

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Art Menor, Chair, Real Property Problems Study Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date February 27, 2016)

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Position Type Chair of the Real Property Problems Study Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

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Appearances Before Legislators _____
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff _____
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support X Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

"Support the passage of an amendment to existing s. 713.132(3) to allow termination of a notice of commencement, provided for under s. 713.135 F.S., at any time whether or not construction has ceased as required under existing law."

Reasons For Proposed Advocacy:

To provide certainty as to the validity of a termination of a notice of commencement without having to cease or complete work on the entire project as required under current law. Since current law does not define "cessation or completion of work" there is always uncertainty whether a filed notice of termination effective even if a project or job is "shut down." Existing law also fails to provide a time period before construction may be recommenced. Many Florida lawyers think the owner must wait 30 days. Where new financing is desired to pay lienors or to complete an unfinished construction project, making sure that the new mortgage has priority over liens for future work is problematic and discourages, to some extent, the ability to obtain it. The

delay in shutting down a project, even for a day or longer, delays the completion of the project and the payment of lienors. See White Paper and exhibits, attached.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) N/A

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

None

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act relating to the safe resetting of priority, in part, between lienors and a mortgage or
3 deed that is given by the owner during the construction of improvements; amending s.
4 713.132(3), F.S.; and providing for an effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Subsection (3) of section 713.132, Florida Statutes, is amended to read:

9 713.132. Notice of termination.—

10 (3) An owner may ~~not~~ record a notice of termination at any time except after
11 completion of construction, or after whether or not construction ceases before completion.
12 However, if the notice of termination is recorded before completion of construction, then it may
13 be recorded only if the Contractor and all lienors giving notice have been paid in full or pro rata
14 in accordance with s. 713.06(4) for all labor, services or materials furnished through the effective
15 date of the notice of termination as provided in s.713.132(4). If an owner or a contractor, by
16 fraud or collusion, knowingly makes any fraudulent statement or affidavit in a notice of
17 termination or any accompanying affidavit, the owner and the contractor, or either of them, as
18 the case may be, is liable to any lienor who suffers damages as a result of the filing of the
19 fraudulent notice of termination; and any such lienor has a right of action for damages
20 occasioned thereby.

21
22 Section 2. This act shall take effect upon becoming a law.

RPPTL White Paper

Amendments to s. 713.132 F.S. – The “Stop-Start” Problem

I. SUMMARY

This proposal is an amendment to section 713.132(3) of the Florida Statutes to allow for the termination of a notice of commencement in cases where construction is ongoing without the requirement that all construction cease before recommencement and eventual completion of the project as under current law. Since liens may relate back to an existing notice of commencement, terminating it is required by most lenders making mortgages securing construction financing, including refinancing or modifying existing loans, and by most buyers taking title to the land during the course of construction. Having to stop work in order to reset the priority of liens is an unnecessary step that entails delay, expense, and uncertainty without any offsetting benefit to the owner or potential lienors.

By eliminating the unnecessary step of shutting down the project, with the attendant factual uncertainty as to whether all work had stopped, the lender can safely secure its loan, and the buyer can purchase the land by making sure the notice of commencement has been terminated. The owner will not have to pay for the delay of shutting down the project. Lienors would benefit from an infusion of new money coming into the project, along with the prospect of ensuring repayment on future work due to the lienor’s ability to offer better loan terms to the owner. Finally, the amendment may decrease transactional costs by streamlining the process of closing the new financing or the conveyance while the project is ongoing.

Under this amendment the owner remains obligated to pay in full or pro rata all contractors and lienors who have given notice to the owner for all work done to the date of the notice of termination in accordance with sec. 713.06(4). Further, nothing in the amendment changes the right of lienors to file liens for unpaid work for a period of up to 30 days after the notice of commencement is terminated.

The redraft of this statute has no fiscal impact on state funds.

