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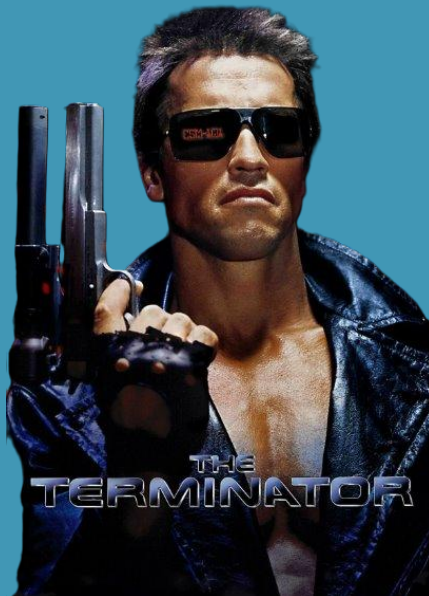
Hasta La Lien Risk, Baby

Terminate Construction Liens

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The Project:

- Mixed-use condominium tower in Tampa with commercial units on the first floor and residential units on the upper floors
- Construction loan - \$150MM.
- Practitioner orders a commitment to insure the loan and several NOCs are found



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Sitework – NOC #1



Section 713.04, F.S. provides contractors who **perform services or furnish materials to make property suitable** as the site for the construction of improvements are **entitled to a lien**

- No NOC required for this type of work
- Priority of this lienor's lien effective at the time of recording (713.07(1), F.S.)
- Contractor also not required to serve a notice to owner

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Notices of Commencement

- Valid 1 year (or longer if specified within the NOC)
- NOCs establish a point of reference
- "Addressing Open Notice of Commencement in Title Insurance Commitments," 52 Fund Concept 93 (Sept. 2020)



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Lienors

Who Can Lien?

- "Lienor" means a person who is
 - A contractor
 - A subcontractor
 - A sub-subcontractor
 - A laborer
 - A materialman
 - A professional lienor under Sec. 713.03, F.S.

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Privity/Non-Privity

Who Has a Contract with the Owner?

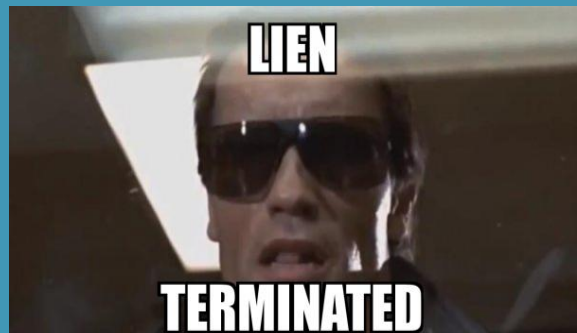
- If a lienor is in direct contract with the owner of the property, that lienor has the ability to lien
- If lienor is not in direct contract with the owner that lienor must serve a Notice to Owner on the property owner within 45 days of beginning to furnish services, labor, or materials on the project
- If a lienor is not in compliance with one of the above, that lienor's lien rights will not be preserved

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NOC #1- Bonds

Overview

- Recorded as an attachment to NOC
- Does not cover liens from the contractor or parties in privity with the owner
- Lienors required to follow specific statutory steps, similar to lien rights



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Types of Bonds

Bonds vs. Transfer to Security

- Payment Bonds
- Conditional Payment Bonds
- Transfer to Security



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Payment Bonds

Sec. 713.23, F.S.

- Furnished by contractor in at least the amount of the original contract price, conditioned on contractor making prompt payments under direct contract
- Liens of parties in privity with contractor named in the bond are transferred to the bond with the same effect of Sec. 713.24, F.S. by contractor recording Notice of Bond

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Conditional Payment Bonds

Sec. 713.245, F.S.

- Notice of this type of bond is also recorded as an attachment to the notice of commencement
- Payment by the surety is conditioned on full payment by owner to contractor for the work claimed ("Pay When Paid")
- Only liens of parties in privity with the contractor are transferred to the bond by the contractor recording a Notice of Bond and a Certificate of Payment

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Transfer to Security

Sec. 713.24, F.S.

