



CONSTRUCTION LAW ALERT

March 2009

www.bergersingerman.com

Equitable Liens On Real Property For Construction Improvements

by Jeffrey S. Wertman, Esq.

A construction lien under Chapter 713, Florida Statutes, is not the only option available to an unpaid contractor, subcontractor, or material supplier. An “equitable lien” is another potential remedy that may be available to secure payment. An equitable lien is recognized in equity as giving a lienor a special equity or right in real property in order to prevent the unjust enrichment of one party or any other related inequity.

What is an Equitable Lien?

An equitable lien is a separate and distinct remedy from a statutory construction lien, and from an action seeking monetary damages.

The Florida Supreme Court has defined an equitable lien as a right of a special nature over a particular property that may arise from a written contact which shows an intention to charge the particular property with a debt or obligation. An equitable lien may also be declared by a court of equity out of general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case.

An equitable lien is non-possessory in nature. In other words, it is not a right which may be the basis of a possessory action, but is simply a charge or encumbrance upon land.

Equitable liens may also be imposed on specific money funds or a bank account, unexpended construction funds or interests in accounts payable. These equitable liens are not the subject of this Alert.

What Are The Legal Elements of an Equitable Lien?

There are two primary legal elements which a claimant must allege and prove in order to establish an equitable lien. First, the claimant must show that there is an inadequate remedy at law. An equitable lien may be imposed, for example, where there is an absence of an available statutory construction lien, or where there is an allegation that the property owner is insolvent or only owns assets outside of Florida. An equitable lien may also be appropriate, when a claimant can establish a valid construction lien, but the remedy is of no value because there are other lien

claimants with superior claims. A claimant will likely be found to have an adequate remedy at law and therefore not entitled to an equitable lien, when there is a construction payment bond upon which a claim can be made.

For many years, there was confusion as to whether a claimant was entitled to an equitable lien if the claimant failed to exercise its statutory lien rights. However, this issue was resolved by the Florida Supreme Court and subsequently by statute. A claimant is not limited to a claim under Florida’s Construction Lien Law but may proceed to establish an equitable lien. Moreover, a claimant’s neglect of its statutory lien rights is not an absolute bar to an equitable lien, but such neglect can be considered by the court when deciding whether to award an equitable lien.

An equitable lien also requires the existence of a valid legal basis. An agreement that certain property will stand as security for a specific obligation provides a contractual basis for the imposition of an equitable lien. In the absence of a contractual agreement that provides for a

particular piece of property to stand as security, the owner's mere acceptance of the benefits of a claimant's labor, materials or services is insufficient for imposing an equitable lien on real property.

An equitable lien can be imposed where there are special or peculiar equities, such as the existence of fraud, misrepresentation or mistake. For example, an equitable lien may be imposed when an owner fraudulent induces a lienor to forbear in perfecting its lien rights or misrepresents the true ownership of the property, or when a claimant works under the mistaken belief that someone else other than the true owner holds title to the property.

What Are The Rules Affecting The Priority of an Equitable Lien?

An equitable lien, recorded first in time, is generally superior to the rights and interests of all persons, with the exception of bona fide purchasers for value, subsequent, valid lien holders that encumber the property without notice of a claimant's work on the property and non-payment; and prior-recorded mortgages.

What is The Statute of Limitations For Filing a Lawsuit to Enforce an Equitable Lien?

A claimant has one year from the furnishing of labor, services or materials for the improvement of real property within which to file a lawsuit to enforce an equitable lien. There is legal authority which provides that an action to enforce an equitable lien must be brought within one year from the last furnishing of labor, services or materials.

Should an Equitable Lien Claimant File a Lis Pendens?

When a claimant seeks to impose an equitable lien upon real property, it must decide whether or not to record a notice of lis pendens. A lis pendens is a written notice that a lawsuit has been filed concerning real estate and puts the public on notice that the property's title is in question. If a lis pendens is recorded, a bond may be required where the claim upon which the equitable lien is not based is not founded upon a recorded instrument. A lis pendens bond protects the interests of the property holder by providing compensation for any costs or damages, including attorneys' fees, caused by the wrongful filing of the lis pendens.

What if an Equitable Lien Cannot Be Established?

If the requirements of an equitable lien cannot be alleged or proven, there are a variety of other remedies available to a construction claimant. A claimant may sue for monetary damages based upon a breach of a written or oral contract. One can also seek monetary damages based upon theories of unjust enrichment or quantum meruit. Quantum meruit recovery is appropriate where the parties, by their conduct, have formed a relationship which is contractual in nature, even though an enforceable contract may not exist. Unjust enrichment recovery is appropriate where a benefit is conferred upon another who accepts and retains the benefit without paying the value of the benefit.

Conclusion

The equitable lien is a valuable tool that can be used to protect persons that provide materials, labor or services for the improvement of real property. Claimants should be aware of the specific requirements and procedure for imposing an enforcing an equitable lien. Moreover, careful consideration should be given to the filing a notice of lis pendens. ■

Jeffrey S. Wertman

jwertman@bergersingerman.com
(954) 627-9912



Jeffrey S. Wertman is a member of Berger Singerman's Dispute Resolution Team and Construction Law & Design Practice Team. Jeff focuses his practice in the areas of construction law, construction litigation, construction ADR, and general civil, corporate, commercial and complex litigation in state, federal and appellate courts.

The information in this Construction Law Alert is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. No responsibility for the loss occasioned to any purpose acting on or refraining from action as a result of any material in this publication can be accepted.

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.