

## FLORIDA'S CONSTRUCTION LIEN LAW: IT'S NEITHER HORSESHOES NOR HAND GRENADES

By: Scott A. Beatty, Esquire



Florida's Construction Lien law is designed to provide a mechanism to protect the rights of contractors, subcontractors and suppliers who provide labor, services and materials in connection with construction projects. And while there are some laws that are liberally interpreted to provide greater enforcement capabilities for those whom they are designed to protect, Florida's Construction Lien law specifically provides that it shall not be subject to any rules of liberal interpretation in favor of the people to whom it applies. Rather, it is "strictly construed" and strict compliance with its provisions is required. In other words, unlike horseshoes and grenades, close doesn't count.

Preliminarily, the Construction Lien law does not apply to every person or entity that provides labor, services or materials in connection with a construction project. Rather, the persons who are entitled to protection under the lien law are identified in the statute as "lienors," to mean a contractor; subcontractor; sub-subcontractor; laborer; materialman; or a professional lienor. These terms are all defined under the Lien law. No other person may have a construction lien.

### **Four Steps to Assert Lien Rights and Important Deadlines**

For purposes of the following discussion, the focus will only be on private, non-bonded jobs. Public jobs or jobs that are covered by a payment bond have different deadlines. If you are dealing with either of those situations, you should check the lien law, or contact an attorney.

The first step in perfecting a lien is the **Notice of Commencement**. When there is a direct contract price of \$2,500.00 or more, the owner must record in the public records a Notice of Commencement before work begins. There are negative consequences to the owner if the owner fails to record the Notice of Commencement before the work begins. The owner is also required to post a certified copy of the Notice of Commencement at the job site.

The next step depends on whether the lienor is in "privity" with the owner. In layman's terms, if the lienor has a direct contract with the owner, the lienor is in privity. For lienors who do not have a direct contract with the owner (i.e., subcontractors, sub-subcontractors and materialmen), then before commencing to furnish labor, services or materials (or no later than 45 days *after* commencing to furnish labor, services or

materials), the lienor must serve a **Notice to Owner** ("NTO") upon everyone above the lienor with whom they do not have a contract. For example, a subcontractor must serve the NTO upon the owner. A sub-subcontractor must serve the NTO upon the contractor and the owner. The purpose is to give notice to *all* of those with whom you do not have a contractual relationship (since those who have a contract with you know who you are). Those lienors in privity with the owner do not have to serve a **Notice to Owner**, but there is no harm if it is done.

The third step applies to all lienors (whether in privity with the owner or not). All lienors must record their **Claim of Lien** no later than 90 days after the final furnishing of their labor, services or materials. The **Claim of Lien** must be recorded in the county in which the property is located. Note that the 90 days is from your last substantive work on the project. Punch list and warranty work usually do not count. A lienor can only lien for the reasonable value of the labor, services and materials furnished (and applicable financial charges, if any, set forth in your contract), which remain unpaid. A lienor cannot lien for the balance of a contract price (for work or materials not furnished -- except for specifically fabricated materials), or for lost profit on work or materials not furnished.

The final step is to sue to foreclose the construction lien. In a private, non-bonded job, the lienor has one year from the recording of their claim of lien within which to file suit to foreclose on the claim of lien, or it is deemed extinguished. Lienors should be cautioned, however, that the timeframe of one year within which to sue can be shortened. An owner can shorten the one year time period by recording a Notice of Contest of Lien with the clerk of the court in the county where the lien is recorded. The Notice of Contest shortens the period to 60 days for the lienor to file suit, or the Claim of Lien is considered extinguished.

### **Be Safe -- Comply with the 45 Day, 90 Day and 1 Year Deadlines on All Jobs**

- (a) Ensure a Notice of Commencement is recorded.
- (b) Send out a Notice to Owner/Notice to Contractor within 45 days of your first furnishing of labor, services or materials (preferably, your company policy should be to do so within 30 days, so as not to run up against the 45 day deadline).
- (c) Whenever you provide your last labor, services or materials, you should calendar the 90th day thereafter and record your Claim of Lien before the expiration of the 90 days (preferably in no more than 60 - 75 days to avoid running up against the 90 day deadline).
- (d) Be prepared to file suit within one year of the recording of your claim of lien.

- (e) Keep records of the date of your last furnishing materials or labor so it is less disputable later.

### **What Happens Next?**

If you have complied with the Construction Lien Law, and recorded a Claim of Lien, your rights are protected through the end of the one year period. Communication is the key to getting paid. The lien law is not a cure-all. It merely provides a mechanism that may provide a source of relief if you do not get paid. While an owner will have defenses, as a practical matter, most of the time the owner will apply pressure to the contractor to pay all lien claims, or the owner may be forced to. That does not mean there will not be negotiations over the amount, including interest and attorney's fees. But the recording of a Claim of Lien will provide a powerful tool to assist in getting you paid.

Sometimes it may be necessary to file suit. If you are approaching the one year deadline from when you recorded your Claim of Lien, if you do not file suit your claim will be extinguished. While you should work with your attorney to communicate prior to the one year anniversary with the hope of being paid (and, hence, avoiding the expense of filing suit), it may be necessary to file suit to preserve your lien rights or to force the owner or contractor to make payment. The filing of suit is often enough to force the owner (or contractor) to make payment.

The lien law is a lengthy and complex statute and often confusing. Although the basic provisions for compliance are described above, there are a number of other provisions that may be applicable to your particular situation. If you have questions, be sure to consult with an attorney that is knowledgeable with the Florida Lien Law. Remember, strict compliance is required, and "close enough" does not cut it.

**Disclaimer:** The contents of this article do not create an attorney-client relationship. Should you have any legal questions you should consult with your attorney. The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

### **About the Author**

Scott Beatty, Esquire concentrates his practice in civil and commercial trial litigation, including business torts, real estate litigation, construction and lien law litigation, contract disputes, collections, foreclosures and title insurance claims. He also handles numerous appeals. Scott holds an AV® Preeminent™ rating by Martindale-Hubbell and was selected as one of *Gulfshore Business Magazine's* and *Gulf Coast Business Review's* (n/k/a Business Observer) Top 40 Under 40. Scott can be reached at 239.344.1169 or via email at [scott.beatty@henlaw.com](mailto:scott.beatty@henlaw.com).