

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

GEORGIA HILLER,

**Case No. 2D15-2827**

L.T. No.: 11-2014-CA-002390

Appellant/Defendant,

v.

PHOENIX ASSOCIATES OF SOUTH  
FLORIDA, INC.,

Appellee/Plaintiff.

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

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**INITIAL BRIEF OF APPELLANT**

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### **III. PREFACE**

**Appellants:**

Georgia Hiller shall be referred to as "Hiller".

**Appellee:**

Phoenix Associates of South Florida, Inc. shall be referred to as "Phoenix".

**Record:**

Citations to the record, set forth in the accompanying Appendix containing 155 pages in 12 Tabs, and to the hearing transcript will be shown as follows:

Appendix B (A Tab No. : page number(s))

Transcript B The transcript from the hearing is found in the Appendix,  
at Tab 11, pages 95-150.

In direct quotes throughout the brief, *all emphasis* has been added unless expressly noted to be in the original text.

#### **IV. STATEMENT OF THE ISSUES**

WHETHER THE TRIAL COURT COMMITTED  
LEGAL ERROR BY REFUSING TO ORDER THE  
IMMEDIATE RELEASE OF THE LIEN TRANSFER  
BOND WHERE PHOENIX FAILED TO TIMELY SUE  
ON THE BOND.

## **V. STATEMENT OF THE CASE AND FACTS**

### **A. Statement of the Case**

Phoenix, a contractor, performed construction services on Hiller's home, a single family dwelling used as her primary residence, under an alleged oral contract. Phoenix claims that Hiller is liable for \$98,050.23, representing the remaining balance allegedly due for construction work performed by Phoenix and various subcontractors on Hiller's property. Hiller contests the claim; denies the amounts claimed to be due; and asserts that there are numerous construction defects causing her substantial damages, to be asserted as a counterclaim. Those issues, although related to this appeal, are separate and distinct from the issue in this appeal: whether Hiller is entitled to the immediate return of the lien transfer bond.

Within the context of bringing these claims, Phoenix took advantage of the special statutory lien rights afforded to it under Florida's Construction Lien Law, Chapter 713, by recording a construction lien<sup>1</sup> against Hiller's property (her primary residence which was the subject of the construction work). In addition, at

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<sup>1</sup> Construction liens under Chapter 713 are sometimes referred to as "mechanic's liens," and are described as such in a number of older cases cited herein. The two terms are synonymous in the context of this appeal and the relevant case law.



the time of filing the Complaint in this action, Phoenix recorded a Notice of Lis Pendens.

Hiller, too, took advantage of Chapter 713 by (i) posting a bond, thereby transferring the lien to a bond; and (ii) serving a Notice of Contest of the claim against the bond, which acts to shorten the time for Phoenix to sue the surety on the bond to 60 days. Phoenix failed to file an action against the surety within 60 days. Therefore, under section 713.22(2), Phoenix's lien was extinguished automatically. Despite these clear and express legal requirements, well-established law applying these statutes, and the undisputed fact that Phoenix did not meet the deadline, the Clerk refused to release the bond without a court order. And, on proper motion, the trial court denied Hiller's request for the return of immediate possession of the bond. In doing so, the trial court applied a 1979 case which was superseded by a 2005 statutory amendment, and refused to apply the new statute or a recent case from the Fourth DCA interpreting it consistent with Hiller's position.

For the reasons expressed herein, the trial court erred in denying the Motion for Release of Bond.

**B. Relevant Factual and Procedural Background**

Phoenix alleges that it entered into an oral contract with Hiller for Phoenix to remodel and make improvements to Hiller's property. (A2:3, Am. Compl. &7) Phoenix alleges that the final contract price with changes orders was \$153,296.50. (*Id.*, &7, A2:4, &11)

On September 22, 2014, Phoenix filed a Claim of Lien for \$98,050.23, which was recorded in Collier County Official Records. (*Id.*, &14; A2:13-14)

On October 24, 2014, Phoenix filed a three-count Complaint against Hiller and, on October 29, 2014, Phoenix filed and the Clerk recorded a Notice of Lis Pendens. (A1:1)

Phoenix later filed an Amended Complaint (A2:2-15) on November 26, 2014, seeking the following 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. (*Id.*)

Hiller obtained a Lien Transfer Bond from Old Republic Surety Company as surety, in the statutorily required amount to transfer the lien to a bond (the "Bond"), and thereby clearing title to her residence. (A3:19-20) Hiller filed and served a Notice of Bond, which was recorded on December 2, 2014, and served on Phoenix by the Clerk on December 3rd. (A3:18) Later, on December 8, 2014, Hiller filed a Notice of Filing Bond, including the Bond and the recorded Notice of

Bond. (A3:15-20) The effect of these filings and recording was to transfer the lien to the Bond.

