

# Florida's Construction Lien Law

## A Contractor's Perspective

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## Summary of Topics

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- Notices of Commencement
- Notices to Owner (NTO)
- Persons Entitled to Lien
- Persons Not Entitled to Lien
- Lienable Services
- Proper Payments
- Claim of Lien
- Liens on Leasehold Space
- Lien Waivers
- Owner Demand for Sworn St.



# Notice of Commencement

## Purpose

- Gives notice to the World.
- Provides an information source for non-privy Lienors.



## Elements of Notice of Commencement

- Furnished by Owner or Lender.
- Recorded in Clerk's Office and posted at job site.
- Contains all information required by law.
- Actual construction activity within 90 days
- If General Contractor bonded, copy of the payment bond must be attached.



## Legal Effect

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- Lasts 1 year (generally)
- Relation Back Rule
- Liens recorded outside 1 year period do not relate back.
- Mortgages recorded before claim of Lien but after Notice of Commencement are inferior.

## Effect of Failure to Record Notice of Commencement

- Problems with Local Building Department.
- Excuse for Subcontractors and Suppliers.



## When a Notice of Commencement Not Required to be Filed

- Public Job
- Prime Contract less than \$2,500 (or \$7,500 for HVAC repair/replace)
- Prime Contract for subdivision improvements (e.g., roads, sewer, water, curbs, clearing and grading)



# Notices To Owner (NTO)

## Purpose

- Impounds Owner's money otherwise payable to GC;
- Protects Owner from paying twice;
- Provides information.



## Elements of NTO

- Furnished by Lienors who have no contract with Owner;
- Must be substantially in statutory form (immaterial errors harmless) ;
- Must be served upon Owner;
- Under certain circumstances, must be served upon GC and Sub;
- Must be served within 45 days.
- NTO must be served by:
  - Certified or Registered Mail;
  - Hand Delivery;
  - Overnight or Second Day Delivery with Proof of Delivery;
  - Posting on Owner's Premises.

## Elements of NTO

- Copies of NTO, if required, must be served on GC and Subcontractor:
  - Supplier of Subcontractor must serve NTO on GC;
  - Sub-Subcontractor must serve NTO on GC as well as Owner;
  - Supplier to Sub-Subcontractor must serve GC, Subcontractor and the Owner.
- Failure to timely serve NTO on the Owner, GC or Sub (when required) results in loss of Lien rights;
- NTO must be received by Owner (GC or Sub) within 45 days after Lienor commenced work. Strictly enforced by the Courts;
- Commencement of Work for Purposes of 45 Day Rule:
  - Sub or Sub-Sub commences work on first day it performs labor at the site or delivers material to the site;

## Elements of NTO

- Supplier commences work on first day it delivers supplies to job site;
- Rule for specially fabricated materials.
- 45 Day period for serving NTO shortened by Final Payment Date.



## When Failure To Serve NTO Excused

- Laborers;
- Subdivision Improvement Project;
- Professionals (e.g., architects, engineers, surveyors);
- Subs who subsequently contract directly with Owner;
- Subs when the Owner and the GC share common identity.



# Persons Entitled To Assert A Construction Lien

## Persons Entitled To Assert A Construction Lien

- ✓ Contractors
- ✓ Subcontractors
- ✓ Sub-Subcontractors
- ✓ Materialman Contracting with any of above or with Owner





# Persons NOT Entitled To Assert A Construction Lien

## Persons NOT Entitled To Assert A Construction Lien

- × Sub-Sub-Subcontractor (third tier or more remote)
- × Materialman to Sub-Sub-Subcontractors
- × Materialman to a Materialman
- × Unlicensed Contractor or Subcontractor
- × Unlicensed Architect or Engineer



# Lienable Services And Materials

## Lien for Materials

- Consistent with direct contract;
- Consistent with Lienor's Contract;
- Materials must be incorporated:
  - Proof of Delivery of materials to job site is prima facie evidence of incorporation;
  - Owner may rebut Lienor's prima facie showing by proving diversion or non-incorporation;
- If Owner proves no incorporation, then Lienor may lose Lien rights unless Owner responsible for diversion or non-incorporation.

