BEST PRACTICES FOR EVALUATING & PREPARING CLAIMS OF LIEN

By: Lee A. Weintraub, Esq.
BECKER & POLIAKOFF, P.A.
One East Broward Blvd., Ste. 1800
Fort Lauderdale, Florida 33301
Phone: 954-985-4147
Fax: 954-985-4176
lweintraub@bplegal.com
www.becker-poliakoff.com

The task of preparing claims of lien for clients or reviewing and evaluating liens recorded against your client's property takes great care and attention, but can be simplified if an organized consideration of a select list of issues is undertaken. This paper will identify and discuss many of those issues, first from the perspective of the attorney preparing the lien on a client's behalf, then from the perspective of an attorney looking for ways to challenge the facial validity of the lien.

COMPILING AND DRAFTING CLAIMS OF LIEN

Form of Claim of Lien

The starting point for preparing a lien must be the form of the document itself. §713.08(3), Fla. Stat., contains the form of lien to be used, although the drafter must only "substantially" comply with the form, provided the statutory warning language is included at the top of the document. There is still no case law addressing the enforceability of a lien lacking the warning language, although trial court rulings appear to be split between enforcing and not enforcing liens lacking warning language. Courts enforcing the lien absent the warning tend to rely upon §713.08(4)(a), providing the omission of any detail in the lien shall not, within the discretion of the trial court, prevent the enforcement of the lien against an owner who has not been adversely affected by the omission. However, courts refusing to enforce the lien recognize the substantially similar language between §713.08(3) ("and [the form of the lien] includes the following warning") and §713.06(2)(c), addressing notices to owner (the notice to owner "must include the information and the warning contained in the following form"). Although, as stated above, there is still no case law addressing the lack of the warning language in liens, there are cases addressing the lack of the warning in notices to owner. Those cases hold a notice to owner is unenforceable absent the warning language. In *Mirror & Shower Door Products, Inc. v. Seabridge, Inc.*, 621 So. 2d 486, 487 (Fla. 4th DCA 1993), the court held a claimant did not substantially comply with the notice to owner

requirement by hand delivering a non-conforming notice to owner and orally giving the statutory warnings. Correctly ruling that the Construction Lien Law must be strictly construed, the court found the omission of the statutory warnings was not an immaterial error or omission that the statute would excuse in the absence of the owner's prejudice. Additionally, in *Gulfside Properties Corp. v. Chapman Corp.*, 737 So. 2d 604, 607 (Fla. 1st DCA 1999), the court rejected a lienor's argument that service of invoices and a job proposal constituted compliance with the notice to owner requirement. The court specifically pointed out those documents did not include the mandatory statutory warnings, rendering service of those documents in lieu of a notice to owner fatal to enforcement of the construction lien.

Although on their face both of those cases stand for the proposition that the statutory warning requirement in notices to owner is important enough to defeat any attempt to enforce a lien in their absence, both cases are also easily distinguishable. In *Gulfside*, the lien claimant did not even serve a notice to owner at all, but rather served only the invoices and the job proposal. Despite the emphasis in the court opinion about the importance of the statutory warning language and the effect of its absence from documents served on the owner, the case could still be factually distinguished by the fact that no notice to owner was served. In *Mirror & Shower Door Products*, the court interpreted the 1991 version of §713.06 providing "the notice *must* be in substantially the following form", whereas the current lien statute provides "the claim of lien shall be sufficient if it is in substantially the following form, and includes the following warning." One could convincingly argue the lien statute is not as mandatory regarding the use of the statutory form as the notice to owner statute interpreted in *Mirror & Shower Door*. Nevertheless, as stated above, despite good arguments available to either side, trial courts appear to be split on the enforceability of claims

of lien lacking the statutory warning language. Until an appellate court decides this issue, it will continue to be a potential trap for the unwary.

Is Your Lienor Client Properly Licensed?

Pursuant to §713.02(7), unlicensed lienors lack lien rights. This is further confirmed by §489.128(1), Fla. Stat., providing contracts are unenforceable in law or equity by unlicensed lienors[1]. Therefore, when preparing a claim of lien, the lawyer should check the client's licensure status. Inquiry should be made as to whether the scope of work requires a license and, if so, whether the business organization recording the lien is properly qualified. §489.128(1)(a), Fla. Stat.

A lienor may not be considered unlicensed when they submit an application to designate a qualifying agent, but the Licensing Board fails to act upon the application within the statutorily required time limits. *DeBiasi v. S&S Builders, Inc.,* 593 So. 2d 314 (Fla. 4th DCA 1992) (unlicensed lienor was permitted to enforce a lien when the Licensing Board misplaced or mishandled the qualifier application).

