

Florida's Construction Lien Law: Something old, something new and some things not to do

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Overview

- The Basics of Florida's Lien Law
 - Who Can Lien
 - What is Lienable
 - Perfecting Your Lien Rights
- 2019 Statutory Changes
- Common Pitfalls
- Questions

Who Can Record a Claim of Lien

- Contractor (whoever contracts with Owner)
- Subcontractor (includes temp labor firm)
- Sub-subcontractor
- Laborer (rights run to the individual; includes temp employees working for sub on single project)
 - Labor supply company would not be a laborer
- Supplier (cannot perform labor or install materials)
- Certain design professionals
 - Architects, interior designers, surveyors, mappers, engineers

Who Cannot Record a Lien

- Sub-sub-subcontractor and anyone dealing with them
 - Includes temporary staffing agency used by sub-subcontractor
 - Might include laborers who perform work for a sub-sub (depends on contract)
- Supplier to supplier
- A supplier's fabricator
- Unlicensed contractor
- Companies providing services that don't permanently improve the property, i.e., cleaning or maintenance

Exclusions to Liens

- Government/public property is not subject to a lien
 - BUT, can lien for work done on public property as part of private job—lien attaches to owner's private property even though work was done on public property
- If a Project is properly bonded then there can be no liens
 - If a lien is recorded then Owner/GC can record Notice of Bond which automatically transfers the lien to the payment bond
 - Can also post a Lien Transfer Bond: Bond amount + 3 years statutory interest + greater of \$1,000 or 25% of the lien amount to cover attorneys' fees

What Is Lienable

- Improvements to the real property that is the subject of the Contract are lienable
- Labor
- Services
- Materials
- Equipment

Materials

- Materials must be incorporated into the Project
 - Proof of delivery is prima facie evidence of incorporation (on site stored materials)
 - Owner may rebut and defeat lien unless lienor can show Owner responsible for non-incorporation
- Specially fabricated materials--- Exception to incorporation requirements
 - Actually fabricated/manufactured in accordance with contract
 - Unique to this Project and not readily useable elsewhere (i.e., not off the shelf)
 - Do not need to be delivered to job site
- NOTE: Not the same as specially ordered; must not be usable on another project

Additional Lienable Items

- Rental equipment used to assist in construction activity
- Amount of Lien is limited to reasonable rental value for period of actual use
 - In determining reasonable rental value, contract price for rental is not determinative unless Owner is a party to the contract
- Unpaid finance charges due under contract are lienable

Tenant Improvements

- When a party enters into a contract with a lessee for improvements, the leasehold interest is generally subject to the construction lien
 - Can't lien fee simple interest unless lease agreement requires lessee to make certain improvements or the improvements are the “pith of the lease”
 - Lessor can limit exposure by:
 - 1) prohibiting liens in lease AND
 - 2) recording the lease or statutory notice in public records notifying of prohibition.
 - Failure to record the lease/notice exposes to liens if improvements are pith of the lease

What is Not Lienable

- Generally, items that do not directly benefit the property and are not in furtherance of the prime contract should not be included in the Claim of Lien
- Examples include:
 - Punchlist and warranty repairs
 - Disputed change order work (authorized vs unauthorized)
 - Lost profits and delay damages
 - Liquidated damages
 - Attorney fees
 - Repair costs of rental equipment
 - Overhead and profit only

The Lien/Bond Process

- #1- Notice of Commencement (NOC)- Owner records
 - Provides information for potential lienors
 - Creates priority for claims
 - Bond should be attached
- #2- Notice to Owner/Notice to Contractor- Serve within 45 days of 1st start
 - Required for lienors not in contract with the Owner (i.e., not GC), except laborers
 - Serve on upstream parties without direct contract (i.e., sub-sub serve on Owner **and** GC)
 - Specially fabricated materials: Deadline is measured **from date fabrication begins** rather than first delivery
 - Supplier: Deadline measured from first day supplies **delivered to job site**
- #3- Claim of Lien/Notice of Nonpayment- due 90 days from final furnishing
 - Copy of lien must be served on Owner within 15 days of recording
 - Final Contractor's Affidavit must be served on Owner 5 days before filing suit
- #4- File suit within 1 year of Lien/Notice of Nonpayment

Payment Bonds on Private Projects

- What Is It?
 - Security to ensure contractor pays lower tiered subcontractors and suppliers
 - Should be recorded as an attachment to the NOC
- Timing Requirements for Lienor not in privity with GC
 - Serve Notice to Contractor within 45 days after commence work
 - Serve a written Notice of Nonpayment to the contractor and the surety no later than 90 days after the final furnishing
 - Failure to receive retainage (up to 10%) is not considered non-payment requiring Notice of Nonpayment
 - File suit within 1 year of final furnishing

2019 Legislative Changes

- Significant changes to the Notice of Nonpayment under F.S. 713.23 (private job) and F.S. 255.05 (public job)
 - F.S. 337.18 bonds for roadway projects were not affected
- Notice of Nonpayment is a prerequisite to perfecting a bond claim
- Previously....
 - No set form
 - Not under oath
 - No specific service requirements
 - Did not have to specify what was for retainage for private projects
 - No penalty for including incorrect information

Changes to F.S. 713.23 and F.S. 255.05

- Statutory form must be “substantially” followed
- Must be served on the contractor & surety in accordance with F.S. 713.18
- Must specify amounts for retainage (non-privity claimants)
- Must be completed under oath- more akin to a sworn statement of account
- Effective October 1, 2019

New verification requirement

- “A claimant who serves a fraudulent notice of nonpayment **forfeits** his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has **willfully exaggerated** the amount unpaid, **willfully included** a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a **willful exaggeration.**”
 - Good faith dispute or minor mistake not considered willful exaggeration
 - Negligent inclusion/omission without evidence of prejudice to contractor **will not** defeat claim
 - Service of a fraudulent notice of nonpayment is a **complete defense**

Statutory Form

NOTICE OF NONPAYMENT

To (name of contractor and address)

(name of surety and address)

The undersigned lienor notifies you that:

1. The lienor has furnished (describe labor, services, or materials) for the improvement of the real property identified as (property description). The corresponding amount unpaid to date is \$, of which \$ is unpaid retainage.