II. CURRENT SITUATION

Under current law, an owner may file a notice of commencement in order to give notice to his general contractor’s subcontractors and suppliers. If so, then the owner can ensure the general contractor is making payment to his subcontractors and suppliers. If not, then the unpaid subcontractor may become a lienor by filing a claim of lien against the land. In that case, the lien relates back to the filing of the notice of commencement.

To ensure the original mortgage lender has priority over the liens of contractors, the owner must file the notice of commencement after the filing of the mortgage. The lender furnishing construction financing thus may enjoy legal priority over the lienors.

If the owner finds the amount of financing is not sufficient to complete the work, or is able to find more favorable terms from another lender during the course of construction, a new mortgage or a modification of an existing mortgage may be beneficial to the owner and all the contractors. Assuring priority to the new or modified mortgage, however, is problematic under the current law. In order to reset the priority of liens of the subcontractors and suppliers, current sec. 713.132(3) requires that work must be complete. The statute provides:

(3) An owner may not record a notice of termination except after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with s. 713.06(4).

In cases where construction is not complete (“mid-construction”), then the priority of liens cannot be reset until the work ‘ceases.’ This is problematic for a number of reasons. First, it is difficult to determine factually whether ‘work’ has actually stopped, as illustrated by the case of *Florida Wood Services, Inc., v. Osprey Links Joint Venture*, 720 So.2d 591 (Fla. 5th DCA 1998). In *Wood Services*, the concept of stopping work was given an expansive definition beyond the mere cessation of actual physical construction on the project site. The court found that as long as the general contractor continued to look for a replacement for the subcontractor who had left the project, work had not stopped so as to allow the owner to invoke the reset provisions of a similar statute, sec. 713.07(4).

Even if physical work stops on the actual construction site, it is not unusual for contracts to be negotiated, drawings amended, permits pulled, and off-site ‘work’ to continue off the construction site. The *Wood Services* case suggests that if off-site work does not cease, then the termination of the notice of commencement may not be effective. If that is true, then a new buyer or mortgagee whose interest is acquired mid-construction may be liable for all liens that would relate back to the terminated notice of commencement. This result might have a chilling effect on providing projects with new money or better terms of existing financing that might otherwise assure the completion of construction projects and the payment of the lienors themselves.

Second, even if work ceases, one question remains: Why does construction have to cease? Though required by current law, the statute’s legislative history is silent with

respect to its cessation of work requirement. Further, neither the statutory language nor case law indicates a comprehensive reason for such an imposition. In addition, the statute does not provide how long the work must be delayed before it can be recommenced presumably after the filing of a new mortgage, or modification of an existing mortgage, and the filing of a new notice of commencement. Perhaps sec. 713.132 (4) might have been intended to tell us as it provides that:

(4) A notice of termination is effective to terminate a notice of commencement at the later of 30 days after recording the notice of termination or the date state in the notice of termination as the date on which the notice of commencement is terminated.

Often subsection (4) has been thought by some to require that work cease for at least 30 days before it can recommence. A redacted email from a Florida real estate lawyer has been provided as an example of this common view. Notwithstanding the statute's ambiguity, presuming subsection (4) requires a 30 day cessation period for work, all the parties involved in the project are not well served by such a postponement. For instance, the owner may have lessees waiting anxiously for the delivery of tenant space in the new project. Likewise, contractors are anxious to earn their final payments in order to move on to other jobs that must be started or lost to other competitors. Additionally, contractors are often subject to penalties for delays in the completion of the project under their construction contract.

