

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT**

APPEAL CASE NO: 2D15-2827

**GEORGIA HILLER
Appellant/Defendant,**

v.

**PHOENIX ASSOCIATES OF SOUTH FLORIDA, INC.
Appellee/Plaintiff.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA**

Lower Tribunal Case: 11-2014-CA-002390

**ANSWER BRIEF OF APPELLEE/PLAINTIFF
PHOENIX ASSOCIATES OF SOUTH FLORIDA, INC.**

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PREFACE

Appellants:

Georgia Hiller shall be referred to as “Defendant Hiller”

Appellee:

Phoenix Associates of South Florida, Inc. shall be referred to as “Plaintiff”

Record:

Citations in the record, appearing as (A __) reference the tab and page in the Appendix to the Initial Brief.

Citations appearing as (P. App. __) reference the tab in the Appendix to this Answer Brief.

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF MET THE REQUIREMENTS OF THE STATUTE OF LIMITATIONS, [Fla. Stat. § 713.22](#), WHEN PLAINTIFF COMMENCED THIS ACTION TO ENFORCE ITS CLAIM OF LIEN FORTY-ONE DAYS PRIOR TO DEFENDANT POSTING A TRANSFER BOND.

2. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT THE DELAY IN JOINING THE SURETY DID NOT VIOLATE THE STATUTE OF LIMITATIONS OR PREJUDICE THE SURETY IN ANY WAY.

STATEMENT OF THE CASE AND FACTS

Plaintiff entered into an oral contract with Defendant Hiller calling for Plaintiff to remodel and make improvements to Defendant's property. (A2:3, Am. Compl.¶7) Plaintiff alleges that the final price with change orders was \$153,296.50. (A2:3, Am. Compl.¶7, A2:4, ¶11)

On September 22, 2014, Plaintiff filed a Claim of Lien for \$98,050.23, which was recorded in the Collier County Official Records. (A2:3, Am. Compl.¶14; A2:13-14)

On October 24, 2014, Plaintiff commenced this action to enforce its Claim of Lien by filing a three-count Complaint against Defendant Hiller. On October 29, 2014, Plaintiff filed and the Clerk recorded a Notice of Lis Pendens. (A1:1)

Plaintiff filed an Amended Complaint (A2:2-15, Am. Compl.) on November 26, 2014, clarifying some facts but seeking the same relief: in Count I, foreclosure of its lien; in Count II, money damages for breach of oral contract; and in Count III, money damages for unjust enrichment. (A2:2-15)

Defendant Hiller obtained a Lien Transfer Bond from Old Republic Surety Company as surety, and filed a Notice of Bond, which was recorded on December 2, 2014, and served on Plaintiff by the Clerk on December 3rd. (A3:18) On December 8, 2014, Hiller filed in this proceeding a Notice of Filing Bond,

including the Bond and the recorded Notice of Bond, which were served upon Plaintiff's counsel. (A3:15-20)

Defendant Hiller filed a Motion to Dismiss the Amended Complaint on December 11, 2014. (P. App. 1) Defendant's Motion to Dismiss was set for hearing by the court on March 10, 2015. (P. App. 2)

Thirty-five (35) days after the posting of the Transfer Bond, Defendant Hiller filed a Notice of Contest with the Clerk, as provided under [§ 713.22\(2\), Fla. Stat.](#) The Notice of Contest was recorded by the Clerk on January 7, 2015, and was served on Plaintiff by the Clerk, via certified mail, on January 8, 2015. (A4:21-22) In contrast to the Notice of Filing Bond, Bond and Notice of Bond, this Notice of Contest was not filed in this proceeding, nor served upon Plaintiff's counsel. The Notice of Contest provides "the time within which you may file suit to enforce your lien is limited to 60 days from the date of service of this notice." (A4:21-22)

On March 10, 2015, the scheduled date of the hearing on her Motion to Dismiss, Defendant Hiller answered the Amended Complaint (A5:22-23), and raised as one of her affirmative defenses the shortening of the duration of Plaintiff Phoenix's claim against the Bond and the failure of Plaintiff to timely bring a claim against the Bond. (A5: at 25-27, ¶ 29)

Plaintiff served a Reply to the affirmative defenses, contending that because it had filed an action to enforce the lien, before the Bond was posted, the Notice of Contest was ineffective. (A6:44, ¶ 1) Plaintiff filed a Motion to Supplement its Complaint, along with a proposed Supplemental Complaint (A7:48-62) seeking relief against the surety and naming the surety as a party defendant.

