

## WHO IS RESPONSIBLE FOR CONSTRUCTION LIENS FOR TENANT IMPROVEMENTS?

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Under Florida law, licensed contractors and other professionals who supply labor, services, or materials to improve real property are entitled to a lien against the property they improve. Generally, an owner understands that if they engage a contractor to improve their property, it could be subject to a lien if they fail to pay. This concept is not as straightforward when the owner leases the land to another who intends to construct improvements upon it. Is there potential for the tenant's construction liens to attach to the real property? The answer is maybe.

This article explores Florida's Construction Lien Law and the circumstances under which construction liens for tenant improvements attach to the interests of the owner. The determination requires evaluating the actions of the owner, tenant, and contractor in a given situation.

### Background

Florida's Construction Lien Law has a lengthy history. In 1967, the current Ch. 713, F.S., replaced its predecessor in Ch. 84. However, the general rule describing how liens for tenant improvements attach embodied in today's Sec. 713.10, F.S., has not changed much from its earlier version. The current statute provides:

*(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvements as such right, title,*

*and interest exists at the commencement of the improvement or is thereafter acquired in the real property. When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor.*

A strict reading of the first sentence of Sec. 713.12, F.S., indicates that a contractor engaged by the tenant to construct leasehold improvements is limited to a lien upon the tenant's leasehold interest only for non-payment. But the second sentence of the statute casts a cloud over this straightforward interpretation since an off record "agreement" may change the applicability of the contractor's lien.

The concept of this off-record agreement or contract creating a doorway to owner liability is not new. The Florida Supreme Court has ruled numerous times on the nature of a side contract or agreement that may result in lien exposure to the owner. In *Masterbilt*

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*Corp. v S.A. Ryan Motors of Miami*, 6 So.2d 81 (Fla. 1942), the court found that consent of the owner for the improvements made by a subtenant does not confer or grant the contractor authority to work or right to impose a lien on the owner's property. In *Robert L. Weed Architect, Inc. v. Horning*, 33 So.2d 648 (Fla. 1947), the court stated that if the lease expressly requires the lessee to make the improvements, then the lessee is deemed to be the owner's agent and the contractor can be construed to be in privity with the owner. In the case of *Brenner v. Sullivan*, 84 So. 2d 44 (Fla. 1955), the court also held the liens of the contractor will attach to the owner's interest in the land where a lease required the tenant to make the improvements. In *Anderson v. Sokolik*, 88 So.2d 511 (Fla. 1956), the court further imposed lien liability on the owner when the tenant improvements were the pith of the lease. The court held that when the lessee contracts for improvements he does so in accordance with a contract with lessor when these improvements are the essence or pith of the lease. A strong dissenting opinion on the facts of the *Anderson* case did not change this standard for holding the owner's interest in the land subject to liens.

Subsequent appellate court decisions uniformly followed these prior decisions and further highlighted the case-by-case analysis required to determine if the terms of lease required the improvements to be made by the tenant or if the lease terms made it obvious the improvements were the pith of the lease. See *A.N. Drew, Inc v. Frenchy's World Famous Cajun Café, Inc.*, 517 So.2d 766 (Fla. 1st DCA 1988); *Van D. Costas, Inc. v. Rosenberg*, 432 So.2d 656 (Fla. 2d DCA 1983); *Davidson Lumber Co. v. Sullivan*, 403 So.2d 560 (Fla. 3d DCA 1981); *Miracle Center Development Corp. v. M.A.D. Construction, Inc.*, 662 So.2d 1288 (Fla. 3d DCA 1995) (consent to the improvements is not enough); *Robb v. Lott Paving Company, Inc.*, 289 So.2d 776 (Fla. 4th DCA 1974); and *Budget Electric Co. v. Strauss*, 417 So.2d 1143 (Fla. 5th DCA 1982) (introducing the test for consideration to determine if the lease required the improvements).

### Statutory Solution

In 1963, the Florida legislature made comprehensive changes to the mechanics' lien law in order to avoid confusion and misunderstandings by contractors regarding their lien rights when contracting with tenants for their improvements. The legislature enacted Sec. 84.101, F.S., which provided that the interest of the lessor shall not be subject to liens as long as the lease expressly prohibits such liability and

the lease was recorded. However, filing the entire lease to provide adequate notice of the lease prohibition from liens of the contractor remained problematic.