III. EFFECT OF PROPOSED CHANGES

By removing the cessation requirement from the notice of termination statute, the proposed changes eliminate ambiguities as to whether work has actually ceased, and, if so, how long work must be ceased prior to recommencement. In so doing, the problems for the owner and all contractors stemming from extending the time for completion are also eliminated. Finally, the mere filing of the notice of termination and payment in full of all work done up to the date of filing is all that is required to assure that priority may be reset, provided that the deed, new mortgage or modification of the existing mortgage is filed before the new notice of commencement. This simplified procedure will reduce the attendant costs of closing, and will reduce the risk to the closing attorneys who may be tasked with obtaining proof that the project is shut down pursuant to sec. 713.132(3). These cost savings will be passed along to those professionals engaged in the business of contracting, developing, and supplying work or materials to construction projects.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There is likely no fiscal impact on state and local governments that will result from any of the above proposals.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal may have a substantial, cumulative and beneficial economic impact on home builders, title insurance underwriters, title agencies, construction contractors, tradespeople, construction material suppliers, construction bonding underwriters, construction bond agents, and other real estate practitioners in the state of Florida. By facilitating this interim lending, funds would be readily available, even in troubled projects, which may lessen the amount of liens that will be filed because lienors will be paid.

VI. CONSTITUTIONAL ISSUES

The proposed amendment does not implicate any constitutional issues. The 1988 Florida Constitution allows for the creation of mechanic's lien rights for contractors and subcontractors. Florida's first mechanic's lien statute was enacted in the 1930's and the existing sec. 713.07(4) traces its roots at least as far back as the enactment of Chapter 713 in 1963. The rewrite of this section balances all of the interest and rights that currently exist under Chapter 713, while making it more economically advantageous for the parties involved.

V. OTHER INTERESTED PARTIES

So far, this Amendment has involved various standing committees of the Executive Council of the Florida Bar's Real Property, Probate and Trust Law ("RPPTL") Section. Among these are the members of the Construction Law Committee which has participated in this effort giving valuable guidance and helpful suggestions.

ATTACHMENTS

Exhibit A – The proposed Amendment to existing s. 713.132(3).

Exhibit B – Existing s. 713.132

Exhibit C – *Florida Wood Services, Inc. v Osprey Links Joint Venture, etc. et. al.*, 720 So. 2d 591 (Fla. 5th DCA 1998).

Exhibit 'A'
To White Paper re Amendment to s. 713.132(3)
Proposed Amendment

1 A bill to be entitled

2 An act relating to the safe resetting of priority, in part, between lienors and a mortgage or
3 deed that is given by the owner during the construction of improvements; amending s.
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12 However, if the notice of termination is recorded before completion of construction, then it may
13 be recorded only if the Contractor and all lienors giving notice have been paid in full or pro rata
14 in accordance with s. 713.06(4) for all labor, services or materials furnished through the effective
15 date of the notice of termination as provided in s.713.132(4). If an owner or a contractor, by
16 fraud or collusion, knowingly makes any fraudulent statement or affidavit in a notice of
17 termination or any accompanying affidavit, the owner and the contractor, or either of them, as
18 the case may be, is liable to any lienor who suffers damages as a result of the filing of the
19 fraudulent notice of termination; and any such lienor has a right of action for damages
20 occasioned thereby.

21
22 Section 2. This act shall take effect upon becoming a law.

Exhibit ‘B’
To White Paper re Amendment to s. 713.132(3)

2015 Florida Statutes

713.132 Notice of termination.—

(1) An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:

- (a) The same information as the notice of commencement;
- (b) The recording office document book and page reference numbers and date of the notice of commencement;
- (c) A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;
- (d) A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;
- (e) A statement that all lienors have been paid in full; and
- (f) A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

(2) An owner has the right to rely on a contractor’s affidavit given under s. 713.06(3)(d), except with respect to lienors who have already given notice, in connection with the execution, swearing to, and recording of a notice of termination. However, the notice of termination must be accompanied by the contractor’s affidavit.

(3) An owner may not record a notice of termination except after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with s. 713.06(4). If an owner or a contractor, by fraud or collusion, knowingly makes any fraudulent statement or affidavit in a notice of termination or any accompanying affidavit, the owner and the contractor, or either of them, as the case may be, is liable to any lienor who suffers damages as a result of the filing of the fraudulent notice of termination; and any such lienor has a right of action for damages occasioned thereby.