On March 24, 2015, Defendant Hiller filed a Motion for Release of Bond, Discharge of Lis Pendens, and Dismissal with Prejudice on Count I. (A9:69-92) The relief Defendant Hiller sought in the Motion was an order directing the Clerk to release and return the Lien Transfer Bond to Defendant Hiller, a discharge of the Lis Pendens, and dismissal of Count I, which sought to foreclose the construction lien. (A9:74, ¶ 15b, c)

The trial court held a hearing on May 21, 2015, on Defendant Hiller's Motion and on Plaintiff's Motion for Leave to File a Supplemental Complaint. The trial court denied the Motion for Release of Bond; denied the Motion to Dismiss with Prejudice of Count I, and as agreed to by Plaintiff's counsel, granted the request to discharge Lis Pendens; the court granted Plaintiff's request for leave to file its Supplemental Complaint. (A10:93) (The complete hearing transcript is found at A11:95-150) The trial court, in ruling, stated that:

And I am swayed by the American Fire and Casualty Company versus Davis Walter (sic) and Waste Industries case, a Supreme Court case, finding that the suit to enforce the lien was timely filed. That's not in dispute here.

The delay in joining the surety, I'm finding, did not violate the statute or prejudice in any way.

(A11:148-49; 49/lines 6-11)

JURISDICTION OVER THIS APPEAL

Plaintiff does not believe that [Fl. R. Civ. P. 9.130](#), grants jurisdiction over this appeal. Plaintiff's argument was presented in its Motion to Dismiss Appeal as Premature, which was denied by this court.

SUMMARY OF ARGUMENT

The statute of limitations, [§ 713.22, Fla. Stat.](#), was fully complied with when Plaintiff commenced this action to enforce its Claim of Lien, on October 24, 2014. The Claim of Lien which had been recorded on September 22, 2014, just thirty-two (32) days earlier. The commencement of this action also terminated the running of the statute of limitations.

As a result of Defendant's posting of a Transfer Bond, the issue of joinder of the surety is raised. [Fla. R. Civ. P. 1.160](#), and case law provide for liberal joinder of the surety. There is no time limit to bring about joinder of the surety in this action.

[§ 713.24, Fla. Stat.](#), when properly read, only requires a separate or independent proceeding to be commenced against the surety on a transfer bond, if the court in which the lien foreclosure action was filed, loses jurisdiction due to an "absence of allegations of privity between the lienor and the owner". [§ 713.24\(1\)\(b\), Fla. Stat.](#)

In all other circumstances, upon the posting of a transfer bond, the action to enforce the claim of lien remains pending in the court, and only the remedy is changed. A new legal proceeding, against the Defendant as bond principal, and against the bond surety, may not be legally maintained, while the original action against the Defendant for breach of contract and unjust enrichment remains.

The stated purposes for the 2005 legislative amendments to [§ 713.24, Fla. Stat.](#), were to avoid the necessity of filing a new action in the circuit court, and to preserve lien rights when a transfer bond has been filed. The Florida Legislature could easily and clearly have rewritten the statute to mandate that a new action be filed upon the posting of a transfer bond. The Legislature did not do so, because it did not intend to do so.

It is a misconstruction of these amendments, to assert that they were intended to completely change the settled law, by requiring joinder of a surety within the time limits of the statute, even though the original lien foreclosure action was timely filed and pending.

ARGUMENT

I. A. § 713.22, FLA. STAT. FULLY COMPLIED WITH

Plaintiff commenced this proceeding on October 24, 2014, by filing its Complaint. Count I of Plaintiff's Complaint sought to enforce its Claim of Lien through foreclosure. Plaintiff's Claim of Lien had been recorded on September 22, 2014, thirty-two days earlier.

As a result, Plaintiff's commencement of this action satisfied the time limitations of the statute of limitations. [§ 713.22, Fla. Stat.](#); [*Am. Fire & Cas. Co. v. Davis Water & Waste Indus.*, 377 So. 2d 164 \(Fla. 1979\)](#). The statute expressly provides that the existence and effectiveness of Plaintiff's Claim of Lien is "continued beyond the 1-year period by the commencement of an action" to enforce the lien. [§ 713.22\(1\), Fla. Stat.](#)

Plaintiff, by timely filing its Complaint on October 24, 2014, not only satisfied the time limits of the statute of limitations, but also terminated the running of the statute of limitations. [*Friday v. Newman*, 183 So. 2d 25, 26 \(Fla. 2d DCA 1966\)](#)

As the time requirements of the statute of limitations were met and the running of the statute of limitations terminated, upon the filing of Plaintiff's Complaint, Defendant Hiller's subsequent service of the Notice of Contest of Lien is without effect.