- Alternative when no bond has been posted
- Any person with an interest in the land may transfer a lien using this method
- Either by depositing a sum of money or filing a bond with the clerk
- Clerk then records a certificate showing the transfer of the lien from the real property to the security/bond and required to send a certificate of transfer to the lienor

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Signage – NOC #2

What's the Scope of Work?



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NOC Requirement #2

The Significance of 90 days

- 713.13(2), F.S. - If the improvement described in the notice of commencement is not actually commenced within 90 days after the recording thereof, such notice is void and of no further effect
- 713.08(5), F.S. - The claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor



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NOC Requirement #2

The 90-day Affidavit

- An affidavit of a reliable person stating that 90 days have elapsed since the final furnishing of labor, services or materials to the property described in this commitment and all lienors are paid in full in relationship to the Notice of Commencement recorded in ____, Page ____, Public Records of ____ County, Florida.
- Aff-22 – Construction Over 90 Days – by Owner (Affidavit Practice Manual)

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NOC Requirement #2

The Expiration Date

9. Expiration date of notice of commencement (the expiration date is 1 year from the date of recording unless a different date is specified) :



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First Floor Pool - NOC #3

Work complete < 90 days- TN 21.03.01

- Evaluation of multiple factors (not exclusive list):
 - Scope of work
 - Amount paid to date
 - Number of subcontractors
 - Status/progress of work
- Obtain owner affidavit
- Obtain contractor affidavit



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NOC Requirement #3

Work completed less than 90 days ago

As to the Notice of Commencement recorded under _____, Public Records of _____ County, Florida: (1) Obtain an Owner's Affidavit which contains the following: (a) names and addresses of all persons serving notice to owner pursuant to Sec. 713.06(2), F.S., (or if none received, the affidavit should so state), (b) a statement that a personal inspection of the property was made to determine whether persons posted a notice to owner on the property, (c) the names and addresses of all persons having privity of contract with the owner under Sec. 713.05, F.S., (d) a statement that the improvement described in the notice of commencement has been completed, (identifying the notice by the book and page where recorded), (e) a statement that the owner has obtained the affidavit required by Sec 713.06(3)(d)(1), F.S., from all parties having privity of contract with the owner under Sec. 713.05, F.S., and (f) a statement that all persons serving notice to owner and all persons having privity of contract with the owner under Sec. 713.05, F.S., have been paid in full. (2) A Waiver and Release upon Final Payment under Sec. 713.20(5), must be obtained from all persons serving notice to owner and from all persons having privity of contract with the owner under Sec. 713.05, F.S.

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NOC Requirement #3

Owner's Affidavit (Aff-23)

- An Owner's Affidavit stating:
 - Names and addresses of all persons serving notice to owner;
 - Owner made a personal inspection of the property;
 - Names and addresses of all persons in privity of contract with the owner;
 - All improvements described in the NOC are complete; and
 - All persons are paid in full

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NOC Requirement #3

Contractor's Affidavit (Aff-25)

- An affidavit signed by the contractor stating:
 - Contractor is paid in full;
 - All improvements described in the NOC are complete;
 - All persons providing labor, services or materials to the job have been paid in full; and
 - Lien of the contractor is unconditionally waived



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NOC Requirement #3

Additional Considerations

- Large projects involving high dollar amounts, such as our scenario may require additional items:
 - Certified list of the parties supplying labor, services and materials to the contractor pursuant to Sec. 713.165, F.S.
 - Progress payment report containing contract values and payment schedule to subcontractors and suppliers
 - Copies of lien waivers from all subcontractors and suppliers pursuant to Sec. 713.20(5), F.S.
 - Indemnity Agreement

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Total Build - NOC #4

Consider the timing

2. General description of improvement: Construction of condominium structure and parking structure.



2. Description of improvement: New commercial construction

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NOC Requirement #4 - Restoration of Priority

Insuring first lien priority of the mortgage

Restoration of priority must be achieved by meeting the following requirements.