(4) A notice of termination is effective to terminate the notice of commencement at the later of 30 days after recording of the notice of termination or the date stated in the notice of termination as the date on which the notice of commencement is terminated, if the notice of termination has been served pursuant to paragraph (1)(f) on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner.

History.—s. 7, ch. 90-109; s. 5, ch. 92-286; s. 3, ch. 97-219; s. 4, ch. 98-135; s. 7, ch. 2012-211.

Exhibit 'C'
To White Paper re Amendment to s. 713.132(3)

Florida Wood Services, Inc., v. Osprey Links Joint Venture

590 So.2d 591 (Fla. 5th DCA 1998)

720 So.2d 591, 23 Fla. L. Weekly D2330
(Cite as: 720 So.2d 591)

H

District Court of Appeal of Florida,
Fifth District.
FLORIDA WOOD SERVICES, INC., a Florida
Corporation, Appellant,
v.
OSPREY LINKS JOINT VENTURE, etc., et al.,
Appellees.

Nos. 97-2480, 97-2503.
Oct. 16, 1998.
Rehearing Denied Nov. 18, 1998.

Materialman, which had provided lumber and hardware used by subcontractor which defaulted on apartment complex project, sought to foreclose its lien. The Circuit Court, Orange County, John H. Adams, Sr., J., granted owner's motion to discharge claim of lien. Materialman appealed. The District Court of Appeal, Peterson, J., held that: (1) owner did not have common identity with general contractor and was not in direct privity with subcontractor; (2) owner could not invoke notice of partial recommencement procedure; and (3) whether materialman's sworn statement of account was invalid depended on whether owner was prejudiced.

Orders partially vacated; remanded.

West Headnotes

[1] Mechanics' Liens 257 ↪99.1

257 Mechanics' Liens
257II Right to Lien
257II(E) Subcontractors, and Contractors'
Workers and Materialmen
257k99.1 k. Contract or Consent of
Owner. Most Cited Cases

Owner of property did not have common identity with general contractor, and thus was not in direct privity with subcontractor for purposes of determining whether owner could be required to

pay materialman's lien, although owner claimed that it could not be required to pay more than contract price with subcontractor.

[2] Mechanics' Liens 257 ↪111(1)

257 Mechanics' Liens
257II Right to Lien
257II(E) Subcontractors, and Contractors'
Workers and Materialmen
257k111 Default in Performance of
Principal Contract
257k111(1) k. In General. Most Cited
Cases

Owner of property could not invoke notice of recommencement procedure to defeat lien of materialman which provided lumber and hardware to subcontractor which failed to complete its portion of project, where general contractor continued with construction by finding replacement for subcontractor; such procedure could be invoked only if entire construction project ceased, not when only portion of project ceased on default of subcontractor not in privity with owner. West's F.S.A. § 713.07(4).

[3] Mechanics' Liens 257 ↪154(2)

257 Mechanics' Liens
257III Proceedings to Perfect
257k154 Verification of Claim or Statement
257k154(2) k. Sufficiency in General.
Most Cited Cases

Whether sworn statement of account given by president of materialman was invalid, such that materialman would be deprived of lien, because president was not formally administered an oath by attending notary depended on whether owner was prejudiced or adversely affected by president's failure to obtain properly administered oath. West's F.S.A. § 713.16(2).

*592 David A. Maney and Lorena L. Kiely of Maney, Damsker, Harris & Jones, P.A., Tampa, for

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Appellant.

Neil H. Butler of Butler & Long, Tallahassee, for Appellees.

PETERSON, Judge.

Florida Wood Services, Inc. (FWS), a materialman who furnished lumber and hardware to JM Construction Co., Inc. (JM), a subcontractor who was to perform framing and rough carpentry on a construction project, appeals the trial court's discharge of its claim of lien. We reverse.

