**CONTRACTOR LIENS CAN BE AVOIDED**

**BY: WILLIAM G. MORRIS, ESQ.**

Most people hiring a contractor are concerned with reputation of the contractor and trying to make sure that the home or improvements to be constructed will be well-built. Most people believe that if they pay the contractor as work progresses, their obligation to pay for the construction will end when they finish paying the contractor. Some of those folks are rudely awakened to find that subcontractors, material suppliers and professionals have filed liens against their property even though they paid the contractor in full. If the property owner had been as careful in making payments as in overseeing completion of construction, the owner could have avoided unexpected liens.

Florida’s legislature believes those involved in the construction industry should be protected more than other contracting parties. Those providing services to improve real property are given statutory lien rights. These lien rights did not exist at Common Law and are strictly a creation of statute. Florida’s first construction lien laws were adopted in 1887. They have been revised many times over the years, but never abolished.

A lien filed under the construction lien statutes acts like a mortgage. It must be filed within 90 days after the lienor last furnished labor or materials to the project. It is effective for one year from date of recording and can be foreclosed like a mortgage. The statutes even provide the lienor can recover attorney fees if successful.

The construction lien laws attempt to reach a balance between protecting a property owner and protecting those providing services improving the value of real property. They do that by establishing a procedure for notices and payment. The statutes place obligations on both property owner and those providing improvement services.

The first obligation falls on the property owner to make sure a Notice of Commencement is recorded in the Public Records and placed on the property before construction starts for all but the smallest jobs. The statutes require the Notice of Commencement include a description of the property, description of the improvements, name and address of the owner, name and address of the contractor and the name and address of an agent of the owner in Florida upon whom notices can be served.

Potential liens relate back to the recording of the notice of commencement, but that document does more than establish a date for priority of liens. It provides addresses so that everyone working on the job can give notice to the owner, which is the statutory way of protecting both an owner and potential lienor. The owner needs to make sure everyone properly noticed gets paid. As long as the owner makes what are termed “proper payments” under the statutes, an owner is able to avoid liens or defeat lien claims.

A property owner does not have to worry about the unknown. With the exception of party with whom the owner has a direct contract, potential lienors are required to serve the owner with a Notice to Owner that they are providing services or materials to the property and that the owner should make sure they get paid. The notice must be sent to the property owner within 45 days after the first provision of labor, services or materials by the lienor. After the owner gets a Notice to Owner, the owner is obligated to make sure the subcontractor or material supplier is paid when the owner pays the primary contractor. That means the property owner must pay attention to all Notices to Owner.

To make a “proper payment,” the property owner must make sure that all potential lienors have been paid to the extent of payment to the contractor. That is generally done by requiring the contractor to provide releases of lien from everyone who served a Notice to Owner. If the subcontractor or material supplier has not been paid in full, the release should be for monies due through date and to the extent of the payment being made to the contractor. The owner should also get a release of lien from the contractor to the extent of the payment and an affidavit from the contractor confirming that all potential lienors have been paid through the amount of the current payment.

What could go wrong? The contractor might provide a fraudulent release. Good news for the property owner is that the Florida Supreme Court ruled that problem falls on the subcontractor or material supplier because they are in a better position to protect themselves from a fraudulent release than the owner. A more common problem is the contractor explaining that the owner’s money will be used to pay the subcontractors and material suppliers after the contractor is paid so releases are only available through the previous draw payment. If the homeowner makes payment under those circumstances, the homeowner is assuming the risk that the contractor will pay. If the contractor does not pay, the subcontractor and material suppliers can file liens.

Procedure at time of final payment to the contractor is a bit different. At that time, the property owner must obtain a final release of lien from the contractor, final releases from all of the subcontractors and material suppliers providing Notice to Owner and an affidavit from the contractor that all subcontractors and material suppliers have been paid. The property owner may rely on the contractor’s affidavit in making final payment and if a subcontractor or material supplier later files a lien, that lien claim will generally be a loser.

If the property owner does not follow the procedure for proper payments, the property owner can be subject to paying twice for the same work. If the original work was faulty, the property owner may have the burden of paying to fix the faulty work and paying subcontractors and material suppliers not paid by the original contractor. All of these problems can be avoided by diligence during the payment process, but most property owners lack experience and knowledge to protect themselves. For that reason, it is often a good idea to retain an experienced attorney to oversee the payment process.

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