The existence of a license alone may not be sufficient. A lawyer should also consider the scope of the license, both in terms of scope of work and geography, especially if a local license is involved, to ensure the lienor holds the **proper** license. Furthermore, if the project is a design/build arrangement, the lawyer should ensure that both the contractor performing the work and the professional designing it were licensed and at least one of them signed the design/build contract. It is ok for either one of those entities to sign the contract, provided the other scope of work (construction vs. design) is subcontracted to an entity properly licensed for that scope.

[1] Section 713.02(7) goes on to provide that, although unlicensed lienors may not enforce claims of lien, the unlicensed contractor's subcontractors, suppliers, customers and sureties continue to retain all rights and obligations under their respective contracts, bonds, or the lien law. Therefore, only the unlicensed entity loses its rights at law and equity. See also §489.128(3), Fla. Stat.

For the purposes of determining enforceability of liens and contracts, a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of its construction contract or, if the contract fails to specify an effective date, the date on which the last party to the contract executed it. If such a date still can not be determined, then the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date upon which it provided labor, services or materials under the contract. §489.128(1)(c), Fla. Stat.

Ensure There is No Bond That Would Exempt the Project From Liens

When gathering documents for use in lien preparation, be sure to obtain a copy of the Notice of Commencement, critical for several reasons, including the references to the property's legal description, owner's name and address, and any payment bonds on the project. Pursuant to §713.02(6), payment bonds provided pursuant to §713.23 exempt the owner's property from the Lien Law except for the lien of the contractor furnishing the bond. Pursuant to §713.23(1)(a), a copy of the bond must be attached to and recorded with the Notice of Commencement. Therefore, before preparing a claim of lien, you should review the Notice of Commencement for reference to a bond that would exempt the property from liens.[2]

Reference to an attached payment bond does not necessarily end your inquiry, as you must review the form of the bond to ensure it complies with §713.23. Although §713.02(6) exempts property from liens when secured by §713.23 unconditional payment bonds, such an exemption does not exist for conditional payment bonds under §713.245. Conditional payment bonds insulate the property from liens only to the extent the property owner paid the contractor for the scope of work encompassed in a claimant's lien. §713.245(11). Otherwise, the owner's property is not exempt from liens and all lienors must still comply with the Lien Law to perfect lien rights.

[2] Of course, omission of any reference to a payment bond in the Notice of Commencement does not necessarily mean the project is unbonded, as §713.13(1)(e) permits an unrecorded bond to be used as a transfer bond against liens except for the lien of the contractor in privity with the owner.

§713.245(3) Although the lien transfers to the bond to the extent of payments made to the contractor, if the lien exceeds the amount paid to the contractor, then the excess amount will remain as a lien on the property. §713.245(10) and (11).

Conditional payment bonds are easily identified by the statutory legend on the first page in at least ten point type stating the surety's obligation shall only be to the extent of payments made by the owner to the contractor. §713.245(1)(c). For a conditional payment bond to be enforceable, the subcontract between the contractor and the lienor must have an enforceable "pay if paid" clause, unequivocally stating that the lienor is not entitled to payment from the contractor except to the extent the owner first pays the contractor for the lienor's scope of work. §713.245(1). If the subcontract lacks a legally valid "pay if paid" clause, the bond will be deemed an unconditional statutory payment bond under §713.23. *North American Specialty Ins. Co. v. Hughes Supply, Inc.*, 705 So. 2d 616, 618 (Fla. 4th DCA 1998).

Ensure All Work for Which the Client is Billing is Lienable

Rather than merely accepting your client's word regarding the validity of the lien amount, a prudent lawyer should first review the scope of work underlying the client's billings to ensure all work is lienable. Otherwise, should a client subsequently lose its lien claim based upon a finding of non-lienable work, the client will question why proper counsel was not provided when the lien was prepared. Therefore, obtain a copy of the underlying contract between the client and its customer and all change orders and invoices reflecting the full scope of work for which the client is billing and ensure all items are lienable.

The lien must be entirely for work performed pursuant to the client's contract. Discrepancies between the scope of work identified in the contract and the work identified in the lien may preclude the lien's enforcement. In *Lofter v. Rashide*, 523 So. 2d 1230 (Fla. 3d DCA

1988), the materials to be provided by the lienor were referenced in its contract as "Peach No. 2 pr." The lien identified the work as "completely installed drapes on traverse rods screwed into the walls." Finding the written contract at variance with the lien, the court refused to enforce the lien.

The *Lofter* holding was reaffirmed by the Third District Court of Appeal in *Keller v. Newman Sons, Inc.*, 756 So. 2d 120, 122 (Fla. 3d DCA 2000). However, the *Keller* court found the homeowner was estopped from asserting that the lienor had supplied non-conforming materials because the homeowner knowingly accepted the non-compliant equipment from the lienor in exchange for a reduction in the contract price. The homeowner's estoppel prevented what could have been an adverse court ruling denying enforceability of the lien.