2. The lienor has been paid to date the amount of \$ for previously furnishing (describe labor, services, or materials) for this improvement.

3. The lienor expects to furnish (describe labor, services, or materials) for this improvement in the future (if known), and the corresponding amount expected to become due is \$ (if known). I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true to the best of my knowledge and belief.

DATED on (date) , (month) 2019.

(signature and address of lienor)

[Notary signature/stamp]

What does this mean?

- The Notice of Nonpayment and its accuracy is now as important as a Claim of Lien
 - Check your dates and your numbers
- Greater potential for fraud claims but remember a good faith dispute as to the amount due does not equal fraud
 - Presently no independent cause of action
- Courts will rely heavily on fraudulent lien caselaw

COMMON PITFALLS WITH LIEN/BOND CLAIMS

Partial and Final Lien Waivers

- Statutory forms that have minimum information that must be included
 - May not require a lienor to furnish a lien waiver or release of lien that is different from the statutory form but if lienor agrees to different form it will be enforceable
- Can be conditioned upon the clearance of the funds if clearly stated (e.g., “This release of Lien is not effective until payment of the above consideration is received in paid funds.”)
 - In the absence of a payment bond protecting the owner, the owner may withhold from any payment to the contractor the amount of any such unpaid check until any such condition is satisfied
- Cannot require party to release lien or bond rights in advance of work being performed

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through (insert date) to (insert the name of your customer) on the job of (insert the name of the owner) to the following property:

(description of property)

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified.

DATED on , (year). (Lienor)

By: _____

Conditional vs Unconditional Waivers

- Owners often require conditionals for current month and unconditional for prior month
- Argument that all waivers are conditional by virtue of language “in consideration of the sum...”- if no funds received then release is not valid
- This is often different than a true conditional release which would specify that it is conditioned upon receipt of payment and not valid until such payment is received
- More important focus is on what you are releasing and carving out any disputed claims— if not following statutory form release will be interpreted based upon its language

Additional Considerations

- A release can be for a specific time and/or dollar amount
 - If time should only be through date of work performed – as opposed to the date it is signed
- An exact dollar amount is not required to be listed (i.e, \$10)
- If case where no work done then would recommend just releasing all claims for work done through a particular date
- Release should carve out anything not included
 - Retainage (especially if releasing through a certain date)
 - Pending change orders

Perfecting Lien/Bond Claim Issues

- Measuring your time- failure to do both operates to invalidate a lien
 - NTO/NTC- 45 days
 - Lien/Notice of Nonpayment- 90 days
- Including nonlienable items in Claim of Lien or Notice of Nonpayment
 - Exposure to fraudulent lien claim

Final Furnishing

- Defined in F.S. 713.01(12)
 - The last date that the lienor furnishes labor, services, or materials. Such date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the lienor's previously performed work or materials supplied. With respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use.

Practical Application

- General test for determining whether an activity would extend time for recording lien/serving Notice of Nonpayment
 - performed in good faith;
 - within a reasonable time;
 - in pursuance of the terms of the contract; and
 - whether the work was necessary to a “finished job.”
- Remedial, corrective, warranty, repair work or work incidental and **not necessary to complete the contract** does not extend time for filing claim of lien
- Fifth DCA includes completion of punchlist work as exclusion to liens

Service of Required Notices

- F.S. 713.08(1) requires that service of NTO, Claim of Lien, Notice of Contest of Lien be made by the following:
 - Personal service to person to be served
 - Common carrier delivery service or by certified mail with evidence of delivery
 - Posting at the site of improvement if (1) or (2) cannot be done
- F.S. 713.23 does not specify service in accordance with 713.18 but F.S. 255.05 does so good practice to do so
- This does not apply to waivers, pay apps or other documents that are not required to be served

Service Effective Date

- Section (2) provides that service of NTO/NTC is effective on date of mailing IF:
 - It is sent by certified mail/return receipt to last known addr on NOC or if no NOC, the building permit application
 - The notice is mailed within 40 days after 1st furnishing AND
 - Person who served the notice maintains a log that shows the certified mail details or electronic tracking
- All other notices are effective on date of mailing if:
 - Sent to last known addr on NOC, building permit application of person to be served, and
 - Returned as refused, not forwardable, unclaimed through no fault of person serving

Recent Court Ruling

- Subcontractor served NTO via certified mail to address listed on NOC
- The NTO was returned undeliverable.
- Court ruled service improper- finding that the subcontractor was required to try for personal service or post on jobsite, i.e., another form of service when the NTO came back
- Is this correct under Florida Statutes?

Analysis

- Argue- No
- Subcontractor complied with the requirements for proper service under F.S. 713.18(1)
 - Sent to last known address on the NOC
 - Service was timely (within 45 days per F.S. 713.06)
- Service was effective on date of mailing if sent within 40 days of first performing—note the Court wasn't analyzing the time but whether the FORM of service was proper
- Fact that it came back as refused/undeliverable should not impact otherwise proper service

QUESTIONS?

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