REAL PROPERTY, PROBATE & TRUST LAW SECTION
WHITE PAPER

CONSTRUCTION LIENS FOR LEASED PROPERTY

I. SUMMARY

This legislation is intended to create greater certainty in extending the protection intended by Section 713.10 of the Florida Construction Lien Law to landlords[1] of property on which tenants make improvements by addressing the holding in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA 2010) that a landlord's blanket notice recorded under Section 713.10, Florida Statutes that all leases contained language prohibiting construction liens against the landlord's property was defective because the language in the notice was not identical in every lease. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Section 713.10 of the Construction Lien Law is entitled "Extent of Liens" and provides that a lien "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..." If, however, "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."

Prior to 1985, Section 713.10 provided that a landlord's interest would not be subject to liens for improvements on its property "when the lease is recorded in the clerk's office and the terms of the lease expressly prohibit such liability." *See* §713. 10, Fla. Stat. (1983). In 1985, the statute was amended to provide alternatives to recording the entire lease. Specifically, the landlord could record either the lease or a short form of the lease or, if all of the leases entered into by the landlord prohibited such liability, the landlord could record a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language. *See* §713.10(2), Fla. Stat. (1985).

"In amending this statute, the Legislature obviously sought to provide a simplified and less costly manner in which lessors may provide notice to prospective contractors of their disclaimer of liability for improvements made by a lessee." *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34, 38 (Fla. 1st DCA 2004).

Unfortunately, there are some practical problems for landlords in using the two alternatives provided by the 1985 amendments. These problems were highlighted in the case of *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA, 2010) which was decided on March 3, 2010.

[1] The statute uses the terms "lessor" and "lessee". Most practitioners use the terms "landlord" and "tenant" since they are less likely to be mistakenly used for the wrong party. The proposed statutory amendments continue to use the terms lessor and lessee but in this paper the terms landlord and tenant are used for greater clarity.

The first alternative – recording the lease or a short form of it -- poses title problems for landlords. The lease or short form[2] remains of record forever unless terminated while leases expire or are terminated with regularity and the termination is generally not a matter of record. The title search obtained in connection with a sale or mortgage by a landlord will reflect all recorded leases or memoranda of leases even as to leases that have expired or have been terminated. The buyer or mortgagee is then on notice of any interest in the property claimed by the tenant which would include not only the tenant's leasehold interest but also other possible rights such as to lease additional space or to purchase the property. In order to pass clear title, the landlord will need to eliminate of record all recorded leases or memoranda of them which are no longer in effect. This process can be time consuming and expensive. For this reason, it is not common, except in the case of major leases, for leases or notices of them to be recorded in Florida.

The second alternative – recording a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language – poses a different practical problem for landlords. Often when a landlord purchases a property he inherits leases that do not contain lien prohibition language which, under the holding in the *Everglades Electric* case, would mean the landlord could not record an effective blanket notice. Additionally, the lien prohibition language contained in the leases may vary or be changed in some of the leases. Under the holding in the *Everglades Electric* case, even where the landlord has substantially complied with the statute, a small, technical variation in the language of a single lease can lead to the blanket notice being found ineffective thus defeating the lien prohibition effect generally intended by the statute even where lienors were not prejudiced by the technical non-compliance.

Another practical problem with the use of the blanket notice option under Section 713.10 is that many municipal building departments and City Attorneys have taken the erroneous position that the landlord must be listed as the owner in, and must sign, the Notice of Commencement for work being performed by a tenant. When this happens the safe harbor of Section 713.10 may be compromised as lienors can claim that they were misled by the Notice of Commencement into believing that the landlord was performing the work.

Section 713.01(23), Florida Statutes, defines "Owner" as "a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property." A leasehold interest is a legal interest in real property that can be sold by legal process. Therefore, if a tenant enters into a contract for the improvement of its premises, it is the "Owner" as to that project within the contemplation of and should be listed as such in, and should sign, the Notice of Commencement. Further bolstering this interpretation is the language of Section 713.10 itself that a lien "shall extend to, and only to, the right, title, and interest <u>of the person who contracts for the improvements</u> as such right, title, and interest exists at the commencement of the improvement." *emphasis added*.

[2] The term "short form of lease" is not commonly used as the name of the document that is recorded in lieu of recording the entire lease. The term "memorandum of lease" is more prevalent.

Notwithstanding the seemingly universal interpretation of the current law by practitioners in this area, municipalities, who are charged with certain responsibilities regarding Notices of Commencement,[3] frequently take the position that the landlord be listed as the owner in any Notice of Commencement for tenant improvements even if the tenant is the party who enters into the contract for improvements. When a landlord who has otherwise complied with the lien prohibition requirements of Section 713.10 is forced to sign the Notice of Commencement she or he faces the risk of loss of the protections otherwise afforded by Section 713.10, as lienors can then claim that they believed the landlord, and not the tenant, was the "owner" as to the improvements and thus Section 713.10 did not apply.

III. EFFECT OF PROPOSED CHANGES

A. Section 713.10

1. The opening, currently unnumbered paragraph is split into two new subsections numbered as (1) and (2) respectively to aid in the comprehension of the section as a whole especially because of the addition of new Subsection (3).

2. Former Subsection (1), now renumbered as Subsection (2)(a), is revised as follows:

(a) An option to record a memorandum of the lease is added to the existing options of recording the entire lease itself or a short form of it. In practice, the term "memorandum of lease" is much more common than the term "short form of lease". *See* Footnote 2. This is a non-substantive change.