Lien rights are only available to those who "improve" real property. §§713.05 and 713.06. "Improve" is defined in §713.01(14) in a very broad manner - essentially equating it to a permanent fixture or improvement of property. In the absence of a permanent benefit to the property, liens cannot be enforced against the owner's interest. *Palm Beach Mall, Inc. v. Southeast Millwork, Inc.*, 593 So. 2d 1121, 1122 (Fla. 4th DCA 1992). Stated otherwise, non-permanent work, such as minor repairs or maintenance, is likely not lienable.

When describing the scope of work in a lien, materials specially fabricated at a place other than the project site, but not incorporated into the project, as well as the contract price or value thereof, must be separately stated in the lien. Sect. 713.08(1)(c), Fla. Stats.

A lawyer should be especially cautious when considering the lienability of unapproved change order work. Although the definition of "contract price" in §713.01(7), by which a lien amount may be judged, includes "the price of extras or change orders", the phrase "extras or change orders" is a separately defined term requiring authorization by the owner. §713.01(11). In *Hobbs Const. & Development, Inc. v. Presbyterian Homes of the Synod of Fl.*, 440 So. 2d 673 (Fla. 1st

DCA 1983), a lienor with a cost plus contract liened for sums exceeding the guaranteed maximum price for delays, additional field overhead expenses, overtime labor, and interest. The court, pointing out that claims exceeding the guaranteed maximum price require substantiation by valid change orders, denied the lienor's claim for amounts unsupported by written change orders pursuant to the terms of the contract. The lienor was found liable for fraudulent lien. Therefore, when compiling a lien for a client that includes claims for extra work unsupported by written change orders, an attorney should discuss with the client the legal implications and potential exposure for fraudulent lien. Of course, written change order requirements are imposed only if the contract requires it, but they are waivable in a number of instances, including course of conduct, estoppel, express waiver, and other exceptions found in case law. Although verbal change orders may be enforceable in both contract and lien scenarios notwithstanding a written change order requirement, a lawyer should discuss the risks and implications with his or her client before including change order amounts in the lien.

Recovery for overhead and profit as separate items is not within the purview of the Lien Law. Contractors may not lien solely for overhead and profit when the rest of their job costs have been paid. This would expose a contractor to fraudulent lien liability. *Martin v. Jack Yanks Construction Co.*, 650 So. 2d 120, 121-122 (Fla. 3d DCA 1995). However, overhead and profit may be included as part of the contract price or reasonable value of the work when combined with claims for non-payment of the underlying costs as well.

An interesting question is whether bonuses due under a contract for completing a project under budget or ahead of schedule are lienable. Although there is no case on point addressing this issue, the ambiguously worded case of *C.V. II, Inc. v. Cury Corp.*, 559 So. 2d 231, 233 (Fla. 4th DCA 1990) provides some guidance. It appears the lienor included in its lien a claim for a

bonus for completing the project under budget. The underlying contract entitled the lienor to 50% of the difference between the budget amount and the actual cost. It appears the owner transferred part of the lien to a bond, but did not include in the bond amount the buy-out provision for the lienor's bonus. The court appeared to require the owner to increase the transfer bond amount to include the lienor's "buy-out" bonus. Therefore, although not directly on point nor clearly worded, it appears the Fourth District Court of Appeal blessed the inclusion of a bonus within a lien amount when properly authorized by contract.

Similarly ambiguous is the issue of whether a lienor may include a liquidated damage claim in its lien. Although, if properly authorized by contract, a lienor may be able to include actual delay damages as part of the reasonable value of work performed, liquidated damages are a predetermined sum of money charged on a per diem basis for each day of delay and do not necessarily reflect the actual costs incurred by the lienor attributable to the delay. §713.01(7), defining "contract price," permits liens for costs attributable to breaches of contract, arguably including liquidated damages. The statute goes on to provide that "no penalty or liquidated damages between the owner and a contractor diminishes the contract price ***as to any other lienor.***" [emphasis added]. This provision suggests ambiguously that liquidated damages will not impact the lien amount available to any lienor other than the contractor entitled to such a claim. Therefore, it is arguable that liquidated damages, even though not reflecting actual costs incurred due to a delay, may nevertheless be lienable. Absent any case on point, clients should be advised of the risks of fraudulent lien exposure when such claims are included in the lien.

Chain of Contracts: Does Your Lienor Have Lien Rights?

§713.01(18) identifies the class of lienors entitled to lien rights. They are the contractor; subcontractors; sub-subcontractors; laborers; materialmen contracting with the owner, contractor,

subcontractor, or sub-subcontractor; and professional lienors. Everybody else is deprived of lien rights. A prudent lawyer should ensure that his or her client does not fall into an excluded category before preparing a lien.