Osprey Links Joint Ventures (Osprey), the appellee and owner of the property against which FWS's claim of lien was filed, contracted with Royal American Construction, Inc. (RAC), a general contractor, to construct an apartment complex. RAC obtained the services of JM who began to perform while obtaining supplies from FWS. FWS timely and correctly served its Notice to Owner pursuant to section 713.06, Florida Statutes (1995). JM failed to complete the framing and rough carpentry, after having been paid \$573,027.50, and failed to pay FWS all that it was owed for lumber and hardware furnished to the project. FWS then recorded its claim of lien for \$467,123.48 as allowed by Section 713.08, Florida Statutes (1995).

Osprey then attempted to invoke the Notice of Commencement provisions of Section 713.07(4), Florida Statutes (1995), by recording in the public records an "Affidavit of Partial Abandonment and Intent to Recommence Construction" and a "Notice of Partial Commencement" relating only to the framing and rough carpentry portion of the project. The total amount ultimately paid by RAC to JM and others to complete the framing and rough carpentry was \$2,677,435.65. JM's contract with RAC was for \$1,950,000. Osprey claims it should be relieved of FWS's claim of lien because the amount remaining unpaid on the RAC-JM subcontract, \$1,376,972.50 (\$1,950,000-573,027.50), should be offset against

the cost of completion thereby leaving no funds with which to pay FWS's claim.

When FWS sought to foreclose its lien, Osprey's motion to discharge FWS' claim of lien was granted. The trial court found:

1. Osprey and RAC had a "common identity" because they were related entities. Therefore, Osprey was in direct privity with JM and could not be required to pay more than the contract price with JM, to wit: \$1,950,000 to complete the framing and rough carpentry.

2. Osprey complied with section 713.07(4), Florida Statutes (1995), by recording the Affidavit of Partial Abandonment and Intent to Recommence Construction.

3. Because Osprey had to pay more than the original price established in the contract price between RAC and JM to complete the framing and rough carpentry, no further obligation existed to pay lienors for unpaid claims.

4. FWS failed to properly respond to a request for a sworn statement of account pursuant to section 713.16(2), Florida Statutes (1995) and its president failed to observe the formalities of giving the oath in that statement. The deficiency rendered void the earlier claim of lien.

In an imaginative attempt to complicate a simple construction lien dispute, Osprey argued successfully to the trial court that because Osprey and RAC were related, and shared a common identity, Osprey was in privity with JM. This concept formed the foundation for the next step of the argument. *593 Osprey, now in privity with JM, could invoke the commencement provisions of subsection 713.07(4), Florida Statutes (1995), file its "Notice of Partial Commencement", and eliminate any obligations to FWS because the cost of completing the framing and rough carpentry after JM defaulted was in excess of the original contract with JM. Osprey relied upon subsection 713.06(1),

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Florida Statutes (1995), in concluding that it could not be responsible to FWS for its \$467,124 claim of lien. We admire the imagination used to formulate this concept but decline the invitation to adopt it, given its total lack of statutory or case law support.

A. COMMON IDENTITY

[1] Osprey argues that it should be treated as having a direct contract with JM because it had a "common identity" with RAC, based on *Aetna Casualty & Surety Co. v. Buck*, 594 So.2d 280 (Fla.1992), *rev. denied*, 639 So.2d 976 (Fla.1994), and accordingly, is in privity with JM and entitled to offset based on the liability limits of the RAC-JM contract price.

In *Aetna*, the president and sole shareholder of both the owner and general contractor were the same individual. A materialman's claim of lien was served only upon the general contractor and not the owner. The court ruled that service of the lien only on the general contractor constructively provided notice to the owner of the claim. *See also C.L. Whiteside & Associates Constr. Co., Inc. v. Landings Joint Venture*, 626 So.2d 1051 (Fla. 4th DCA 1993). The court also concluded that the constructive service rendered the claim effective because the owner and contractor had a common identity, to wit: the same individual is the president and sole shareholder of the two entities. This common identity concept was established in order to allow a lienor, who serves notice to an individual serving in a dual corporate capacity for both the owner and general contractor, to enforce its lien when no prejudice exists for failing to serve the owner. We do not find the concept of common identity applicable where as here, its use by the related parties who chose to make themselves separate entities would defeat the claim of a materialman who diligently and accurately followed the construction lien law. Such an inequitable result would frustrate the rationale behind the concept of common identity, i.e., to prevent the related parties from reaping a windfall.