Most importantly for the purposes of this appeal, Hiller filed a Notice of Contest the claim against the Bond as provided under section 713.22(2) of the Florida Statutes (the "Notice of Contest"). (A4:21) The Notice of Contest was filed *after* the lien was transferred to the Bond, and is in compliance with the form required by the statute. The Notice of Contest was recorded by the Clerk on January 7, 2015, and was served on Phoenix by the Clerk, via certified mail, on January 8, 2015. (A4:21-22) 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." (*Id.*) The Clerk's service shortened Phoenix's statutory limit to 60 days within which to bring an action against the surety. Phoenix missed this jurisdictional deadline.

Thereafter, Hiller answered the Amended Complaint (A5:23-43, served March 10, 2015), and raised as one of her affirmative defenses the shortening of the duration of Phoenix's claim against the Bond and the failure of Phoenix to timely bring a claim against the Bond. (*Id.* at 25-27, &29)

Phoenix served a Reply to the affirmative defense, 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) After being advised of this, Phoenix still did not sue the surety but instead filed a Motion to Supplement its complaint, along with a proposed Supplemental Complaint (A7:48-62) seeking to assert a claim against the surety (or at least naming the surety as a party defendant).<sup>2</sup>

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<sup>2</sup> As part of its argument below, Phoenix asked the trial court to deem the claim against the surety as timely filed by treating the Supplemental Complaint as relating back to November 26, 2014, the date of the Amended Complaint against Hiller. (A11:122-23, 147-48)

On March 24, 2015, Hiller filed a Motion for Release of Bond, Discharge of Lis Pendens, and Dismissal with Prejudice on Count I. (A9:69-92) In this motion, Hiller explained the procedural history and the fact she had filed a Notice of Contest, which shortened by operation of law the deadline for Phoenix to sue the surety on the Bond to 60 days. Hiller asserted that:

Because Phoenix failed to timely institute a suit to enforce its claim against the Bond (i.e., the security) on or before March 9, 2015, the Lien was automatically extinguished by operation of law. *Cool Guys, LLC*, 84 So. 3d at 1076 (there is no ambiguity in the statute; contractor was precluded from bringing a claim on a transfer bond after missing the limitations period) . . . .

(A9:73, &12)

The primary relief Hiller sought in the Motion was an order directing the Clerk to release and return the Bond [the Lien Transfer Bond] to Hiller and to discharge the lis pendens. (A9:74, &15b,c) Hiller also sought dismissal of Count

I, seeking to foreclose the construction lien, because the lien was extinguished automatically, and no action can be maintained to foreclose an extinguished lien. (*Id.*, &15a) The Motion had no effect on Counts II or III of the Amended Complaint.

The trial court held a hearing on May 21, 2015,<sup>3</sup> on Hiller's Motion for Release of Bond and on Phoenix's late-filed motion 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 granted Phoenix's request for leave to file amend. (A10:93)

At the hearing, Hiller's counsel laid out the statutory framework, and explained that after the lien was filed, Hiller had been forced to post an irrevocable letter of credit for \$140,000 or more to obtain a Bond, and that "\$140,000 of her money is locked up until this lawsuit or this lien issue is resolved." (A11:99-102; 102/lines 2-4) Hiller also explained that, after posting the Bond, she elected to shorten the statute of limitations for an action against the surety, and that Phoenix failed to comply with sections 713.22 and 713.24 of the Florida Statutes.

Phoenix's counsel asserted that because Phoenix filed an action to foreclose its lien on the house within a month of filing the Claim of Lien, there was no

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<sup>3</sup> The complete hearing transcript is found at A11:95-150.

deadline of any kind to bring sue the surety on the Bond. (A11:116/10-20) In other words, there was no special 60-day statute of limitations because Phoenix's lawsuit already was pending at the time the Bond was posted and at the time the Notice of Contest was served. Phoenix cited an irrelevant case generally discussing statute of limitations, but not in the construction lien context<sup>4</sup> (A11:120); two cases in which the issue was whether the initial foreclosure action was timely<sup>5</sup> (A11:121-24); and a case that had been the leading case on this issue before the 2005 amendments to section 713.24(4) but which is no longer good law on this point.<sup>6</sup> (A11:125-31).