Subsubsubcontractors and any person or entity in privity with subsubsubcontractors lack lien rights. Suppliers to suppliers do not have lien rights. §713.01(18)(e). Unlicensed contractors lack lien rights. Sect. 713.02(7). Section 713.01(20), defining "materialman," requires material suppliers to furnish materials "on the site of the improvement or for direct delivery to the site of the improvement." Therefore, suppliers of materials shipped to the customer's warehouse to be stocked until needed on future jobs may not be afforded lien rights.

Laborers other than architects, landscape architects, engineers, surveyors, mappers, and the like who do not personally perform labor or services on the project site do not constitute "laborers" entitled to lien rights under §713.01(16). Nobody except the contractor in privity with the owner is entitled to lien rights on projects where the direct contract price is $2,500.00 or less. §713.02(5). Finally, nobody performing or repairing destructive testing pursuant to the Chapter 558 notice and opportunity to cure statute is entitled to lien rights unless the owner contracted for the testing or repairs. Sect. 558.004(2)(g), Fla. Stats.

Although not included within the statutory definition of "contractors", architects, landscape architects, interior designers, engineers, surveyors, and mappers are afforded lien rights for services used in connection with improving property or supervising construction work pursuant to §713.03. If any of these professional lienors had a direct contract with the owner, then lien rights will be available even if the owner abandons any intent to construct and the property is never actually improved. §713.03(2). Professional lienors are not required to serve either notices to owner or contractors final affidavits. §713.03(3). Unlike a contractor,

unlicensed architects may lien for their services on 1- or 2- family residences or townhouses because §481.229, Fla. Stat., provides an exemption from the licensing requirements for design work on those projects. Notwithstanding the above-foregoing, architects, landscape architects or engineers improving property pursuant to a design-build contract qualify for the definition of "contractor" and must comply with all requirements under the Lien Law for contractors, including a contractor's final affidavit. §713.01(8). Lien rights are not available to design professionals providing services only as expert witnesses in arbitrations or litigation. *Robert M Swedrowe, Architect/Planners, A.I.A., P.A. v. First American Investment Corp.*, 565 So. 2d 349, 353 (Fla. 1st DCA 1990).

Confirmation of Property's Legal Description and Ownership

A prudent lawyer should check the status of title of the subject property when preparing a lien for a number of reasons. First, the client should be advised if prior and superior encumbrances on the property may dilute the security of its lien to such an extent that enforcement by foreclosure may be fruitless. In this regard, consider whether the lien will be recorded during the duration of the Notice of Commencement such that it will relate back to the date of recordation of the Notice for priority purposes. §713.07(2).

Second, and much more important, an attorney should verify the current ownership of the property, both to ensure that the correct property is liened and to consider whether the nature of ownership may require application of sometimes complicated law to complicated property ownership arrangements. For example, it is clear that, when property is held by the owner in fee simple absolute, then the entire fee interest of the owner may be subject to a construction lien. However, ownership interests short of fee simple may present complicated issues for the preparer of a lien.

When the party contracting for an improvement as an owner has no legal or equitable interest in the property, a construction lien will not lie. *Donald M. Paterson, Inc. v. Bonda*, 425 So. 2d 206 (Fla. 4th DCA 1983). Where the property is held in trust, so that legal and equitable titles are separated, the interest of the party contracting for the improvement as the owner is the interest subject to a lien. *Chapman v. St. Stephens Protestant Episcopal Church*, 136 So. 238 (Fla. 1931); *Amatrudi v. Blake*, 117 So. 2d 416 (Fla. 3d DCA 1960). See also §713.01(23), defining "owner" as a person who owns any legal ***or equitable interest*** in real property**.**

Although the definition of "real property" subject to the lien law excludes public property (§713.01(26)), a lienor working on public property as part of a private construction job may lien the owner's private property for work performed on the public property. This is the only instance where a lienor may lien property for work not actually performed on that lot (other than, of course, specially fabricated goods not incorporated into the project). §§713.04, 713.05, and 713.06.

What happens if a lienor is working on a residence owned by husband and wife, but only one spouse signed the direct contract? §713.12 provides a contracting spouse shall be deemed the agent of the other to the extent of subjecting the interest of the other spouse in the property to construction liens. However, this applies only where the contracting spouse is not separated and living apart from the other spouse. The statute binds the non-contracting spouse unless that spouse, within ten days after learning of the contract, gives the contractor notice and records an objection in the public records in the county where the land is located. Unless the non-contracting spouse meets this burden, courts will foreclosure the lien against that spouse's interests by finding a consent, based on agency, to the contract. Legal documents may not need

to be served upon the non-contracting spouse, as the contracting spouse is treated as their agent for that purpose.

