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# Protect Yourself Against Tenant Construction Liens In Fla.

Law360, New York (February 22, 2013, 1 22 PM ET) ·· If you are a commercial landlord, you may inadvertently be subjecting your land and building to liens by contractors who perform work for your tenants. Since the commencement of the recent economic downturn, many commercial buildings have changed hands, and many new owners have inherited leases negotiated by prior owners. Florida law offers a means by which a landlord can protect itself from lien claims against its land and building if a tenant fails to pay its contractors, but many landlords are not taking advantage of this protection.

Generally, a claim of lien by a tenant's contractor only encumbers the tenant's leasehold interest, since the tenant is the party who contracted for the improvements. This means that if the tenant's contractor is not paid, the contractor can foreclose its lien and have the tenant's leasehold interest sold at a foreclosure sale, at which the contractor itself may acquire the tenant's interest under the lease if there are no other bidders (although most leases would provide for either scenario to be a default under the lease).

However, if the tenant's lease specifically provides for the tenant to improve its premises, Section 713.10, Florida Statutes (part of the Florida Construction Lien Law) states that the tenant's contractor will also have the right to lien the landlord's interest (i.e., the land and building containing the leased premises), which is much more valuable. The basis for this is that the landlord authorized the work by allowing for it in the lease. It is possible, however, for the landlord to avoid subjecting its interest to liens for a tenant's work by meeting two conditions.

The first condition is that the tenant's lease must specifically provide that the interest of the landlord (i.e., the land and building) will not be subject to liens for tenant improvements. In light of this, a prospective purchaser of a commercial building should determine as part of its review of the leases whether they all contain such a prohibition. If they don't, and a tenant is doing work on its premises, a lien claim filed by the tenant's contractor before closing could not only encumber the landlord's interest upon its acquisition by the purchaser, but also have priority over a first mortgage loan obtained by the purchaser to finance the acquisition, both of which could interfere with the closing.

As such, it is in the interest of both the seller and the purchaser of commercial property to ensure that all leases contain a prohibition against a tenant's contractor being allowed to lien the landlord's interest. In connection with a purchase and sale, it may be possible to get non-conforming leases amended to include such a provision in order to protect the purchaser This could be particularly important if there are tenants doing (or who have the right to do) a significant amount of work on their premises pursuant to their leases. Conservative lenders in today's economy are more frequently expecting this. In any event, once the landlord closes on the purchase of the building, it should make sure that all new leases that it signs contain such a provision

This provision alone, however, is not sufficient to protect the landlord from lien claims for a tenant's work. Under Section 713.10, Florida Statutes, a second condition must be met. A notice stating that the landlord's interest may not be subjected to liens for tenant improvements must be recorded among the public records of the county where the land is located, before the tenant records a Notice of Commencement to evidence the start of the tenant's work. This notice can take two forms.

First, it can consist of a copy of the lease itself (or a memorandum of the lease, which is preferable), containing the specific language prohibiting liens against the landlord's interest. Alternatively, if the prohibition is contained in a majority or more of the leases in effect at the building, a notice of that fact can be recorded. This alternative notice must contain certain information specified in the statute, consisting of the name of the landlord, the legal description of the land, the specific language contained in the various leases prohibiting the landlord's liability for liens, and a statement that all or a majority of the leases expressly prohibit such liability.

While many landlords include the prohibition against landlord liability in their leases, it is not uncommon for them to forget that they have to record a notice to that effect in order to obtain the full protection of the statute. Complicating the situation is the fact that, if the alternative form of notice pertaining to multiple leases is used, it is possible that there are multiple leases in effect on different lease forms, containing different wording for the prohibition against liens on the landlord's interest.

In 2010, the Florida 4th District Court of Appeals decided a case (Everglades Electric Supply Inc. v Paraiso Granite LLC, 28 So.2d 235) involving the recording of an alternative notice which stated that all leases contained such a prohibition, and which quoted the prohibition in the notice. However, that exact same language was not actually used in all the leases. Some of them contained different wording even though they did include the concept of the prohibition.

The court found that the notice did not meet the technical requirements of the Statute, and so did not afford the desired protection to the landlord. The court suggested that the landlord could have protected itself by recording a separate notice for each lease, containing the language used in that lease, until any non-conforming leases were no longer in effect, at which time (with all leases then containing the exact same language), it could record the alternative notice applicable to multiple leases. As a result of this case, it is important for the landlord or its attorney to take into account the exact language used in each lease when deciding how to address this notice requirement.

Further complicating the situation is another provision of the Florida Construction Lien Law which governs Notices of Commencement Specifically, Section 713.13, Florida Statutes, provides that the owner whose property is being improved is required to sign and record a Notice of Commencement with respect to the improvements. If the tenant is the party contracting for the improvements, the tenant is technically considered the "owner" of the property being improved, because that property consists of the tenant's leasehold interest (which is a property right under Florida law). The Notice of Commencement should be completed with that in mind, should identify the tenant as the "owner" of the property being improved, should state that the tenant only owns a leasehold interest, and should be signed only by the tenant.

In that circumstance, the Notice of Commencement form contains a separate block to identify the name of the fee simple owner so that persons working at the premises are aware of the identity of both the tenant (against whom they can claim liens) and the landlord (against whom they cannot claim liens if the landlord has taken the precautions described in this article). It is not uncommon for Notices of Commencement to be prepared by the tenant's contractor or the landlord's property manager

Sometimes the person preparing the Notice of Commencement erroneously identifies the landlord and not the tenant as the "owner" of the property being improved, because the landlord owns the land and building. If such an erroneous Notice of Commencement is signed by the landlord and recorded, it can result in lien claims being filed by the tenant's contractor or subcontractors against the landlord despite the precautions set forth above. It is therefore recommended that the landlord incorporate into its lease form a requirement that the tenant submit any Notice of Commencement to the landlord for approval before it is recorded, and that the landlord or its property manager implement a monitoring system to ensure that this is addressed whenever a tenant is known to be undertaking work with respect to its premises.

It should be noted that Section 713.10, Florida Statutes, requires a tenant to notify its contractor if the tenant's lease precludes the contractor from claiming liens against the landlord's interest, but a landlord should not expect that all of its tenants will do this. It is probably worthwhile for a landlord to include that requirement in its leases, and to take affirmative steps to ensure that such a notice is given to the tenant's contractor when the landlord is aware that a tenant will be doing work in its premises.

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