Hiller's counsel explained about the 2005 statutory amendments and tried to correct the court's misapprehension of the law (A11:138-44), but to no avail. The trial court denied the Motion for Release of Bond, stating:

<sup>4</sup> *Friday v. Newman*, 183 So. 2d 25 (Fla. 2d DCA 1966)(addressing that filing of Complaint, and not service on defendant, is what stops the statute of limitations).

<sup>5</sup> These next two cases are irrelevant to whether a late-claim can be filed against a surety, because in each case the initial claim was timely, and the sole issue was whether a later amended complaint related back to original filing date. *Scarfone v. Marin*, 442 So. 2d 282 (Fla. 2d DCA 1983)(initial claim against the surety was timely); *Mainlands Const. Co. v. Wen-Dic Const. Co.*, 482 So. 2d 1369 (Fla. 1986)(counterclaim to foreclose was timely filed within 20 days).

<sup>6</sup> *Am. Fire & Cas. Co. v. Davis Water & Waste Indus., Inc.*, 358 So. 2d 225 (Fla. 4th DCA 1978), *aff'd*, 377 So. 2d 164 (Fla.1979)(no deadline to sue surety on bond if suit is already pending against property owner when lien transfer bond is filed).

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 the surety in any way.***

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

The written Order was rendered on May 21, 2015, the date the Clerk stamped the Order. (A10:93) Because the 30th day fell on a Saturday, this Appeal was timely filed electronically on the following Monday, June 22, 2015 at 03:25:22 PM. (A12:151-55) The clerk-stamped order is attached to the Notice of Appeal.

**C. Jurisdiction over this Appeal**

This Court has jurisdiction over this nonfinal appeal under Rule 9.130(a)(3)(C)(ii), because the order under review determined Hiller's right to immediate possession of property. As explained in the Response to the Orders to Show Cause, this appeal fits within the scope of Rule 9.030 and there are numerous cases upholding the right to a nonfinal appeal.

Alternatively, and also as explained in the Response filed concurrently with this Initial Brief, the Court under Rule 9.040 could treat this appeal as seeking a writ of certiorari directed to the trial court to correct the departure from the

essential requirements of law for which there immediate and irreparable harm, or issue a writ of mandamus directing the Clerk of Courts to engage in the ministerial act of releasing the bond as required by section 713.24.

## **VI. SUMMARY OF ARGUMENT**

This appeal involves a rather simple issue. There is no dispute that Phoenix filed a lien against Hiller's property, and Hiller filed a Bond to transfer the lien from her house to the Bond. It also is undisputed that Hiller served a Notice of Contest, which she had every right to do, electing to shorten the time within which Phoenix had to commence an action against the surety. As amended in 2005, Florida Statutes section 713.22 provides that when a Notice of Contest is recorded and served on the contractor/lienor, even if this occurs during the pendency of an action against the property owner, the contractor must sue the surety within 60 days or the lien is "extinguished automatically."

Florida construction lien laws must be *strictly* construed and the deadlines applied inflexibly. The special statutes of limitation imposed by Chapter 713, which only pertain to the statutory privilege of maintaining a lien against real property and have no effect on the right to seek damages, are strictly enforced as written. Trial courts have no discretion to bend these time requirements, as might otherwise be allowed in other civil matters.



In this case, the trial court erred by refusing to apply the 2005 statutory amendments and applicable case law issued after the amendment. Instead, at Phoenix's urging, the trial court followed an older Fourth DCA case decided interpreting the former statute. Before the amendment, if a bond was posted *during the pendency of a suit to foreclose the lien*, the contractor did not need to do anything further within any particular time-frame to maintain a claim on the bond.

That changed in 2005, when the Legislature added a sentence to section 713.24 providing that if, *during the contractor's proceeding* against the property owner, a bond is posted that transfers the lien to the bond, the contractor must commence an action against the surety "within 1 year after the transfer, unless otherwise shortened by operation of law." This amendment abrogates the case which "swayed" the trial court to rule for Phoenix and against Hiller on bond issue.