When a lessee contracts for improvements, the leasehold interest is subject to construction liens. Section 713.10 addresses the extent to which the fee simple owner may be liable to satisfy the lien. As a first step, a lien may not be recorded against the lessor's fee simple interest unless the lease agreement **requires** the lessee to make certain improvements, in which case the improvements constitute the pith of the lease. *14th & Heinberg, LLC v. Henricksen & Co., Inc.*, 877 So. 2d 34 (Fla. 1st DCA 2004). No lien attaches to the fee simple interest if the lease simply **permits** the lessee to make improvements. The lease must **require** the lessee to construct the improvements. *Miracle Center Development Corp. v. M.A.D. Construction, Inc.*, 662 So. 2d 1288, 1291 (Fla. 3d DCA 1995). The mere fact that a lease gives a lessee an option to make improvements does not necessarily permit construction liens to attach to the lessor's interests. *Joans v. Wright*, 391 So. 2d 313 (Fla. 2d DCA 1980). The lessor's mere acquiescence to the construction of improvements contracted for by the lessee is not, by itself, sufficient to establish the lessor's liability to a construction lien claimant. *Budget Electric Co. v. Stauss*, 417 So. 2d 1143, 1144 (Fla. 5th DCA 1982); *Davidson Lumber Co. v. Sullivan*, 403 So. 2d 560 (Fla. 3d DCA 1981).

Even if that standard is met, §713.10 allows a lessor to limit its liability for liens by 1) prohibiting liability for construction liens against the lessor's interests in the express terms of the lease; and 2) recording the lease or a short form thereof in the public records in the county where the property is located. If a lessor expressly limits liability for liens in the lease, but fails to record the lease or a short form memo in the public records, the lessor may nonetheless be found liable for liens if the construction of improvements is an integral part of the lease (constituting

the pith of the lease). *Heflin v. W.D.M. Corp.*, 391 So. 2d 357 (Fla. 2d DCA 1980); *Van de Costas, Inc. v. Rosenberg*, 432 So. 2d 656 (Fla. 2d DCA 1983). Section 713.10 imposes a duty on the lessee to notify the contractor of the lien prohibition in the lease. A knowing or willful failure of this requirement renders the contract between the lessee and the contractor voidable at the contractor's option. Lienors who can not enforce a construction lien against the lessor's interest may consider seeking recovery against the lessor for equitable lien or unjust enrichment.

Pursuant to section 713.10(3), a lienor may serve a written demand upon the lessor, in a separate document from the notice to owner, for a sworn copy of the lease provision prohibiting liens. The lessor's failure to serve a copy within thirty days, or the service of a false or fraudulent copy, will subject the lessor's interests to liens provided the lienor perfected its lien rights and did not have actual knowledge of the lease's prohibitions against liens.

The lessor's interests are not subject to liens when the lessee is a mobile homeowner leasing a mobile home lot in a mobile home park. §713.10(2)(b)(3).

When a party under contract to buy real property contracts for an improvement built before that party receives legal title, construction liens will attach to the extent the party subsequently acquires title. *Adamson v. First Federal Savings & Loan Ass'n of Andalusia,* 519 So. 2d 1036, 1037 (Fla. 1st DCA 1988). Under § 713.10, a lienor can reach the property interests of the person contracting for the improvement as said interests exist upon the commencement of the improvement or are thereafter acquired.

If the owner, for the purpose of the chain of contracts, no longer owns the property at the time of the lien, such as a buyer of property who never takes title or a tenant constructing for improvements who is later evicted, the lien will attach to the physical improvement itself if removal of the improvement from the land is practicable. Sect. 713.11, Fla. Stats. The court, in

enforcing the lien, may order the improvement to be separately sold and the purchaser may remove it within such reasonable time as the court may fix. The purchase price for the improvement is then paid into the court registry. The owner of the land upon which the improvement was made may demand that the land be restored substantially to its condition before the improvement was commenced, in which case the court will order its restoration and the reasonable costs therefore will be first paid out of the purchase price and the remainder will be paid to lienors and other encumbrances in accordance with their respective rights.