1. **Obtain** an owner's affidavit ...
2. **Obtain** an Indemnity Agreement ...
3. **Obtain** a Waiver and Release upon Progress Payment from: (a) all persons serving notice to owner; and (b) all persons having privity of contract with the owner under Sec. 713.05, F.S.
4. **Record** the mortgage, mortgage modification or deed to be insured followed by the recording of a new Notice of Commencement.
5. **Post** the newly recorded Notice of Commencement at the job site...

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NOC Requirement #4

The Process of Restoring Priority – TN 21.03.03

- 1) Establish a date close to closing
- 2) Identify all the potential lienors
- 3) Pay potential lienors for services up to the established date
- 4) Obtain waivers and releases from each lienor
- 5) Owner's must provide an affidavit stating all lienors are paid in through the established date (Aff-24)
- 6) Close and record the mortgage
- 7) Record and post a new Notice of Commencement

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Lien Waivers

What are they good for?

- Statutory Form-Sec. 713.20, F.S.
- Aff-25.1 – Contractor's Payment Affidavit and Lien Waiver
- Aff-26 – Subcontractor's Payment Affidavit and Partial Waiver of Lien
- Different types:
 - Partial
 - Final
 - Conditional
 - Unconditional

CONDITIONAL WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$1,736,886.13, hereby waives and releases its lien and right to claim a claim lien for labor, services, or materials furnished through May 31, 2024 to [REDACTED] on the job of [REDACTED] to the following described property:

Floors 16, 17, 18, 19, 20, 21
Miami, Florida 33133

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified. This release is conditioned upon the check(s) given to the undersigned lienor in consideration of this release clearing the bank or institution upon which it (they) is (are) drawn.

Dated this 31st day of May 2024

Lienor Name: DPR Construction, A General Partnership
Address: 1301 East Broward Blvd., Ste 300
Fort Lauderdale, FL 33301

By: [Signature]
Printed Name: Adrian Barrios

State of Florida County of Broward

Sworn to (or affirmed) and subscribed before me by means of ☒ physical presence or ☐ Online notarization, this 31st day of May, 2024, by Adrian Barrios



[Signature]
Signature of Notary Public - State of Florida
(Print, Type or Stamp Commissioned Name of Notary Public)

☒ Personally Known OR ☐ Produced Identification
Type of Identification Produced

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Lien Waiver Audits

With big projects, organization is key

- Remember we are identifying potential lienors!
- What to request?
 - Who are the parties and is there a construction manager?
 - Contract related to each NOC
 - Most recent payment application – or-
 - Sec. 713.165, F.S. list
 - Sec. 713.06, F.S. affidavit



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Lien Waiver Audit Tool

Part 1 - Organize by NOC

Notice of Commencement Information

| | |
|---------------------|------------------------------|
| Type of Interest: | Fee |
| NOC Recording Date: | 1/10/2025 |
| Stated Expiration: | None |
| Filing Party: | GC - Mega Construction, Inc. |
| Bonded: | No |
| BI Requirement #: | #4 |



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Lien Waiver Audit Tool

Part 2 - Identify the Risk

| Party Type | Name(s) | Notice to Owner? | Contract with Owner? | Contract \$ Amount | Waiver? | Waiver Type (Conditional / Unconditional) | Final or Partial Waiver? |
|---------------|-------------------------|------------------|----------------------|--------------------|---------|---|--------------------------|
| Contractor | Mega Construction, Inc. | | Yes | \$ 24,000,000.00 | Yes | Conditional | Partial |
| Subcontractor | Windows plus | Yes | | \$ 3,000,000.00 | Yes | Conditional | Partial |
| Subcontractor | Concrete, Inc. | Yes | | \$ 1,200,000.00 | Yes | Unconditional | Final |