Because Phoenix did not comply with the strict requirements of the statute, the lien "extinguished automatically" and the bond should have been returned to Hiller immediately upon request. If this Court follows the clear language of sections 713.22 and 713.24(4), and based upon the undisputed fact that Phoenix did not comply with those requirements, this Court should reverse the order below and order the immediate return of the Bond to Hiller.

## **VII. ARGUMENT**

### **A. STANDARD OF REVIEW**

This appeal involves a purely legal question based upon undisputed facts. Therefore, this Court should apply a de novo review. *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001)("standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo. As a rule, statutes of limitation impose a strict time limit for filing legal actions.").

Importantly, when dealing with construction liens (often referred to as mechanic's liens) and lien transfer bonds under Chapter 713, a trial court has no discretion to refuse to immediately release the bond when the statutory conditions for release have occurred. *Dracon Const., Inc. v. Facility Const. Mgmt., Inc.* 828 So. 2d 1069, 1070 (Fla. 4th DCA 2002) (in special statutory proceedings like this, trial court does not have discretion to bend time requirements).

### **POINT I**

#### **B. THE TRIAL COURT ERRED IN REFUSING TO ORDER THE IMMEDIATE RELEASE OF THE LIEN TRANSFER BOND BECAUSE PHOENIX FAILED TO TIMELY FILE AN ACTION AGAINST THE SURETY.**

##### **1. This Appeal Deals Solely With The Return of the Bond**

Before addressing the merits of this particular case and the application of the law to the facts, it is essential that the Court recognize two important points. First, this appeal relates solely to a bond and nothing else. The sole issue here is whether Phoenix can maintain a claim against the Bond or whether the Bond must be released to Hiller. That issue has nothing to do with whether Phoenix may assert a cause of action for damages arising from an oral contract or an unjust enrichment claim. Clearly, Phoenix can do so regardless of the outcome here.

Phoenix started this process by taking advantage of a special statutory right, created for it by the Florida Legislature, which allowed it to file a construction lien against Hiller's home. In response, Hiller had the right to post a bond, thereby transferring the lien to the Bond, to clear title to her property during the pendency of this lawsuit. That right came at a cost B to obtain the Bond, Hiller was required to tie up, for however long it takes, collateral and assets in the amount of \$140,000.

Once the bond was filed, Hiller also availed herself of another special statutory right, to shorten to 60 days the statute of limitations for Phoenix to sue the surety. Because Phoenix did not file an action against the surety on the Bond within 60 days from the date the Clerk sent the Notice of Contest by certified mail, as set forth in section 713.22(2), the lien extinguished automatically.

As a result, Hiller was entitled to the return of the Bond, and the Clerk was supposed to release the security upon request of the person depositing it (Hiller), without judicial intervention. But the Clerk refused (A113:18-24), so Hiller requested an order from trial court compelling the release, but that was denied. Hiller is entitled to the immediate release of the bond, and should not have to wait. Indeed, the Legislature has dictated that she not be forced to wait for the entry of a final judgment at the end of the case to have the bond returned.

**2. The Deadlines Under Chapter 713 Are Inflexible**

Second, Florida's Construction Lien Law must be *strictly* construed and its deadlines applied inflexibly. *W.W. Plastering, Inc. v. Chism Const. Inc.*, 867 So. 2d 600, 601-02 (Fla. 1st DCA 2004); *Pierson D. Const., Inc. v. Yudell*, 863 So. 2d 413, 416 (Fla. 4th DCA 2003). Again, the issue on appeal does not affect the damages claims and counterclaims, which can be pursued in the normal course of litigation. Instead, this appeal solely involves whether the contractor has fulfilled the strict time requirements to maintain a claim against the Bond. Either way, the lawsuit for damages below will continue.

In *W.W.*, appellant attempted to foreclose a construction lien after more than one year had passed from the date the lien was transferred to a bond. *Id.* at 601. The trial court granted appellees' motion to dismiss because the appellant had not

timely initiated the action. The First DCA held that "unless an owner elects to shorten the time for filing an action against a bond by following the procedures set forth in section 713.22(2), Florida Statutes, an action against a transferred lien must be filed... within one year of the date that the transferred lien is recorded or the security must be returned. Florida construction lien laws must be *strictly* construed." *Id.* at 601-02.