Under §713.01(23), a condominium association is deemed to own the common elements or association property. The right to enforce a construction lien against condominium property is controlled by §718.121, Fla. Stat. If the lien is recorded before the declaration of condominium is recorded, the lien may be enforced against the entire property, including the common elements. *Southern Colonial Mortgage Co. v. Medeiros*, 347 So. 2d 736 (Fla. 4th DCA 1977). However, §718.121(2) prohibits the enforcement of construction liens attaching after the declaration of condominium has been recorded against the common elements, even if the lienor furnished work in that area. In that instance, the lienor may enforce its lien against all the condominium parcels in the proportions for which the owners are liable for common expenses. Each unit owner is entitled to release the lien from his or her unit by paying a pro rata share of the lien amount in proportion to the unit owner's pro rata interest in the condominium property. *Royal Ambassador Condo Ass'n. v. East Coast Supply Corp.*, 495 So. 2d 932, 934 (Fla. 4th DCA 1986); §718.121(3). The unit owner's right to obtain a lien release for his or her parcel includes the right to transfer the lien claim to a bond pursuant to §713.24, but only as to the proportionate amount of the lien attributable to the individual condominium parcel. *Trintec Construction, Inc. v. Countryside Village Condominium Ass'n, Inc.*, 992 So. 2d 277 (Fla. 3d DCA 2008). Liens

may be enforced against individual condominium parcels when the unit owners expressly request that construction work be performed on the unit. §718.121(2). Condominium associations may lien units for unpaid assessments, in which case their lien relates back to the date on which its original declaration of condominium was recorded. Consequently, in most instances, association liens for assessments will take priority over construction liens even if the association liens are recorded after the construction lien. §718.116(5)(a), Fla. Stat.

A deed to a subsequent purchaser of property recorded before a construction lien takes priority over the lien and destroys lien rights. §713.07(3). The exception is if the lien was recorded during the duration of a Notice of Commencement, in which case the lien relates back in time to become effective on the same date as the Notice of Commencement. §713.07(2).

As a final point, attorneys should be aware that, although the statute is vaguely worded and is inserted in the code governing mortgages, §697.10, Fla. Stat., is worded broadly enough to potentially make attorneys liable for damages, costs and attorneys fees for preparing, even though not signing, a lien with an inaccurate legal description that impairs somebody's property. Great care should be taken to ensure the legal description in the lien is accurate.

Review Back-up for Client's Lien Accounting

Although nobody expects a lawyer to fulfill the role of a project accountant, a prudent attorney should obtain the contract, change orders, and project billings to ensure that nothing blatantly non-lienable is included in the lien amount. Ensure that client change orders do not include non-lienable items such as copy expenses, courier costs, postage, and the like. Make sure the client is liening only for work performed. If the project was terminated before completion, make sure the client is not liening for the full contract price, including unperformed work or lost profits. *Viyella Co. v. Gomes,* 657 So. 2d 83, 85 (Fla. 3d DCA 1995). Although

contract law may support the client's claim for lost profits, the Lien Law will not and liens for incomplete work or lost profits will subject the claimant to liability for a fraudulent lien.

§713.31(2)(a) defines a fraudulent lien as any lien in which the lienor has: 1) willfully exaggerated the lien amount, 2) willfully included a claim for work not performed upon or materials not furnished to the property being liened (such as liening for incomplete work or lost profits); or 3) compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration.

A minor mistake or error in a lien or a good faith dispute as to the amount due does not constitute a willful exaggeration that would defeat an otherwise valid lien. §713.31(2)(b). Counsel plays an important role in avoiding a finding of fraudulent lien, as advice of counsel is an ameliorating factor in avoiding fraudulent lien liability. Whether the lienor sought advice of counsel before preparing and filing the lien is relevant to determining the lienor's intent and good faith. However, a lienor can rely on consultation with counsel as a defense to a fraudulent lien claim only if the lienor fully and completely disclosed all pertinent facts to the attorney from whom the advice was sought. *Sharrard v. Ligon*, 892 So. 2d 1092, 1096 (Fla. 2d DCA 2004). If, during litigation to defend against a fraudulent lien claim, the client wishes to raise advice of counsel as a defense, careful thought should be given to the possible corresponding waiver of the attorney/client privilege as to all communications between the lawyer and the client pertaining to the lien preparation. It is readily foreseeable that, by raising advice of counsel as a defense to a fraudulent lien claim, the lienor may waive the attorney/client privilege as to those communications.

Finally, when representing a material supplier who provided materials to a customer on an open credit account, an attorney should review the claimant's lien accounting to ensure

payments received were properly applied to the appropriate accounts in accordance with §713.14. That statute requires the supplier to demand from the person making payment a designation of the specific account and items of account to which the payment is to apply. If payments received on one project are misapplied to the wrong project, the owner will have a defense to the lien claim to the extent of the misapplied payments. Section 713.14 applies equally to subcontractors and sub-subcontractors receiving payment for materials only and provides that, upon a payment made by the owner to the contractor for materials which is subsequently paid over to the subcontractor, sub-subcontractor or supplier, the recipient of the payment must demand a designation of the specific account and items to which the payment is to be applied. Failure to make such demand may deprive the lienor of lien rights to the extent of the payment involved if said payment is misapplied. Additionally, upon receiving a designation of the application of payment, the lienor must apply the payment in accordance therewith. Counsel preparing a lien on behalf of a lienor who received payments for materials only at some point during the project should review §713.14 and the client's accounting records to ensure compliance or, if appropriate, counsel the client accordingly.