## Lien for Materials

- Exception to Incorporation Requirement:
  - Specially fabricated materials:
    - actually fabricated;
    - unique to this Project and not readily useable elsewhere;
    - manufactured in accord with contract;
    - does not need to be delivered to job site.

## Lien for Equipment

- May Lien for 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.

## Lien for Services

- May Lien for work actually performed that provides permanent improvement;
- A/E contracting with Owner may Lien for design work although not constructed.

## Lien for Miscellaneous Items

- No Lien for overhead and profit as separate line item;
- No Lien for delay damages;
- Lien permitted to include contractually based finance charges.



# Making Proper Payments To Lienors

## Purpose of Proper Payment Rule

- Avoid paying twice for same improvement.



## How an Owner Seeks to Protect Itself and Avoid Paying Twice

- Establish retainage to pay “hidden Liens” and costs to correct and complete;
- Have Architect certify amount of work completed for each payment application;
- Require Contractor to submit affidavit with each pay application;
- Require Contractor to consent to Owner’s right to make direct payments;
- Require Contractor with each pay application to submit partial or final Lien releases for subs and suppliers;
- Require Contractor with each pay application to submit its own partial Lien release.

## Final Payment

- Owner must receive Contractor's final affidavit before making final payment;
- Contractor's final affidavit only required to list unpaid Subs and suppliers who timely served NTO;
- Owner is responsible for paying Subs and suppliers not listed on Contractor's final affidavit who timely served NTO before final payment;
- Owner should withhold full final payment until all final Lien releases are received;
- If contractor refuses to provide Contractor's final affidavit, owner should wait 90 days and then pay in full or pro rata all persons who timely recorded claims of Lien and served an NTO.

## Lender Liability for Improper Payments

- Construction Lenders who disburse loan proceeds directly to Contractor must make proper payments and record NOC;
- Construction Lender may avoid duty by disbursing loan proceeds to Owner;
- Construction Lender that fails to make proper payments liable to Owner;
- Contractors, Subs and Suppliers have no claim against a Construction Lender for making improper payments.



# The Claim Of Lien

## Purpose

- Constructive Notice to Owner of Liens of persons not required to serve an NTO (e.g., contractors, professionals, materialman in privity with the Owner);
- Establishes priority of Lien for professional Lienors and subdivision improvement Lienors;
- Filing Claim of Lien within 90 days of last work permits Claim of Lien to relate back.

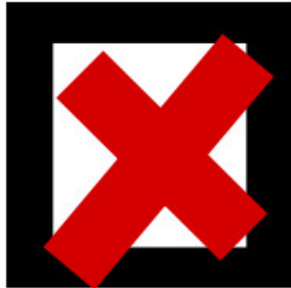
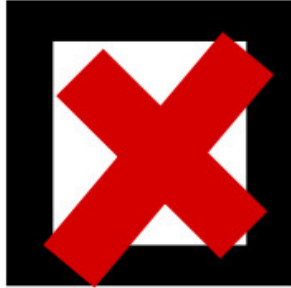
## Elements of a Claim of Lien

- All Lienors must record a Claim of Lien in order to perfect Lien rights;
- A Claim of Lien must be properly recorded:
  - Clerk's Office for the county where the improved property is located;
  - If property in two counties, Claim of Lien must be recorded in both counties.
- Copy of Claim of Lien must be served on Owner within 15 days:
  - Failure to properly serve permits Owner to defeat Claim of Lien if Owner can show prejudice from such failure to serve;
- Substantially in Statutory Form:
  - Claim of Lien must be signed under oath or verified by Lienor or agent;



## Elements of a Claim of Lien

- Claim of Lien generally must be recorded within 90 days of final work on the Project:
  - Only exception to above general rule occurs when GC abandons the Project or is terminated;
- In computing 90 days, last day may not fall on a Saturday, Sunday or legal holiday; and
- Repair, corrective, warranty, or minor punch list work does not delay the running of the 90 period.



## Errors and Omissions in the Claim of Lien Form

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- Enforceable absent prejudice.