In 1985, the Florida legislature changed the obligation to record the entire lease as a means to impart knowledge of lease terms on the tenant's contractor. Sec. 713.10 (2) (b), F.S., was refined but continued to provide the owner with two ways to place the contractor on notice of the terms of a lease limiting the extent of a contractor's lien. The first method was modified to allow the owner to record the lease or a short form thereof that contained the terms of the lease that expressly prohibit liability. The second method authorized recording a blanket notice of the lease prohibition and setting forth the express language covering all tenant leases occupying any space on the land. This statutory safe harbor regarding tenant improvements seemed to provide clarity and protection to both the contractor and owner.

The First District Court in *14th & Heineberg, L.L.C. v. Hendricksen & Co. Inc.*, 877 So. 2d 34 (Fla. 1st DCA 2004) held the improvements were not required by the lease and denied a lien on the owner's interest. More importantly, this court pointed out that where the improvements were required, or were the pith of the lease, the owner's interest in the land will be subject to mechanics' liens unless the owner records the necessary disclaimer. See also *MHB Construction Services, L.L.C. v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So.3d 587 (Fla. 4th DCA 2011). Thus, the strength of the statutory safe harbor was recognized as a means to avert owner liability.

An apparent glitch with the provisions of Sec. 713.10(2)(b), F.S., (1997), was pointed out by the Fourth District Court in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA 2010) when it ruled that all leases must contain the specific language or the blanket notice option would not be sufficient to protect the owner from liens. The court in *Everglades* allowed the lien of the contractor to attach to the owner's property despite the filing of a blanket notice of the lien prohibition, because not all of the applicable leases contained the same or similar language included in the recorded notice.

This case prompted the Florida legislature in 2011 to change the blanket notice provision from requiring that all leases contain specific language prohibiting liens to requiring that a majority of the leases do so. Additionally, in 2011 the legislature added a new paragraph 3 to this section allowing the contractor an opportunity to confirm the lien prohibiting language is in the lease. The contractor may serve a written notice on the lessor demanding a copy of the provision in the lease. The interest of the lessor in the property is subject to liens if lessor fails to serve a verified copy of the lease provision on the contractor within 30 days of the demand unless the requesting party has actual notice of the provision. Much attention has been given to this provision and its effect on the reliability of the other provisions of this section.

In 2012, a further change was made to these safe harbor provisions eliminating the requirements that all leases include the prohibiting language and that the language be identical.

Currently Section 713.10 (2), F.S., provides:

- (a) *When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor;*
- (b) *The interest of the lessor is not subject to liens for improvements made by the lessee when:*
  - 1. *The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or*
  - 2. *The terms of the lease expressly prohibit such liability, and a notice*

*advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:*

- a. *The name of the lessor.*
  - b. *The legal description of the parcel of land to which the notice applies.*
  - c. *The specific language contained in the various leases prohibiting such liability.*
  - d. *A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.*
3. *The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.*

*A notice that is consistent with subparagraph 2, effectively prohibits liens for improvements made by the lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the applications of liens are not identical.*

## Drafting Considerations

The language in the statute and the court rulings point out some drafting measures that might avert lien exposure. Prudent landlords seeking to shield their fee interests in leased land from tenant improvement construction liens should consider the following tips. First, always insert specific language in the lease prohibiting lien exposure. Be careful not to require the improvements as a condition of the lease nor make the improvements the primary purpose of the lease. Record either a memorandum of lease containing the specific lien prohibition language or a blanket notice accurately reflecting the lien prohibition in a majority of leases. Finally, require the tenant to provide the contractor with a copy of the lien prohibition clause in the lease and secure a written acknowledgment of actual notice of the clause from the contractor prior to the recording of the notice of commencement.

## Insuring Factors and Considerations

In a current transaction can the owner's interest be safely insured when there is a recorded notice of commencement for tenant improvements? The Fund Member should review the lease and determine if the improvements were mandatory or the essence of the lease. Document if there is a direct agreement between the owner and contractor. Confirm the lease contains lien prohibition language and whether one of the authorized methods of providing notice of it to

the contractor was properly effectuated prior to the recording of the notice of commencement. Compile evidence of when and if the contractor has actual knowledge of the lease terms. Share these findings with a member of the Fund's Underwriting Department to collaborate and determine requirements for insuring without exception for potential liens related to tenant improvements. ☐