Timely and Proper Notice to Owner

A prudent attorney should also obtain a copy of the client's Notice to Owner and evidence of service to ensure the form of the Notice complies with §713.06 and contains the mandatory statutory warning. The attorney should also confirm the Notice was timely served in accordance with §713.06(2)(a) (received by the owner within 45 days of the first day of work) or §713.18(2) (mailed to the owner within 40 days after the first day of work with a corresponding registered or certified mail log).

When evaluating the form of the Notice to Owner for compliance with the statute, remember that errors or omissions in the Notice do not prevent the enforcement of a lien against a person who has not been adversely affected by same. §713.06(2)(f). If specially fabricated materials are involved in the client's scope of work, the first day of work from which a Notice to Owner deadline is measured is the first date of fabrication of the materials, rather than the first date of delivery. *Oolite Industries, Inc. v. Millman Construction Co., Inc.*, 501 So. 2d 655, 656 (Fla. 3d DCA 1987). Otherwise, for non-specially fabricated materials, a supplier's first day of work for Notice to Owner purposes runs from the first furnishing of materials to the jobsite. *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 625 (Fla. 1995). For rental equipment, the first day of work runs from the date on which the equipment is delivered to the project. *Essex Crane Rental Corp. of Alabama v. Millman Construction Co., Inc.*, 516 So. 2d 1130, 1131 (Fla. 3d DCA 1987). A change in the client's contract does not restart the 45 day clock in which a Notice to Owner must be served. *Pilate Elec. Const. Co., Inc. v. Waters*, 384 So. 2d 61, 62 (Fla. 1st DCA 1980).

Service of a Notice to Owner may be established by a certified mail return receipt, Federal Express or other overnight courier receipt, a postal manifest stamped in at the post office or any other receipt establishing actual delivery. If the lienor is in privity with the subcontractor, then copies of the Notice should also be sent to the contractor; if in privity with the subsubcontractor, then copies should additionally be sent to the subcontractor (although service upon the subcontractor is excused if the subcontractor's name and address, which are not included on a Notice of Commencement, cannot be determined). §713.06(2)(a).

If, while reviewing the client's documents during lien preparation, the lawyer determines the Notice to Owner was untimely or improperly served, before writing off the lien the lawyer

should consider whether any of the exemptions from the Notice to Owner requirement may apply. When the owner and contractor share a common identity, a lienor in privity with the contractor need not serve a Notice to Owner. *Aetna Casualty & Surety Co. v. Buck,* 594 So. 2d 280, 282 (Fla. 1992). The issue of common identity is not synonymous with common ownership. *C.L. Whiteside & Associates Const. Co., Inc. v. Landings Joint Venutre,* 626 So. 2d 1051, 1052 (Fla. 4th DCA 1993). To find common identity, the court will consider factors such as whether the owner and general contractor share the same address, whether their respective contracts have been signed by the same individual in his or her representative capacity for each of them, and whether the owner's and contractor's involvement on the project is nearly interchangeable. *Id*.

Notices to Owner are not required for liens filed pursuant to §713.04 governing subdivision site improvements. Lienors contracting with an owner's agent are also excused from the Notice to Owner requirement. *King v. Brickell Banc Savings Ass'n.,* 551 So. 2d 604, 605 (Fla. 5th DCA 1989).

Determining Last Day of Work for Timeliness of Lien

As part of preparing a claim of lien, the lawyer should have the client identify the last day of work on the project from which the 90 day deadline for recording the lien may be measured. However, determining the last day of work is not always simple. In *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.,* 937 So. 2d 695 (Fla. 5th DCA 2006), the court recited the general principle that the 90 day period for lien recordation begins with the last day on which work was done in actual fulfillment of the contract. Remedial work does not extend the time for filing the lien because the contract is already complete and any additional work performed is merely incidental to the executed contract. *Id.*. In *Delta Fire Sprinklers*, the court ruled that neither a final

inspection and testing of the sprinkler system with the building inspector nor completion of punch list items constituted the last day of work on the project because those items were deemed to be merely incidental to the executed contract. The lienor had submitted final pay requisitions for a fully completed job before the final inspection and punch list work. The court stated that if a lienor bills for final payment, then the work must be done and the 90 day clock for recording a lien begins to tick, even if "incidental" work remains, such as a final inspection with the building department.

For suppliers of rental equipment, the delivery of equipment to the job site is prima facie evidence of the period of actual use of the equipment from the delivery date through the time the equipment is last available for use at the site or two business days after the lessor of the equipment receives a written notice from the job owner or lessee to pick up the equipment, whichever occurs first. §713.01(13). That triggers the 90 day period within which a supplier of rental equipment must record a claim of lien.