A Notice of Contest of Lien, on its face, is only applicable in the event a suit has not been commenced to enforce the lien prior to the serving of the Notice. Section 2 of the statute, provides that an owner “may elect to shorten the time in subsection 1 within which to commence an action to enforce any claim of lien or claim against a bond or other security ... by recording in the Clerk’s office”, a Notice of Contest of Lien. [§ 713.22\(2\), Fla. Stat.](#)

Obviously, the Defendant’s service of her Notice did not act to shorten a time period that had already been fulfilled. The statute’s requirement that the lien of any lienor “who fails to institute a suit to enforce his or her lien within 60 days after service of such notice shall be extinguished automatically” is inapplicable to this action. Plaintiff had instituted a suit to enforce its lien on October 24, 2014, seventy-six (76) days before Defendant Hiller’s Notice of Contest of Lien was served upon Plaintiff on January 8, 2015.

The warning of the Notice of Contest of Lien, “that the time within which you may file suit to enforce your lien is limited to 60 days from the date of service of this matter” is also meaningless, as Plaintiff had filed suit to enforce its lien, seventy-six (76) days prior to the Notice. Plaintiff was directed to do what had already been accomplished.

Once Plaintiff satisfied the time limits of [§ 713.22\(1\), Fla. Stat.](#), the effectiveness and validity of Plaintiff’s Claim of Lien continued, and the running

of the statute of limitations was terminated. [*Am. Fire & Cas. Co.*, 377 So. 2d at 165](#); [*Friday*, 183 So. 2d at 26](#); [§ 713.22\(1\), Fla. Stat.](#) By its express terms, and logically, [§ 713.22, Fla. Stat.](#), is satisfied by the commencement of this action by Plaintiff to enforce its lien. There is no requirement in the statute that more than one action be commenced to enforce any one lien. [*Am. Fire & Cas. Co.*, 377 So. 2d at 165](#).

I. B. § 713.24, FLA. STAT. PROPERLY CONSTRUED

The provisions of [§ 713.24, Fla. Stat.](#), regarding Transfer Bonds, do not change this analysis. The statute provides that upon filing of the Certificate of Transfer the real property shall be released from the lien claimed, and such lien shall be transferred to the security. [§ 713.24\(1\)\(b\), Fla. Stat.](#) Consequently, Plaintiff's Claim of Lien, upon which suit had been commenced, forty-one (41) days earlier, was transferred to the bond when posted on December 3, 2014.

A new lien was not created by the Defendant's posting of the bond, rather the existing Claim of Lien was merely transferred to new security. [§ 713.24\(1\), Fla. Stat.](#); [*Resnick Developers S., Inc. v. Clerici, Inc.*, 340 So. 2d 1194, 1197 \(Fla. 4th DCA 1976\)](#).

Plaintiff's Claim of Lien, its validity and the amount owed remains the basis of this suit, while the transfer bond is only security for the claim, and not the basis out of which the claim arises. [*Int'l Cmty. Corp. v. Davis Water & Waste Indus.*](#),

[455 So. 2d 1164, 1166 \(Fla. 2d DCA 1984\)](#), citing [Resnick Dev., 340 So. 2d at 1194](#).

[§ 713.24\(4\), Fla. Stat.](#), does not contain an additional or independent limitation period, but merely restates that a proceeding to enforce a transferred lien be commenced within the time specified in [§ 713.22, Fla. Stat.](#) [§ 713.24\(4\), Fla. Stat.](#); [Gen. Guar. Ins. Co. v. Sunrise Nursing Homes, Inc., 326 So. 2d 446, 447 \(Fla. 2d DCA 1976\)](#) (an action to enforce the transferred lien must commence within the time specified for action on the lien itself).

More importantly [§ 713.24, Fla. Stat.](#), contains no requirement that a new and separate action be commenced in the event a lien is transferred to a bond. To the contrary, the statute expressly provides that the court where the original lien foreclosure claim is pending retains jurisdiction.

Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited, or file a motion in a pending action to enforce a lien, for an order to require additional security, reduction of security, change or substitution of sureties, payment of discharge thereof, or any other matter affecting said security.

[§ 713.24\(3\), Fla. Stat.](#)

The history of [§ 713.24, Fla. Stat.](#), illustrates repeated legislative amendments aimed at making the statute more protective of lien rights, and

undoing court decisions which had required new and independent legal proceedings to be commenced upon the transfer bond.

In 1965, the statute was revised in order to grant to a court of equity deciding a lien foreclosure, jurisdiction over the surety bond, the posting of which had previously required the filing of a new action in law. [*Triangle Distribs., Inc. v. Travelers' Indem. Co.*, 195 So. 2d 237 \(Fla. 3d DCA 1967\)](#).