B. RECOMMENCEMENT

[2] Subsection 713. 07(4), Florida Statutes (1995), provides:

713.07 Priority of Liens.-

(4) If construction ceases before completion and the owner desires to recommence construction, he may pay all lienors in full or pro rata in accordance with s. 713.06(4) prior to recommencement in which event all liens for the recommenced construction shall take priority from such recommencement; or the owner may record an affidavit in the clerk's office stating his intention to recommence construction and that all lienors giving notice have been paid in full except those listed therein as not having been so paid in which event 30 days after such recording, the rights of any person acquiring any interest, lien or encumbrance on said property or of any lienor on the recommenced construction shall be paramount to any lien on the prior construction unless such prior lienor records a claim of lien within said 30-day period. A copy of said affidavit shall be served on each lienor named therein. Before recommencing, the owner shall record and post a notice of commencement for the recommenced construction, as provided in s. 713.13.

Even if we were to find Osprey's common identity/privity argument persuasive, we interpret subsection 713. 07(4) as prescribing a procedure that may be invoked when the owner has contracted with a general contractor and the entire construction project ceases, not when only a portion of the project ceases upon the default of a subcontractor not in privity with an owner. Throughout this "partial recommencement procedure" employed by Osprey, RAC never defaulted but continued to act as general contractor under its original contract with Osprey. The only difference before and after the "recommencement" in this case was that a different *594 framing and rough carpentry subcontractor completed JM's obligation at RAC's request and Osprey declined to satisfy FWS's lien for supplies integrated into the job.

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The notice of recommencement procedure cannot be interpreted in a way that allows the collusion of the owner and general contractor to defeat the claim of a materialman. Here, RAC failed to select a financially responsible subcontractor and may have failed to protect itself from JM's supplier after it received a copy of FWS's notice to owner in accordance with subsection 713.06(2)(a), Florida Statutes (1995). Osprey always had the opportunity to protect itself, after receiving FWS's notice to owner, by following the statutory procedure for making proper payments.

Our conclusion is further supported by the terms of the contract between Osprey and RAC. Those terms provide that costs which would cause the guaranteed maximum price of \$15,212,000 to be exceeded shall be paid by the contractor without reimbursement from the owner. When RAC's subcontractor, JM, failed to complete its portion of the construction project, that failure did not impact the contract between Osprey and RAC; accordingly, RAC honored its obligation and continued with the construction by finding a replacement for JM. Osprey, however, reacted in a way not contemplated by subsection 713. 07(4), Florida Statutes, which allows an owner to recommence construction if construction ceases before completion and further allows an owner to protect itself against liens arising before the cessation. Osprey, obviously desiring to reduce the economic loss for a group of related entities and more particularly RAC, treated JM's default as a cessation of construction. In furtherance of this idea, it recorded the "Affidavit of Partial Abandonment and Intent to Recommence Construction," a procedure not described either in subsection 713. 07(4) or in any reported case. Osprey's financial exposure should not have been affected by JM's default since it was RAC's obligation to deliver a completed project for the guaranteed price of \$15,212,000.

Accordingly, we reject Osprey's attempt to

create a "partial" recommencement provision under subsection 713. 07(4), so as to defeat FWS's claim of lien.

