments to become improper payments when a Notice of Commencement expires because work did not start within 90 days of recording the notice or because the one year time limitation has lapsed.
- Require the recording of a Notice of Commencement before a building permit will be issued, but with provisions to protect the lender of a construction loan secured by residential real property.
- Increase lender responsibility in tracking payments, making sure the work is being done, and making sure that subcontractors are getting paid prior to each progress payment. Require a sworn statement from the contractor that states that everyone has been paid before releasing any more money.

¹¹ Barnett, Cynthia. *Florida Trend*, “Left in the Lurch” August 2000 Pages 60-61.

¹² *Id.*

- As part of the mortgage lending paperwork, provide the explanatory information and have the owner sign an affidavit that he or she has received the information on the Construction Lien Law.
- Revise and simplify the existing information sheet required by s. 713.135(1)(b), F.S., including only the most basic and important information. This information sheet should be attached to the building permit in order for the property owner to receive the information at the earliest possible time.
- Require subcontractors to provide the existing or revised one-page information sheet to the owner with each Notice to Owner. If the subcontractor does not include this information, then impose a penalty of losing the lien rights if the owner has been prejudiced by the non-disclosure.
- Investigate the possibility of contractors placing all payments into an escrow account so that construction funds are not commingled with personal funds. Look at the way this is done in other states. This could be modeled after the process used by attorneys and realtors.
- Revise the language for the Release of Lien provision. It currently states that the Release of Lien cannot be given in advance. It is being interpreted to mean in advance of the work being done, but not in advance of payment, which is creating an unfair bargaining position. Many subcontractors are giving releases before they are getting paid because of their relationship with the contractors.
- Require, as a mandatory provision for 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.