“The law should not be ridiculous. When the mechanic’s lien was filed, the lienor had a right to seek redress in a court of chancery if he elected and, if successful, to secure a decree directing the amount of the payment of the indebtedness due him; and, in default of same, to have the property improved sold to satisfy the amount. When the property owner elected to transfer the lien to bond, pursuant to the provisions of [§184.24\(2\), Fla. Stat.](#), F.S.A., the surety [which was obviously compensated] substituted its obligation to pay in place of the property encumbered. And, if the lienor is successful on establishing its right to payment and if same is not forthcoming within a day certain, then it should have a right to go directly against the surety who joined in the issuance of the bond and caused the release of lien in the first instance. To say that the lienor must resort to an independent suit on the bond, when he has been successful in the original action, should not be countenanced by a court of equity.”

[Triangle Distrib.](#), 195 So. 2d at 237, 238, adopting and quoting the reasoning of Judge Barkdull in dissent to [Fid. & Cas. Co. v. D.N. Morrison Const. Co.](#), 99 Fla. 309, 126 So. 151 (1930).

This analysis of the interplay between [§ 713.22, Fla. Stat.](#) and [§ 713.24, Fla. Stat.](#), was clearly approved by the decision of the court of appeals in *Am. Fire and Casualty*, and by the decision of the Florida Supreme Court on review. [Am. Fire &](#)

Cas. Co. v. Davis Water & Waste Indus., 358 So. 2d 225 (Fla. 4th DCA 1978),
aff'd, Am. Fire & Cas. Co. v. Davis Water & Waste Indus., 377 So. 2d 164 (Fla.
1979).

The appellant in *Am. Fire and Casualty Co.*, argued that a lienor's motion to join the surety company as a defendant in a lien foreclosure action was untimely as the joinder was not accomplished until 2 1/2 years after the transfer of the lien to bond. Am. Fire & Cas. Co., 358 So. 2d at 226. The court of appeals held that the provision of § 713.24(4), Fla. Stat., was not applicable to the joinder of a surety into a suit which was already filed prior to the transfer of the lien. Am. Fire & Cas. Co., 358 So. 2d at 227. In other words, "since suit has already been filed, a " . . . proceeding to enforce a transferred lien . . . " was in existence within the one year period" Am. Fire & Cas. Co., 358 So. 2d at 227.

The Florida Supreme Court affirmed the decision of the Court of Appeals, and adopted its reasoning. Am. Fire & Cas. Co., 377 So. 2d at 165. After quoting the provisions of statute of limitations, § 713.22, Fla. Stat., the Florida Supreme Court held that: "The suit to enforce the lien was timely filed and the delay in joining the surety did not violate the statute or prejudice the surety in any way." Am. Fire & Cas. Co., 377 So. 2d at 165. Accordingly, joinder of the surety into the pending action, rather than the initiation of a new action on the bond was

appropriate, and the statute of limitations [§ 713.22, Fla. Stat.](#), does not apply to that joinder.

This legislative intent and case law, to not require a new and independent action upon the posting of a surety bond, is once again explicitly evidenced, by the 1987 revision to the statute. This revision added the clause “or file a motion in a pending action to enforce a lien”, to the statute’s existing provision, that upon the transfer of the lien to a bond, a party may file a complaint in chancery, on any matter affecting the security. [§ 713.24\(3\), Fla. Stat.](#); 1987 SB 720; *Chapter 87-74; Section 6, Laws of Fla.*

Prior to this amendment, the statute was interpreted by some courts as providing only one option for bringing an action against a lien that had been transferred to a bond, the filing of a new complaint, making a new action mandatory. [Garrido v. Nat’l Union Fire Ins. Co., 891 So. 2d 1091, 1093 \(Fla. 4th DCA 2004\)](#). The 1987 amendment expressly grants jurisdiction over the bond proceedings, to the court in the pending lien jurisdiction.

This 1987 amendment of [§ 713.24, Fla. Stat.](#), is important for the additional reason that: in reenacting the statute the legislature is presumed to have an awareness of the judicial construction placed upon the reenacted statute, and to have adopted that construction, absent a clear expression to the contrary.

Gulfstream Park Racing Assoc. v. Dept. of Business Regulation, 441 So. 2d 627, 629 (Fla. 1983) citing Deltona Corp. v. Kipnis, 194 So 2d 295 (Fla. 2d DCA 1966).

As reenactment of § 713.24, Fla. Stat., adopted the construction of that statute in *Am. Fire and Cas.*, the courts are barred and precluded from changing the earlier construction. *Deltona Corp.*, 194 So. 2d at 297.