(b) A requirement that the memorandum of lease or short form of lease contain the specific language from the lease exculpating the landlord's interest from liens for improvements made by the tenant is added. This is intuitively inferred from, but not expressly stated in, the current statutory language and was the subject of the court's opinion in *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34, 38 (Fla. 1st DCA 2004). This is a clarification and not a substantive change.

(c) The reference to recording in the clerk's office is changed to recording in the official records of the county. The current statute refers to recording in the clerk's office in Section (1) and in the public records of the county in Section (2). The references should be consistent and the correct reference is the official records of the county. "Public records" is defined in Chapter 28, Florida Statutes by reference to Section 119.011, Florida Statutes to be any governmental records wherever kept. Official records are defined as those which are kept by the clerk in the Official Records Books, which is where documents affecting title to real estate are recorded. *See* §28.001, Fla. Stat. This is also a non-substantive change.

(d) A requirement is added that in order for the landlord's interest not to be subject to liens for improvements made by the tenant that the lease or short form or

[3] See Section 713.135, Florida Statutes

memorandum be recorded before the recording of a notice of commencement for the improvements being made by the tenant. This ensures that lienors will have constructive, recorded notice of the lien prohibition before work is commenced.

3. Former Subsection (2), now renumbered as Subsection (2)(b), is revised as follows:

(a) The blanket notice option can now be used even if all of the leases for the property do not contain lien prohibition language or if the prohibition language in the individual leases vary so long as the lease under which work is being performed by a tenant contains the prohibition language and a blanket notice for the entire property is recorded and advises that all leases for the property contain the prohibition language or lists the leases which do not contain it. This is a substantive change directly addressing the problems highlighted by the *Everglades Electric* case.

(b) As in renumbered Subsection (2)(a) of the statute, the reference to recording in the public records is changed to recording in the official records for the reasons described above.

(c) As in renumbered Subsection (2)(a) of the statute, a requirement is added that in order to be effective as to lienors relative to a specific tenant improvement project, the blanket notice must be recorded before the recording of a notice of commencement for that tenant improvement project so as to ensure that lienors will have constructive, recorded notice of the lien prohibition before work is commenced.

(d) Former Subsection (1)(c), now renumbered as Subsection (2)(b)(3), will now provide that the blanket notice will still be effective even if all of the leases do not contain lien prohibition language or if the lien prohibition language in the various leases differs so long as: (i) the lease under which the work is being performed contains the prohibition language; and (ii) any leases that do not contain prohibition language are identified in the blanket notice. Again, this is a substantive change directly addressing the problems highlighted by the *Everglades Electric* case.

(e) Language is added permitting the landlord to amend the blanket notice from time to time to revise the list of leases that do not contain exculpatory language. The amendment will be effective when recorded without relation back. The intent is to provide for a method of preserving the lien prohibition effect of a blanket notice should new leases that do not contain the prohibition language be entered into after the date the original notice was recorded.

(f) To address concerns of the title insurance industry created by the *Everglades Electric* case, a new paragraph is added to prevent the retroactive loss to purchasers or mortgagees of the landlord's interest of the lien protection afforded by a blanket notice should the notice be later found to be defective. If a landlord willfully misstates the facts in a notice, any lienor who is materially prejudiced by the misstatement can sue the landlord for damages. This remedy is similar to that provided in Section 713.16, Florida Statutes for failure to serve a copy of a contract or making a false statement in a sworn statement of account in response to the

statutory demand.

(g) To address another concern of the title insurance industry, that listing in the blanket lien prohibition notice the leases that do not contain lien prohibition provisions will create title problems similar to those of recording memoranda of leases (see the discussion in Section II above), another new paragraph has been added. This paragraph provides that a reference in the recorded blanket notice to specific leases that do not contain prohibition language shall not be construed to constitute actual or constructive notice of such leases or the interests of the named tenants in the property, nor place any party on a duty of further inquiry as to the status of these leases or the interests of the tenants. A clarification is included to the effect that this provision shall not be construed to affect the rights of lienors against the interests of the landlords or tenants referred to in the recorded notice. It is the intent of this paragraph that title examiners may ignore references to specific leases in blanket notices.

3. A new Subsection (3) has been added to grant lienors the right to obtain from landlords a verified copy of the provision in the lease between the landlord and the tenant prohibiting liability for improvements made by the tenant. If the landlord does not serve a verified copy of the lease provision within 30 days after demand or serves a false or fraudulent copy, her or his interest shall be subject to a lien by the party demanding the verified copy provided such party is (i) otherwise entitled to a lien under the statute; and (ii) did not otherwise have actual notice that the interest of the landlord is not subject to liens for improvements made by the tenant. The written demand must include a specified form of warning in conspicuous type.

B. Section 713.13.

A new sentence is added to the end of paragraph (a) of subsection (1) of Section 713.13 to clarify that the tenant should be listed as the owner in the Notice of Commencement when the tenant contracts for the improvements. Similarly, a parenthetical is added after the Owner Information blank in the form of Notice of Commencement provided in paragraph (d) of subsection (1) of this section to clarify that the tenant should be listed as the owner if the tenant is the party who has contracted for the improvements that are the subject of the Notice of Commencement. These are not substantive changes but are made to give guidance to local governments and other parties that get involved in the preparation of Notices of Commencement.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of this proposal should economically benefit property owners, allowing them to protect against construction liens resulting from construction projects undertaken by a tenant.

VI. CONSTITUTIONAL ISSUES

This proposal should not raise any constitutional issues.

V. OTHER INTERESTED PARTIES

Associated General Contractors
Florida Home Builders Association
Florida Apartment Association
Florida Association of Realtors
International Council of Shopping Centers
National Association of Industrial and Office Properties