*Pierson D. Const.* involved notice of contest, which shortens the statute of limitations for a claim on a lien or transfer bond to 60 days. The court first noted that because Chapter 713 contains statutes of limitations applicable to liens, those provisions prevail over section 95.11. *Id.* at 415. (Thus, cases interpreting section 95.11 of are little relevance to these issues). At issue in *Pierson D. Const.* was the contractor's failure to comply with the requirements to sue on the construction lien within the shortened 60-day period. The contractor actually filed suit within 60 days, but failed to serve a final contractor's affidavit five days *before* filing suit as required, and never filed the affidavit within the 60 days.<sup>7</sup>

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<sup>7</sup> The court in *Pierson D. Const.* recognized that the failure to file the affidavit five days *before* the suit was filed could be corrected, so long as a final contractor's affidavit was timely filed. But under 713.22, because the property owner shortened the statute of limitations to 60 days, both the affidavit and the lawsuit had to be filed timely: "such filing must have been accomplished within the 60 day limitation period of section 713.22(2)." *Id.* at 416. Because the contractor failed to meet the special statute of limitations, the lien went away and there could be no foreclosure action.

The law as to the strictness of these statutes of limitations is well-established. *Palmer Elec. Services, Inc. v. Filler*, 482 So. 2d 509, 510 (Fla. 2d DCA 1986) ("mechanic's lien law is to be strictly construed in every particular and strict compliance is an indispensable prerequisite for a person seeking affirmative relief under the statute"); *see also, e.g., Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 625-26 (Fla.1995)("Mechanic's lien law is a creature of statute and must be strictly construed . . . . Contracting parties need certainty about when time periods for notification begin."); *Home Elec. of Dade County, Inc. v. Gonas*, 547 So. 2d 109, 111 (Fla. 1989)("Mechanics' lien law is to be strictly construed in every particular and strict compliance is an indispensable prerequisite for a person seeking affirmative relief under the statute.");<sup>8</sup> *Jack Stilson & Co. v. Caloosa Bayview Corp.*, 278 So. 2d 282, 283 (Fla.1973) ("The purpose of the fixed periods provided in such statutory remedies as the one here involved of the Mechanics' Lien Law was to make definite and certain the time within which the matter can be considered as ended."); *Dracon Const., Inc. v. Facility Const. Mgmt., Inc.*, 828 So. 2d 1069, 1070 (Fla. 4th DCA 2002) (in special statutory proceedings like this, trial court does not have discretion to bend time requirements that might

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<sup>8</sup> "The wisdom of the various provisions of the [mechanics' lien act] are matters wholly within the orbit of legislation. We have no right to step into that field." *Id.* at 111, n.2.

otherwise be allowed in other civil matters; enforcing strict time requirements and dismissing lien foreclosure action that was three days late); *Charles Redi-Mix, Inc. v. Phillips*, 580 So. 2d 166, 167 (Fla. 4th DCA 1991)("the Notice of Contest acts by operation of law to discharge a lien on the sixtieth day, without intervention of the court. In addition, the mechanic's lien law is to be strictly construed in every particular; and strict compliance is an indispensable prerequisite for a person seeking affirmative relief.").<sup>9</sup>

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<sup>9</sup> Receded from on other grounds by *Volksbank Regensburg v. Burger*, 703 So. 2d 538 (Fla. 4th DCA 1997).

**3. Phoenix's Claim Against the Bond Extinguished Automatically When Phoenix Failed to Sue the Surety on the Bond Within 60 Days.**

This nonfinal appeal, which alternatively may be treated by this Court as a petition for an extraordinary writ, concerns a discrete sub-issue in the case concerning Phoenix's right to maintain an action on a surety bond posted by Hiller, and Hiller's right to immediate possession B the immediate release of the Bond B as a result of Phoenix's failure to comply with the clear and unambiguous deadline to bring an action against the surety as provided in sections 713.22 and 713.24 of the Florida Statutes.