As a result of these legislative amendments, there exists no general requirement that a new and separate proceeding be commenced once a construction lien is transferred to a surety bond. As a new and independent proceeding is not required, the statute of limitations, having been terminated by the filing of the lien foreclosure action, does not spring back to life. *Am. Fire & Cas. Co. v. Davis Water & Waste Indus.*, 358 So. 2d 225 (Fla. 4th DCA 1978), aff'd, 377 So. 2d 164 (Fla. 1979). Accordingly, the joinder of a surety as a defendant in a pending, timely filed action to enforce a lien, is not subject to the provisions of the statute of limitations, § 713.22, Fla. Stat. *Am. Fire & Cas. Co.*, 377 So. 2d at 165.

The Florida Legislature again amended § 713.24(4), Fla. Stat. in 2005. This amendment was intended to address the issues raised by the decision in *W.W. Plastering, Inc. v. Chism Constr., Inc.*, 867 So. 2d 600 (Fla. 1st DCA 2004) As expressed by one commentator, the “2005 Florida Legislature addressed this issue, but in a less than clear manner” 8 *Fla. Prac., Constr. Law Manual Sect. 8:53* (2014-2015). In *W.W. Plastering*, a subcontractor/lienor filed its action to foreclose

a construction lien in county court, and after the transfer of the lien to a surety bond, a counterclaim was eventually filed by the general contractor. [*W.W. Plastering*, 867 So. 2d at 601](#). More than one year after the lien had been transferred to the surety bond, the counterclaimant had the matter moved to circuit court. [*W.W. Plastering*, 867 So. 2d at 601](#).

As circuit courts had exclusive jurisdiction of bond claims under the statute, at that time, and no action was commenced in a court of competent jurisdiction within one year of the recording of the lien, the dismissal with prejudice of the counterclaim was upheld on appeal. [*W.W. Plastering*, 867 So. 2d at 601](#).

Consequently, the 2005 amendments sought to avoid the necessity of filing a new action in circuit court, where county court had jurisdiction over the amount of the claim on the bond. [2005 Fla. HB 113](#), 2005 Fla. Laws Ch. 227; [§ 713.24\(3\), Fla. Stat.](#)

In the event a new action was filed after the transfer bond, as in *W.W. Plastering*, the amendment sought to preserve lien rights by clarifying that the statute of limitations began as of the date of the transfer, not of the recording of the lien. [2005 Fla. HB 113](#); 2005 Fla. Laws Ch. 227; [§ 713.24\(4\), Fla. Stat.](#)

The synopsis to [2005 Fla. HB 113](#), makes clear that the purposes of the amendments were “providing construction to preserve county court jurisdiction over certain transfer bond claims for non-payment; preserving certain lien rights

when filing a transfer bond after commencing certain lien enforcement proceedings”. [2005 Fla. HB 113](#); 2005 *Fla. Laws, Ch. 227*.

As made clear by the synopsis, the 2005 amendments were not intended to place an additional hurdle in front of the lienor, requiring an independent court case or new proceeding against the surety. To the contrary, the legislature intended to remove that hurdle. It is therefore ironic that these statutory changes, intended to preserve lien rights, are being advanced by Defendant Hiller to extinguish Plaintiff’s lien rights.

The brief of Defendant Hiller rewrites the 2005 amendment by inserting the word “must” into the statute. The Initial Brief states incorrectly that, despite the pending lien foreclosure action against the property owner, the Plaintiff “must” commence an action against the surety on the bond. (Initial Brief, p.17, 22)

In fact, the statutory amendment merely states, permissively:

If a proceeding to enforce a lien is commenced in a court of competent jurisdiction within the time specified in s. 713.22 and, during such proceeding, the lien is transferred pursuant to this section or s. 713.13(1)(e), an action commenced within 1 year after the transfer, unless otherwise shortened by operation of law, in the same county or circuit court to recover against the security shall be deemed to have been brought as of the date of filing the action to enforce the lien, and the court shall have jurisdiction over the action.

[§ 713.24\(4\), Fla. Stat.](#) The statutory amendment clearly does not command that if during a proceeding to enforce a lien, the lien is transferred, then a new or

independent proceeding “must be” commenced against the surety. It would have been quite simple for the legislature to use words of command, and to make the provision mandatory, if they so intended.

However no words of command, such as “must be” or “shall be” appear in this provision. In the light of the legislative intent to make the commencement of new actions unnecessary, and to preserve lien rights after the filing of a transfer bond, the provision should be read as permissive. The extended time limits applying only “in the event” or “when” a new action is commenced, as in *W.W. Plastering*. This new language was intended to preserve the lien rights of a lienor in the position of *W.W. Plastering*. It was not intended to place all lienors in the position of *W.W. Plastering*, thereby endangering their lien rights.