SWORN STATEMENT

[3] Pursuant to subsection 713.16(2), Florida Statutes (1995), an owner may make a written demand upon any lienor for a written statement under oath of his account showing the materials 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. FWS provided all this information in its sworn statement of account to Osprey. However, the deposition of FWS' president revealed that he was not formally administered an oath by the attending notary when he signed the statement. The trial court found the claim of lien invalid for that reason. Subsection 713.16(2), requires that a statement of account be under oath. The same subsection was amended in 1994 to state:

The negligent inclusion or omission of any information deprives the person of his lien to the extent the owner can demonstrate prejudice from such act or omission by the lienor.

Laws of Fla. Ch.94-119. In light of the legislative amendment in 1994, the question becomes whether the owner, Osprey, was prejudiced or adversely affected from FWS' president's failure to obtain a properly administered oath. See *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So.2d 623 (Fla.1995) (court construed claim of lien statute, section 713.08, which contained a similar provision that omission of details or errors in the claim of lien shall not "prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error," and held that failure of subcontractor's president to take an oath when he signed lien claim required remand to determine whether faulty claim of lien adversely affected owners). Cf. *Stresscon v. Madiedo*, 581 So.2d 158 (Fla.1991) (court construed a pre-1994 version of § 713.16(2) which contained no language permitting

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lack of prejudice to be considered in determining the validity of a sworn statement of account and held failure to notarize otherwise valid statement of account is fatal to lien claim). Accordingly, upon remand, the trial court is *595 instructed to determine whether, by a preponderance of the evidence, Osprey was prejudiced or adversely affected by FWS's faulty claim of lien. *Stunkel* at 627.^{FN1}

FN1. Some comment is warranted regarding the trial court's misplaced reliance on the strict requirement of an oath in the context of criminal cases where some interest of an individual is at stake. Specifically, the trial court relied on *Youngker v. State*, 215 So.2d 318 (Fla. 4th DCA 1968) (defendant's liberty interest at stake in prosecution for perjury based on his representations made in a waiver of lien; defendant successfully defended on the ground that his waiver of lien was not made under oath); *Collins v. State*, 465 So.2d 1266 (Fla. 2d DCA 1985) (defendant's liberty and privacy interests at stake in prosecution for trafficking in marijuana; defendant successfully defended on grounds that trial court erred in not suppressing the fruits of the search based on an invalid search warrant due to lack of oath by police officer who sought the warrant); and *State v. Johnston*, 553 So.2d 730 (Fla. 2d DCA 1989) (petitioner's privilege to operate a motor vehicle at stake; court held that the arresting police officer's failure to furnish the Department of Highway Safety and Motor Vehicles with a statement of probable cause under oath consequently did not provide the department with jurisdiction upon which it could proceed with any administrative action to suspend the petitioner's privilege to operate a motor vehicle). In these cases, the courts have strictly construed the requirement of an oath against the state

and in favor of the individual whose liberty interests, and in the later case, whose driving privileges, were at stake. Such cases are different from the instant case which is a civil suit and what is at stake is the complete loss of an otherwise valid claim of lien. Indeed, such drastic loss of an otherwise valid claim of lien as has occurred in the past, *see Stresscon*, has been cured by the 1994 Legislative amendment to subsection 713.16(2).

CONCLUSION

We vacate the trial court's orders finding that Osprey and RAC had a "common identity," the conclusion of law set forth in paragraphs 16-18 of the "Findings of Fact and Conclusions of Law" dated August 27, 1997, the "Final Judgment on Counts 1, V and VII of the Amended Complaint" dated August 27, 1997, and the award of attorney's fees to Osprey.

We remand to the trial court to:

- 1) Determine whether, by a preponderance of the evidence, Osprey was prejudiced by the omission of a formal oath in FWS's sworn statement of account.
- 2) If Osprey cannot demonstrate prejudice, treat the claim established by FWS as a valid claim of lien and determine the extent of Osprey's proper payments and whether Osprey has, or should have, retained funds from payments due to RAC in order to satisfy FWS's liens.

ORDERS PARTIALLY VACATED;
REMANDED.

GOSHORN, J., and ROUSE, R.K., Jr., Associate Judge, concur.

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