| Lien Waiver Date | Waiver Good Thru Date | Claim of Lien? | Release of Lien? | Final or Partial Release? | Last Payment Amount | Amount Remaining | Comments |
|------------------|-----------------------|----------------|------------------|---------------------------|---------------------|------------------|----------|
| 5/1/2025 | | No | | | \$ 6,000,000.00 | \$ 18,000,000.00 | |
| 5/1/2025 | | No | | | \$ 1,200,000.00 | \$ 2,800,000.00 | |
| 4/1/2025 | | No | | | \$ 1,200,000.00 | \$ - | |

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Workable Solutions

Pitfalls in the lien waiver process

- Disorganized construction manager or developer
 - Use a lien waiver tool
 - Organize data by NOC
- Developer is behind in payments
 - Work with Underwriting Counsel
 - Indemnity Agreements
 - Special Purpose Entity (SPE)
 - Financials



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Notice of Termination ("NOT")

NOC #4 (continued)

- Generally, Owner may terminate a NOC in accordance with the provisions of Sec. 713.132, F.S.
- Used by Owner to shorten the 1-year duration of NOC
- NOT is used to restore priority of a mortgage loan if NOC is recorded prior to the mortgage
- NOT is used to restore priority when a prior mortgage is extensively modified, resulting in a novation and loss of priority

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Notice of Termination

- NOT must contain the same information as the NOC and its recording date and reference numbers
- Generally, NOT becomes effective 30 days after the date it is recorded (or longer if stated within NOT)
- NOT is recorded along with Contractor's Final Payment Affidavit



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Notice of Termination

- Due to recent legislation, construction no longer needs to be completed or ceased prior to terminating NOC, but all lienors must have been paid in full or pro rata
- Owner must serve notice, prior to recording the NOT, on all parties in direct contract with the owner or others who have served Notices to Owner
- Notice must also be served on those parties that timely served a notice to owner even if after the NOT was filed
- The later filers are entitled to 30 days from receipt of notice before the NOT is effective to them (See "Restoration of Priority: Applying the Revised Notice of Termination Statute" 56 Fund Concept 61 (June 2024))

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Tenant Build Out – NOC #5

Does a tenant lien attach to the fee ownership?



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Safe Harbor: Sec. 713.10, F.S. Extent of liens.

- Lease must contain prohibition on encumbering the fee
- Landlord must record lease or memorandum of lease reflecting the terms, or a notice of lien prohibition before the notice of commencement
- "Who Is Responsible for Construction Liens for Tenant Improvements?" 53 Fund Concept 105 (Oct. 2021)



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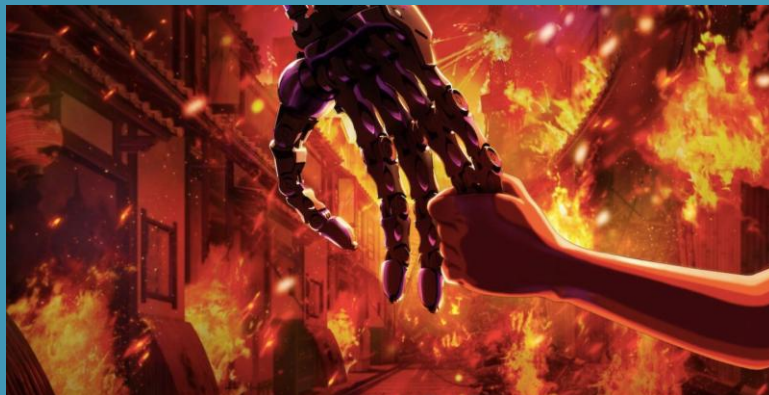
Tenant NOC

Ask the right questions:

- Who signed the NOC?
 - Owner or Tenant
- Who signed the contract?
 - Big name tenants may not want to provide
- What does the lease say?
 - Could the construction be considered the pith of the lease?



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Thank you

For more information please contact:

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