As a result of the 2005 amendments to [§ 713.24, Fla. Stat.](#), new and independent action on a transfer bond is only necessary in those cases where the court in which the lien foreclosure suit is pending, loses authority over the case - that is, when the real property is released by the transfer bond and there is an absence of allegations of privity between the lienor and the owner. [§ 713.24\(1\)\(b\), Fla. Stat.](#)

Once a transfer bond is posted, the owner, if not in privity or a principal on the bond, is not a necessary, or proper party to any pending action, and the owner must be dismissed, or receive judgment in its favor. [Deltona Corp. v. Indian](#)

Palms, 323 So. 2d 282 (Fla. 2d DCA 1975); Canam Sys. v. Lake Buchanan Dev. Corp., 375 So. 2d 582 (Fla. 5th DCA 1979); W. Plumbing & Heating Co. v. Hurley, 168 So. 2d 328 (Fla. 1st DCA 1964). This basis may support the court of appeals decision in *Cool Guys*, as there did not appear to be allegations of privity, as evidenced by the trial court entering Summary Judgment on the case, rather than dismissing only one cause of action. *Cool Guys, L.L.C. v. Jomar Props., L.L.C.*, 84 So. 3d 1076 (Fla. 4th DCA 2012). In addition, the court in *Cool Guys*, cited the decision of *Canam Syst.*, in support of its decision. *Cool Guys*, 84 So. 3d at 1078

If the court's decision in *Cool Guys* is based upon this limited basis, then any holding, that a new or independent action "must" be filed in all cases to enforce a lien, in which a transfer bond is posted, is overly broad. In addition, the court's writing regarding joinder and the continued validity of *Am. Fire & Casualty* is mere *dicta*, as well as incorrect. *Am. Fire* is still applicable to all cases in which a lien enforcement case was filed, and the court retained jurisdiction as a result of allegations of privity and pending causes of action between the lienor and owner.

In Plaintiff's case, the court was not divested of jurisdiction by the posting of the transfer bond. The Plaintiff's action included claims for breach of contract and unjust enrichment against Defendant Hiller for improvements to her residence. In addition, Defendant Hiller is the principal on the transfer bond that she posted.

As principal on the bond, as well as a party to the contract, Defendant Hiller remained a necessary party to Plaintiff's action. Cf. Williams, Hatfield & Stoner, Inc. v. A & E Design, Inc., 538 So. 2d 505, 508 (Fla. 4th DCA 1989); Mesch v. Berry, 528 So. 2d 1250 (Fla. 1st DCA 1988) (owner who is not in privity with lienor or a principal on the bond, is not a proper party).

As privity on both the contract and the bond exists between Plaintiff and Defendant Hiller, the court retained jurisdiction after the posting of the bond.

The sole issue, upon Defendant Hiller's posting of the transfer bond, is one of joinder of the surety into the timely filed, valid and pending proceeding against Defendant Hiller. Am. Fire & Cas. Co., 358 So. 2d at 225; Triangle Distribs., 195 So. 2d 237.

Plaintiff was properly allowed to supplement its Complaint to add paragraph 19, stating that a transfer bond had been posted, and paragraph 20, stating that Defendant Hiller was the principal, and Old Republic the surety on the transfer bond. (Pl. App. 3) Consequently, the prayer for relief on Count I was amended to ask for payment by the surety, rather than foreclosure of the property, in the event Defendant Hiller did not pay the award of damages. (Pl. App. 3) All other provisions of the Amended Complaint remained unchanged.

II. JOINDER OF SURETY PROPER

Florida Rules of Civil Procedure provide that parties may be added by order of the court at any stage of the action and on such terms as are just. [Fla. R. Civ. P. 1.250](#). The Court in *Triangle Distr.*, held that the 1965 amendment of [§ 713.24\(3\), Fla. Stat.](#), (then Section 84.241(3)) changed the law concerning actions against a surety, where a lien has been transferred to the security of a bond, so that no longer did an independent suit at law need to be commenced on the bond. [Triangle Distribs., 195 So. 2d at 238](#).

Finding joinder of the surety into the lien foreclosure case to be the proper avenue, the court of appeals stated that the aim of the rules of civil procedure is to allow liberal joinder of parties and claims. [Triangle Distribs., 195 So. 2d at 238](#). Concurrent with this, is the policy of equity to grant complete relief and avoid multiplicity of suits. [Triangle Distribs., 195 So. 2d at 238](#) citing [Miracle House Corp. v. Haige, 96 So. 2d 417 \(Fla. 1957\)](#).

