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Insights

# Protect Yourself Against Tenant Construction Liens in Florida

Lowndes Leasing Lawyers Blog
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If you are a commercial landlord in Florida, you may inadvertently be subjecting your land and building to liens by contractors who perform work for your tenants. With the recent economic downturn, many commercial buildings have changed hands, resulting in new owners often inheriting leases negotiated by prior owners. Fortunately, Florida law offers a means for landlords to protect their land and buildings from lien claims when tenants fail to pay their contractors. Surprisingly, many landlords are not taking advantage of this protection, putting their assets at risk.

## Understanding Lien Claims in Commercial Leases

Generally, a lien claimed by a tenant's contractor only encumbers the tenant's leasehold interest since it's the tenant 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. In some instances, the contractor itself may acquire the tenant's interest under the lease if there are no other bidders. It's worth noting that most leases would deem 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.

## Two Conditions for Landlord Protection

The first condition is that the tenant's lease must specifically provide that the interest of the landlord will not be subject to liens for tenant improvements. In light of this, a prospective purchaser of a commercial

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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 encumber the landlord's interest. This lien would have priority over a first mortgage loan obtained by the purchaser to finance the acquisition. These issues could potentially interfere with the closing.

As such, it is in the interest of both commercial property sellers and purchasers 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 even better a memorandum of the lease, that contains 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.

## Court Ruling

In 2010, the Florida 4th District Court of Appeals issued a significant ruling in the case of *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC, 28 So.2d 235*. This case involved the recording of an alternative notice which stated that all leases contained such a prohibition, and it 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, leaving the landlord without the desired protection. The Court suggested that the landlord could have protected itself by recording a separate notice for each lease, with each containing the language used in that specific lease. Once any non-conforming leases were no longer in effect, and all leases contained the exact same language, the landlord could record the alternative notice applicable to multiple leases.

As a result of this case, the Florida legislature amended Section 713.10 to provide that a notice would be effective "even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical."

## Notices of Commencement

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" since the tenant holds a leasehold interest in the property, which is recognized as a property right under Florida law. Therefore, when completing the Notice of Commencement, it is crucial to identify the tenant as the "owner" of the property being improved, explicitly state that the tenant only owns a leasehold interest, and have it signed only by the tenant.

To ensure clarity, the Notice of Commencement form contains a separate block to identify the name of the fee simple owner. This step ensures 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, errors can arise when the person preparing the Notice of Commencement incorrectly identifies the landlord and not the tenant as the "owner" of the property being improved. This error, if signed by the landlord and recorded, can result in lien claims being filed against the landlord by the tenant's contractor or subcontractors, 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. Additionally, the landlord or its property manager should implement a monitoring system to ensure that this is addressed whenever a tenant is known to be undertaking work with respect to its premises.

## Tenant Responsibilities

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. If the tenant does not do so, the statute provides that the contractor can void the contract it has with the tenant.

A landlord should not expect that all of its tenants will notify their contractors. 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.

## Requests for Lease Provision

Finally, Section 713.10 provides a mechanism for a tenant's contractor to ask the landlord for a copy of the tenant's lease provision that precludes the contractor from filing liens against the landlord's interest. If the landlord does not respond to that request within 30 days, any liens filed by the contractor will encumber the landlord's interest unless the contractor had actual notice that this was not allowed. It is therefore important for landlords to promptly respond to such requests from contractors.

Given the legal intricacies involved in protecting your property from the risk of liens by contractors hired by your tenants, seeking legal counsel is strongly recommended to take proactive measures to secure your interests under Florida law.