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## Amending the Claim of Lien

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- Permissible within 90 days.

## When a Single Claim of Lien is Sufficient

- When several distinct parcels improved or several buildings constructed under a single direct contract, one Claim of Lien is sufficient; and
- When two or more direct contracts with different Owners covering improvements to adjacent parcels, separate Claims of Liens required.

# Liens On Leasehold Property

## Lessee's Interest

- When Lessee contracts for improvements, its leasehold interest is subject to a Lien.

## Lessor's Interest (Fee Simple)

- Under certain circumstances, Lienor contracting with Lessee may validly assert a Lien against Lessor's fee interest; however
- Lessor (fee simple owner) may limit exposure by recording:
  - the lease or a short form or Memorandum of Lease containing the specific language in lease prohibiting liens from attaching to fee simple interest; provided,

## Liens on Leaseholds

- The recording of the Lease or short form of Lease occurs before recording of the Notice of Commencement. and,
- Terms of Lease prohibit Liens from attaching to fee interest and a Notice is recorded before recording of the NOC; the Notice must include:
  - Name of Lessor;
  - Legal description of land;
  - Specific language in Lease(s) prohibiting Liens; and,
- A statement that all or a majority of leases applicable to the premises expressly prohibit Liens from attaching to Fee Simple interest of Lessor.



## Liens on Leaseholds

- Effect of Lessor’s Failure to Statutorily Limit Liability:
  - Lease not recorded:
    - when Lease, or short form of lease or Notice containing prohibition against Liens not recorded, fee interest is subject to Liens.
- Lease not expressly prohibiting Liens:
  - when Lease, whether or not recorded, fails to expressly prohibit Liens against fee interest, fee interest is subject to Liens.
- Terms of Lease Must Contemplate and Require Improvements:
  - In order for Lien to attach to fee interest, terms of Lease must require tenant to contract for improvements (“pith of lease”); and
  - If Lease only permits but does not require tenant improvements, then no Lien will attach to fee.

## Liens on Leaseholds

- Any Lienor on a TI project may serve a written demand, including a statutory warning, pursuant to Fla. Stat. 713.10, that requires Owner within 30 days to provide a Verified Response identifying lease language prohibiting liens from attaching.
- If Owner does not serve a Verified Response within 30 days, the fee simple interest of Owner becomes subject to the lien rights of the Lienor serving the Notice.

# Lien Waivers And Releases Of Lien

## In Contract with Contractor

- No Lienor can prospectively waive Lien rights;
- Lienors can execute Partial Releases through a date certain for work performed;
- Lienors cannot be forced to sign Release form different from statutory form, unless contract specifies other form;
- Partial Release of Lien does not cover retainage or extras;
- Lienor may expressly condition Release of Lien on clearance of check.

## Incorporating Waiver and Release forms into Contract Documents

- Owner wants Contractor and Subs to waive both Lien and contract rights with each execution of Partial Release.



# Owner's Demand For Sworn Statement Of Account

## Purpose

- Designed to protect Owner; and
- Gives Lienor opportunity to provide proof to Owner to allow Owner to make direct payment.

## Elements of Demand

- Owner or Authorized Agent must make demand;
- Any Lienor subject to demand; and
- Content of demand substantially in Statutory Form.




## Elements of Lienor's Sworn Statement

- Statement of Account must be sworn; invalid if not.
- Content must include:
  - Description of labor, services or materials furnished;
  - Amount due or to become due on Lienor's Contract; and
  - Amount paid on contract to date.
- Must be served on Owner; and
- Owner must receive Statement of Account within 30 days of demand.

## Effect of Lienor's Non-Compliance

- Lienor loses its Lien rights when:
  - It serves a false or fraudulent Statement of Account;
  - It fails to strictly comply with statutory elements applicable.
- Lienor does not lose Lien rights when:
  - Successive demands served by Owner;
  - Owner serves demand after Lienor files suit;
  - Owner serves demand at address other than address on NTO; or
  - Owner fails to serve demand on person designated in NTO.



**CONGRATULATIONS!  
YOU SURVIVED!**

**THANK  
YOU**

# QUESTIONS?



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