Joinder of a surety two and a half years after the recording of the lien, and two and one-sixth years after the transfer of the lien to bond, was held not to be untimely in [Am. Fire & Cas. Co., 358 So. 2d at 226](#). The Florida Supreme Court in affirming and adopting the reasoning of the court of appeals, held that “the delay in joining the surety did not violate the statute or prejudice the surety in any way” [Am. Fire & Cas. Co., 377 So. 2d at 165](#).

The action to foreclose Plaintiff's construction lien had been commenced on October 24, 2014, and notice of the posting of the Transfer Bond was served on December 3, 2014. The trial court acted properly in granting leave to join Defendant Old Republic Surety Co. as a party defendant on March 21, 2015. No prejudice was asserted due to the 108 day delay, and none was found to exist.

The respective decisions of the Florida Supreme Court, and of the court of appeals in *Am. Fire & Cas.*, are both clear to separate the time requirement in which a lienor must initiate suit to foreclose its lien, from the issue of timeliness of joinder of the surety as a defendant into the pending lien foreclosure proceeding

In contrast, the court of appeals decision in *Cool Guys*, and the Initial Brief of Defendant Hiller, both confuse the time requirements of the statute of limitations, with that of timely joinder. These concepts are unrelated and distinct of each other. [*Am. Fire & Cas. Co.*, 358 So. 2d at 226](#), *aff'd*, [*377 So. 2d 165 \(Fla. 1979\)*](#).

The court of appeals in *Cool Guys* states that the claim to recover against the transferred security must, in all cases be brought within the time limits of the statute, even when the lienor seeks to join the surety into a pending action. [*Cool Guys*, 84 So. 2d at 1078](#). This statement by the court of appeals not only misconstrues the language of the statute, it also avoids the reality of civil procedure, and the time necessary to join a party. Joinder of a surety is not

unilateral, and requires: a motion for leave to amend the complaint to reference the posting of the bond; a motion for leave to join the surety as a party defendant, and to authorize the issuance of a summons; the scheduling of a hearing on those motions; issuance of the summons; and service of the summons upon the surety. [Fla. R. Civ. P. 1.100](#), [1.090](#), [1.190](#), and [1.250](#).

More importantly, the court of appeal's decision in *Cool Guys* also contravenes the long established rule that a surety, by executing a bond for filing in a pending cause, voluntarily makes itself a party to such cause and brings itself within the jurisdiction of the court. [Archibald v. Donald](#), 98 Fla. 698, 124 So. 175 (1929); [Von Eng. Co. v. R.W. Roberts Constr. Co.](#), 457 So. 2d 1080, 1082 (Fla. 5th DCA 1984). Principles of indemnity law hold that when a surety has notice of suit against the principal, and is afforded an opportunity to appear and defend, a judgment rendered without fraud or collusion is conclusive against the surety. [Von Eng. Co.](#), 457 So. 2d at 1082 citing [Archibald](#), 98 Fla. 698, 124 So. 175 (1929).

The surety on the performance/payment bond in *Von Eng.*, was held liable for an arbitration award, entered mid-litigation, even though the surety was not ordered to, and did not participate in the arbitration proceeding. [Von Eng. Co.](#), 457 So. 2d at 1082.

These principals of indemnity are also embodied in [Fla. R. Civ. P. 1.626](#), adopted in 1990. This rule provides that when any rule or statute requires or

permits giving of bond by a party in a judicial proceeding, the surety on the bond submits to the jurisdiction of the court when the bond is approved. [Fla. R. Civ. P. 1.625](#). The liability of the surety may be enforced on motion without the necessity of independent action. [Fla. R. Civ. P. 1.625](#).

In the case of *Tokay Towing & Recovery v. Kronea*, this court of appeals held that the plaintiff's right to proceed against the surety did not require joinder of the surety prior to the final judgment; rather it was a matter for post judgment proceedings under [Fla. R. Civ. P. 1.625](#). [*Tokay Towing & Recovery, Inc. v. Kronen*, 906 So. 2d 1269, 1271 \(Fla. 2d DCA 2005\)](#).

The argument that a new action must be filed upon the posting of a bond, even though causes of action based on privity remain in the lien foreclosure case, disregards the legal doctrine which bars the splitting of causes of action. As a general rule the law requires that all damages sustained or accruing to a plaintiff, as a result of a single wrongful act, must be claimed and recovered in one action or not at all. [Mims v. Reid, 98 So. 2d 498, 500 \(Fla. 1957\)](#) quoting [Gaynon v. Statum, 151 Fla. 793, 10 So. 2d 432, 433 \(1942\)](#).