Apportionment of Lien

You may be presented with a client who has performed work on multiple lots or parcels within a subdivision or perhaps multiple buildings within a homeowner's association and you are asked to prepare a lien. A significant issue is whether you may record a single claim of lien for all lots or parcels or separate ones for each lot or parcel. Section 713.09 addresses the ability of a lienor to file a single claim of lien on construction projects involving multiple parcels.

A single claim of lien is authorized when the amount demanded is for work performed for multiple improvements "under the same direct contract," even if the work was performed on separate lots, parcels or tracts of land. This applies only where the owner under the direct contract is the same owner for all lots, parcels or tracts of land against which the single claim of

lien will be recorded. If there is a separate direct contract for each parcel of land or different owners of each parcel, then separate liens are required for each separate parcel, in which case the lien amount must be properly apportioned between parcels.

If the lienor is a lower tier subcontractor, they may not know whether there were separate direct contracts for each parcel of land. Subcontractors can demand copies of direct contracts from the owner pursuant to §713.16(1), although that relief is not available to subsubcontractors or other lienors not in privity with the contractor.[3] For sub-subcontractors or any other lienor not in privity with the contractor, the number of Notices of Commencement may equate to the number of direct contracts.

If multiple liens are required for the multiple tracts of land, care should be taken to properly apportion the lien amounts amongst the various properties. It is not enough to merely divide the total amount due by the number of liens required for the purpose of determining the lien amount for each parcel. Random allocation of lien amounts may subject the lienor to fraudulent lien liability to the extent the amounts due on a particular parcel may actually be overstated in the lien. The lienor and its counsel must properly determine the exact value of work performed on each separate parcel and the amount remaining unpaid therefor, so that each lien, standing on its own, accurately reflects the costs and value of the work performed on each separate parcel.

Place of Recording Lien

The claim of lien must be recorded in the county where the property at issue is located. If the property is situated in two or more counties, the lien must be recorded in the clerk's office in each county. §713.08(5). The lien amount need not be apportioned between the counties; rather,

[3] Copies of the direct contract may be requested only by a lienor "contracting with or employed by the other party to such contract."

the same lien must just be separately recorded in each county for the purpose of giving the court in each county in rem jurisdiction to enforce the lien.

EVALUATING AND DEFENDING LIEN CLAIMS

Upon receiving an adversary's lien, the first thing counsel should do is determine its facial validity. Most of the issues already discussed in this article apply to this endeavor. However, a couple of other issues should be considered for possible defenses. First, look at the person identified as the preparer of the lien, usually identified in the upper left hand corner of the document. The drafting of a claim of lien by third parties unlicensed to practice law constitutes the unauthorized practice of law. Liens require a legal description of property and establish legal rights, so only lawyers or the lienor themselves are authorized to prepare liens. *Fla. Bar Advisory Opinion-Activities of Community Ass'n. Managers*, 681 So. 2d 1119, 1123 (Fla. 1996). Section 713.08(2) provides a claim of lien may be prepared by the lienor or the lienor's employee or attorney, suggesting these are the only individuals authorized to prepare liens. If counsel determines that an adverse lien appears to have been prepared by a notice to owner company or some other unauthorized third party, then an argument could be made the lien is unenforceable.

In addition to other substantive defenses your client may have, such as overcharging, set-offs for defective work and delays, etc., request that your client provide you with copies of all releases of lien the lienor provided. Review these carefully to gauge whether and to what extent the lienor may have released part or all of its claim. Consider whether the release is effective through the date thereof, notwithstanding recitation of a specific dollar amount given in consideration therefor. The lienor may have inadvertently released claims such as retainage, unpaid change orders, materials stored on site or incomplete phases of work. If you detect a

release that may waive part or all of the lienor's claim, verify it was given in exchange for some payment or other consideration to ensure its enforceability. Also be cognizant of whether the release is conditional and, if so, whether the condition (usually receipt of funds) has been satisfied.

Finally, be aware of §713.35, pursuant to which any person who knowingly and intentionally furnishes a release of lien, whether or not under oath, containing false information about the payment status of subcontractors, sub-subcontractors or suppliers, knowing that somebody might rely upon it in exchange for payment, commits a third degree felony. Many lienors submit releases containing boiler plate language stating that all subcontractors and suppliers have been paid in full through the date of the release, which often is not true due to, if nothing else, unpaid retainage or pending change orders. The reckless submission of these releases can be used to great effect when defending a lien claim.

Conclusion

This paper does not cover all possible issues counsel must consider when preparing or defending liens. Nevertheless, a pretty good checklist can be culled from the discussion herein that should assist in preliminarily determining the facial validity of liens and ensuring liens you prepare will pass muster.

ACTIVE: 9999/9999:1151650_1_LWEINTRA