**HOW TO PROTECT FROM CONTSRUCTION LIENS**

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

Damage from Hurricane Ian increased the amount of home renovation work in our area, but there was already a lot going on. New home construction seems everywhere. That increase in construction brings with it an increase in construction liens. When a lien results from owner failure to pay, that seems right. When a lien results from a contractor failing to pay a sub, that seems wrong. Property owners can protect themselves from liens by being careful about payments from contract to completion.

First place to start protection from liens is with the contract. The payment or draw schedule should not be front end loaded. A lot of builder contracts are front end loaded, which means most or all of the profit is paid early in the process. Some contracts are so front end loaded that the contractor will have to pay more to subs and suppliers than the contractor gets from the owner for the last draws. If the contractor has not kept extra funds from earlier draws, the contractor will not have funds to pay subs and suppliers at the end.

The contract should also require the contractor provide proof that subs and suppliers gave been paid every time the contractor asks the owner for payment. This is generally done by affidavit as will be explained later in this article. The owner can also require the contractor provide a sworn statement listing all subs and suppliers.

Post contract protection starts with recording a Notice of Commencement. Florida Statutes require the Notice for jobs $5,000 and above, but statutory requirement does not mean owners comply. The Notice lists owner, contractor, lender, addresses for each, address of the property and brief description of the work to be done. Florida Statutes mandate the Notice be substantially in the form included in the statutes. Whenever a statute suggests a form be substantially like one in the statute, we recommend it be identical to avoid any claim the form is insufficient.

The Notice of Commencement is the source from which all subs and suppliers determine where to send a Notice to Owner. It expires in one year unless a different expiration date is listed on it. For jobs that will or do take more than one year, the Notice of Commencement should indicate a longer expiration or be amended prior to expiration.

Subs and suppliers who do not have a direct contract with the owner are required to send a Notice to Owner to protect their lien rights within 45 days of starting work on a job. Start includes off site preparation. The Notice to Owner warns the owner that sub or supplier is on the job and that failure to make sure the sub or supplier is paid can result in a lien.

Once the owner is given Notice, the owner must make sure the sub or supplier is paid whenever the owner pays the contractor. That sounds difficult, but the statutes have a procedure for making “proper payments.”

To make a “proper payment “to the contractor, the owner must make sure the potential lienors are paid to the extent of payment to the contractor. That means:

1. The owner must get releases of lien from the subs and suppliers from whom the owner received a Notice to Owner
2. The owner must get a release of lien form the contractor to the extent of payment.
3. The owner must get an affidavit from the contractor that all subs and suppliers have been paid to the extent of the payment being made by owner to contractor.
4. The owner must make no payments to the contractor after expiration of the Notice of Commencement.

Seems simple enough, but most owners have no idea of the procedure and even those that know run into the “draw ahead of payment to subs” problem. Most contractors explain they use the current draw to pay subs after they get the draw and can only provide releases through date of the previous draw. For those jobs, the owner should require a contract clause allowing payments jointly to subs and contractor if releases through date of draw will not be provided. Contractors hate that and generally fight hard to avoid it.

When the job is done, the owner must be even more vigilant. The owner must get a Final Contractor’s Affidavit stating that all subs and suppliers have been paid or listing those unpaid and amount due. The owner then only has to get final releases from all subs and suppliers from whom the owner received a Notice to Owner and make sure those listed as not paid in full will get paid and provide releases at time of the final payment to the contractor. The statutes only require owners worry about those who have protected themselves by serving a Notice to Owner and those listed on the final affidavit as not paid in full.

An owner can request copy of contract and statement of account from the contractor, subs and suppliers at any time. Owners can also request a sworn statement of account including even more details. Failure of a sub or supplier to provide a sworn statement can be a complete defense to a claim of lien.

If the owner follows all procedures required for proper payments, owner liability is limited to the total amount due under the owner’s contract with the contractor. But, sometimes liens are filed. What happens then?

A lien must be recorded within 90 days after a sub or supplier ends substantive performance on a job. The lien can be foreclosed like a mortgage. If foreclosure is not filed within 1 year, the lien expires. The lien is for amount due the lienor plus attorney fees and costs, which can add a lot. Because the lien statutes provide attorney fees to lienors, it is not usually hard to find an attorney to pursue lien foreclosure.

If “proper payments” were not made, an owner can end up paying twice. The owner pays once to the contractor, who did not pay the sub or supplier. Later, the owner may have to pay direct to the sub enforcing a lien against the property.

Good news for homeowners is following the statutes and making “proper payments” will provide protection from paying more than the contract amount. Bad news is, many do not know what is a “proper payment” and simply assume the contractor is paying everyone. Later, they find ignorance is not bliss.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***