The law does not permit the owner of a single or entire cause, or an entire indivisible demand, to divide that cause to make it the subject of several actions. [*Commodores Point Terminal Corp. v. Fla. Towing Corp.*, 280 So. 2d 509, 511 \(Fla. 5th DCA 1973\)](#) quoting 1 *Fla. Jur. Actions*, Sect. 42 (1960) at 167,168.

Consequently, Plaintiff could not split its causes of action, suing Defendant Hiller on the contract and unjust enrichment claims in the pending suit, and suing Defendant in a new action, as principal on the bond. [*Mims*, 98 So. 2d at 500](#); [*Commodores Point Terminal Corp.*, 280 So. 2d at 511](#). If Plaintiff would split its cause of action against Defendant Hiller, in such a fashion, the new action on bond would be subject to dismissal. [*Mims*, 98 So. 2d at 500](#); [*Commodores Point Terminal Corp.*, 280 So. 2d at 512](#).

Defendant Hiller asserts that her misconstruction of the 2005 amendment to [*§ 713.24\(4\), Fla. Stat.*](#), provides certainty and a bright line, by requiring a new action to be filed in every instance that a surety bond is posted, even if an action had been previously commenced to enforce a lien. However, the application of the amended statute in that manner is not as certain, or as bright, as the proper application of the statute as explained in the court's decisions in [*Am. Fire & Cas. Co.*, 358 So. 2d 225](#), *aff'd*, [*377 So. 2d 165 \(Fla. 1979\)*](#). Under that precedent, once an action to enforce a lien had been commenced, the statute of limitations had been met and extinguished.

Defendant Hiller's misconstruction of the statute also replaces the "gotcha" trap exposed in *Am. Fire & Casualty*, with a new trap, one of her own making. [*Am. Fire & Cas. Co.*, 358 So. 2d 225](#). Under Defendant Hiller's misconstruction, a defendant would be able to post a transfer bond and provide notice not only to the

lienor, but to its counsel by filing Notice of Bond in the pending lien foreclosure action. The defendant then, five weeks later, would file a Notice of Contest of Lien, serving the Notice only upon the lienor, but not filing it in the pending case, and not serving the Notice of Contest of Lien on the lienor's counsel.

As the lienor is only directed by the Notice to file suit to enforce its lien, something it has already accomplished, sixty days would be allowed to elapse. The defendant would be sure to avoid filing a pleading or affirmative defense in the pending action, which would give notice, to counsel, of the shortened period in which to file a new claim, until the sixty days has expired. Springing the trap, the defendant would file a motion to discharge the bond and to dismiss any action on the lien.

Defendant Hiller's "construction of the statute would destroy its purpose". [*Am. Fire & Cas. Co.*, 358 So. 2d at 227](#), *aff'd*, [*377 So. 2d 165 \(Fla. 1979\)*](#).

CONCLUSION

Under the well settled, applicable law, Plaintiff's commencement of its lien enforcement action prior to the transfer of the lien to bond, satisfied the requirements of the statute of limitations. Plaintiff's prompt joinder of the surety into the pending lien foreclosure action was also without prejudice to the surety.

The legislature amended the provisions of [§ 713.24\(4\), Fla. Stat.](#) in 2005, in order to allow lienors, with pending lien foreclosure cases, to avoid the necessity of filing new cases against the surety when the liens were transferred to bond.

Defendant Hiller's assertion that the amendment of the statute in 2005 required a new case to be commenced against the surety, in every pending lien enforcement case, is contrary to the permissive language of the amendment and to the legislature's expressed purpose for the changes - to preserve lien rights upon the transfer of liens to bond.

The Defendant's interpretation of the 2005 amendment to [§ 713.24\(4\), Fla. Stat.](#), is contrary to 50 years of amendments to [§ 713.24\(4\), Fla. Stat.](#), and the precedent of *Triangle Distr.* and *Am. Fire & Casualty*. This misconstruction turns the world of lien enforcement on its head.

The ruling of the trial judge, that Plaintiff met the requirement of [§ 713.22, Fla. Stat.](#) and that the surety was timely joined, must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 21, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system and that a copy has been furnished to Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A., Alan B. Rose: arose@mrachek-law.com and Daniel Thomas: dthomas@mrachek-law.com via e-mail portal service.

/s/ Thomas Franchino

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the forgoing complies with [Florida Rule of Appellate Procedure 9.100\(1\)](#) and [9.210\(a\)\(2\)](#) as it is computer-generated and is submitted in Times New Roman, 14-point font.

/s/ Thomas Franchino

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