Specifically, the relevant statute gives the property owner the right to "elect to shorten the time . . . within which to commence an action to enforce any . . .

claim against a bond or other security under section 713.23 or section 713.24 by recording in the Clerk's office a notice" in substantial compliance with a presented form. '713.22 (2), Fla. Stat. (2015). That statute further provides that when a Notice of Contest is recorded and served on the contractor/lienor, despite the pendency of a lien foreclosure action against the property owner, the contractor must sue the surety on the bond within 60 days, failing which:

The lien of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her lien within 60 days after service of such notice ***shall be extinguished automatically.***

' 713.22(2), Fla. Stat. (2015).<sup>10</sup>

The issues in this case were specifically addressed in *Cool Guys, LLC v. Jomar Properties, LLC*, 84 So. 3d 1076, 1078 (Fla. 4th DCA 2012). There, the Court applied the same statute and held that, after transfer of a lien to a bond, the lien extinguishes automatically unless a claim is brought on the transfer bond. *Id.* Importantly, in *Cool Guys*, there already was a lien foreclosure action filed and pending when the lien transfer bond was posted. The court correctly interpreted

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<sup>10</sup> Like other statutes of limitation, section 713.22(2) bars an action to enforce a lien not filed within its 60-day time frame. *Pierson D. Const. v. Yudell*, 863 So. 2d at 416; *see also Dykema v. Trans State Indus., Inc.*, 303 So. 2d 52, 52-53 (Fla. 2d DCA 1974)(holding lien claim properly stricken because of lienor's failure to file suit within 60 days from the date of service of a notice of contest of lien under section 713.22(2) resulted in the lien claim being extinguished automatically by operation of law.)



the statute (recently revised in 2005) as requiring that an action be filed against the surety within one year.<sup>11</sup> The court stated:

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<sup>11</sup> In our case, the one year was shortened to 60 days by service of the Notice of Contest, as permitted by section 713.24(4). (A4:21-22)

In February of 2007, Cool Guys recorded a construction lien against property owned by Jomar, claiming it was still owed \$58,296 for air conditioning work. ***In March of 2007, litigation was commenced over the matter and Cool Guys filed a counterclaim for foreclosure of its lien. In December of 2007, during the pendency of the litigation, Jomar posted a transfer bond, transferring Cool Guy'sa lien to a surety bond issued by Accredited Surety.*** Cool Guys received notice of the transfer of the lien to security. Despite such notice, Cool Guys did not attempt to bring a claim on the transfer bond until two years later. Jomar and the surety moved for summary judgment, asserting the claims on the transfer bond were time-barred given the one-year limitations period in section 713.24(4), Florida Statutes. The trial court agreed.

*Id.* at 1077.

The Fourth DCA noted that, under the prior version of the statute, the courts "refused to apply the one-year time limitation in section 713.24(4) to bar a claim against the surety where the lien was transferred to security ***during the pendency of a suit to foreclose the lien.*** See *Am. Fire & Cas. Co. v. Davis Water & Waste Indus., Inc.*, 358 So. 2d 225 (Fla. 4th DCA 1978), *aff'd*, 377 So. 2d 164 (Fla.1979). In other words, under the former version of the statute, if there already was a lien

foreclosure claim pending when the lien transfer bond was filed, there was no need to file a new lawsuit against the surety. But that changed in 2005.<sup>12</sup>

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<sup>12</sup> 8 Fla. Prac., Constr. Law Manual ' 8:53 (2014-2015 ed.) (Since October 1, 2005, if a lien foreclosure action is commenced, and thereafter the lien is transferred to a bond, an action must be brought against the bond within one year after the transfer to the bond [unless that limitations period is shortened by a notice of contest].); *RIGHTS AND LIABILITIES OF SURETIES*, CONSL FL-CLE 8-1 (if an action on a lien is timely filed and the lien is subsequently transferred to a bond or other security during the pendency of that action, the claimant has one year following the transfer, unless otherwise shortened by operation of law, to institute an action against the surety or its claim is automatically barred); 19 Fla. Prac., *Florida Real Estate* ' 38:1, fn.30 (2015 ed.) (Aunder ' 712.24, Fla. Stat., a claim on security to which a construction lien was transferred (whether cash bond or surety bond) must be brought within one year after the transfer, ***whether the transfer of the lien to security occurred before or during the litigation@***); 1 La Coe's Fla. R. Civ. P. Forms R 1.110(229) (2014 ed.) (contractor is precluded from bringing an untimely claim on a construction lien transfer bond); *CONSTRUCTION LIENS*, RPL FL-CLE 5D-1 (when lien is transferred to a bond, an action to enforce the transferred lien against the bond must be timely commenced against the bond itself).

Here, the trial court was urged by Phoenix to rely upon the older case law which predates the 2005 amendments to sections 713.22 and 713.24, and to ignore *Cool Guys* even though it directly addresses this issue. Under the revised section, if a claim is timely filed against the surety within 60 days of the Notice of Contest, the filing of that claim on the bond "shall be deemed to have been brought as of the date of filing the action to enforce the lien." '713.24(4).

In other words, if Phoenix had sued the surety within 60 days, then the statute provides that timely-filed bond claim would relate back to the filing of the

original action against Hiller on the lien. Obviously, if the suit against the surety is untimely, not only is there "no relation back," but the lien (and, thus, the claim against the Bond) is extinguished automatically, as a matter of law. And, if there is no lien and no claim against the Bond, the Clerk is to return the Bond upon request. '713.24(4), Fla. Stat. This error is at the heart of the trial court's legal error because the construction lien statute is strictly construed and its statutory deadline rigidly enforced, as explained in section 2 above.

The trial court was led astray when Phoenix relied upon the 1979 case of *Am. Fire*, interpreting a predecessor to the current statute. Back in 1979, the Fourth DCA held, affirmed by the Supreme Court, that "the surety on a lien transferred to bond is not automatically released, one year after the filing of a claim of lien, if suit to enforce same has been filed before the transfer takes place." *Id.*, 358 So. 2d 225. The court reasoned that if a suit already has been filed against the property owner at the time the lien transferred to a bond, section 713.22 does not apply: "this section clearly intends that any future proceedings be commenced within the year set forth in ' 713.22 and does not seek to address itself to the situation where the suit has already been filed prior to the transfer, which was the case here." *Id.* at 227.

In affirming, the Florida Supreme Court said very little on this point:

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.

*Id.*, 377 So. 2d at 165.<sup>13</sup>

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<sup>13</sup> The trial court parroted this sentiment in denying the Motion to Release Bond. "I am swayed by the American Fire and Casualty Company versus Davis Walter and Waste Industries case, a Supreme Court case, finding that the suit to enforce the lien was timely filed. . . . ***The delay in joining the surety, I'm finding, did not violate the statute or prejudice the surety in any way.***" (A11:148-49; 49/lines 6-11)

Things changed, however, when the Legislature amended sections 713.22 and 713.24 to address this issue. Indeed, the Fourth DCA in its opinion in *Am. Fire* had noted the existence of at least one potential statutory gap: "We are assuming that the period refers to one year from the filing of the claim of lien as in ' 713.22. However, the briefs in this case raise the specter of it being one year from the date of the transfer. While we do not believe the legislature intended the latter, the choice is not crucial in the instant case." *Id.* at 227, n1.

In 2005, the Legislature spoke loudly and clearly in amending section 713.24(4) to address what happens when there already is a lien foreclosure claim already pending at the time the lien is transferred to a bond:

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. (2005). This newly-added sentence directly overrules and abrogates the holding in *Am. Fire*, because the Legislature addressed the situation where there was a timely action already pending to enforce a lien (which is the case with Phoenix) when the lien was transferred to a bond.

As of 2005, in that situation, the lienor must bring (i) an action, (ii) in the same county or circuit court, (iii) to recover against the security, (iv) within 1 year after the transfer, ***unless otherwise shortened by operation of law***. If so, the action "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). If not, then the lien "shall be extinguished automatically," '713.22(2), and the bond is to be returned to Hiller upon request. Contrary to the clear language of section 713.24(4) and the undisputed fact that Phoenix did not comply with those requirements, the trial court erroneously allowed relation back because there would be no prejudice to the surety. That is not a relevant factor in this case.

This Court has not yet addressed this issue in the context of the revised 2005 statute, but the Fourth DCA's reasoning and logic in *Cool Guys* is sound. This Court is bound to follow, and should follow, the *Cool Guys* opinion .

### **VIII. CONCLUSION**

The trial court erred by applying the wrong version of the statute and following the wrong law, at Phoenix's urging. Because Phoenix did not comply with the requirements set forth in the Notice of Contest, the lien was extinguished and Hiller is entitled to the immediate return of the Bond.

Accordingly, for the reasons expressed herein, this Court should REVERSE the erroneous order entered by the trial court.

## **IX. CERTIFICATE OF SERVICE**

WE CERTIFY that the foregoing Initial Brief has been electronically filed and that a copy has been furnished to all counsel and parties on the attached service list by e-mail portal service this 14th day of July, 2015.

## **IX. CERTIFICATE OF COMPLIANCE**

WE CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) because this is a computer-generated brief and is submitted in Times New Roman 14-point font.

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