



## CONSTRUCTION LAW ALERT

September 2007

[www.bergersingerman.com](http://www.bergersingerman.com)

### Assignments of Construction Liens

by Jeffrey S. Wertman, Esq.

Many builders, general contractors and subcontractors are experiencing erosion of their cash flow as a result of the downturn in the real estate market. To avoid the opportunity costs arising from not being able to fund the costs of the next project and the legal costs, time and risk of collecting upon pending construction liens, more construction participants are selling their liens. Lien purchasers are being assigned liens for a portion (discounted amount) of the actual lien. The assignment of construction liens requires careful consideration and raises several important legal questions.

#### Are Construction Liens Assignable in Florida?

#### How is an Assignment Accomplished?

Construction liens are assignable in Florida. Section 713.19, Florida Statutes, provides: "A lien or prospective lien, except that of a laborer, may be assigned by the lienor at any time before its discharge. The assignment may be recorded in the clerk's office." See also *Westinghouse Elec. Corp. v. Carol Florida Corp.*, 122 So.2d 795, 799 (Fla. 3d DCA 1960) ("mechanic's liens are assignable").

This statute is based upon the policy that the lien is deemed to attach

to the benefited property as soon as the labor is performed or the materials are furnished.

Assignees should get a written assignment of the contractual rights and documents for the proof of the lien claim. *Florida Nat'l Bank v. 1 Phillips Center, Ltd.*, 555 So.2d 951 (Fla. 2d DCA 1990).

#### What is The Operation and Effect of an Assignment of a Construction Lien?

The assignment of construction liens vests all the rights and interest of the assignor in the assignee. *Westinghouse Elec. Corp. v. Carol Florida Corp.*, 122 So.2d 795, 799 (Fla. 3d DCA 1960). After an assignment, a claim of lien may be recorded by the assignee or the assignor where the assignor is acting for the protection of the assignee, and then the lien can be enforced by the assignee.

In *Mainlands Constr., Inv. v. Wendic Constr. Co.*, 482 So.2d 1369 (Fla. 1986), an owner of improved property filed a lawsuit seeking to discharge a construction lien recorded by a contractor. The contractor answered the complaint and filed a counterclaim to foreclose on its construction lien. The owner moved to dismiss the portion of the counterclaim seeking foreclosure on the lien. The trial court granted

the owner's motion to dismiss. The contractor appealed. The appellate court reversed the trial court's dismissal of the claim seeking to foreclose on the lien. The owner appealed to the Florida Supreme Court.

One of the issues before the Florida Supreme Court was whether the contractor had a right to sue on the lien at the time of the filing of the original counterclaim. The owner argued that the contractor lost the right to sue on the construction lien in light of a previous assignment of monies due under a contract to the contractor's assignee, a bank.

The Florida Supreme Court disagreed. The Court held that the contractor did not lose its right to sue on the lien by its previous assignment of monies due under the contract because, under *Westinghouse Elec. Corp. v. Carol Florida Corp.*, 122 So.2d 795, 799 (Fla. 3d DCA 1960), an assignor can file a lien subsequent to an assignment where the assignor is acting for the protection of its assignee.

Assignees who seek to enforce a construction lien should first carefully evaluate the validity of the assigned lien because enforcing an invalid or fraudulent lien could have serious consequences. In *Banner Supply Co. v. Habitat, 1 Constr. Corp.*, 519

So.2d 1 (Fla. 3d DCA 1987), the court held that an unpaid material supplier, which was the assignee of the rights under a construction lien filed by a contractor, was liable to the owner of the lien property for compensatory and punitive damages for willfully overstating the amount of a construction lien claim. This was the case even though the material supplier did not prepare the lien or assume the assignor-contractor's liabilities or obligation.

A vigorous dissenting opinion pointed out that the assignment included no express assumption of obligations or liabilities of the subcontractor to the building owner and the fact that the building supplier sued to enforce its rights under the assignment should not expose it to liabilities beyond the terms of the assignment.

### **Is a Security Interest in an Account Receivable an Assignment of The Construction Lien Securing The Receivable?**

A security interest in an account receivable is not an assignment of the construction lien securing the receivable. See *Wen-Dic Constr. v. Mainlands Constr. Co.*, 463 So.2d 1187, 1188 (Fla. 2d DCA 1990) (assignment of construction company's interest in receivables from a landowner for security purposes did not transfer the construction company's construction lien to the assignee); *Hunt Truck Sales & Service, Inc. v. Holopak Village*, 363 So.2d 27, 27-28 (Fla.

4th DCA 1978) (plaintiff's security interest in accounts and contracts is not an assignment of a construction lien sufficient to transfer the right to foreclose the lien).

In *Florida Nat'l Bank v. 1 Phillips Center, Ltd.*, 555 So.2d 951 (Fla. 2d DCA 1990), the Second District Court of Appeal distinguished the *Wen-Dic Constr.* and *Hunt Truck Sales* decisions. In that case, a bank, which was the assignee of all right, title and interest in a construction lienholder's accounts receivable, appealed from an order which denied it recovery on a bond that was substituted for the construction lien. The basis of the trial court's order was that the bank had not received a valid assignment of the construction lien. The appellate court reversed the trial court's order holding that the bank could collect from the surety bond insurer because the bankruptcy court authorized the bank to collect the account receivable.

### **Pleading The "Assignment" in an Action to Enforce The Assigned Lien**

An assignee of a claim of lien must properly plead the assignment in an action to enforce the assigned lien. *Calton, Inv. v. Camelot at Mariners' Village*, 576 So.2d 940 (Fla. 5th DCA 1991). The assignee should also attach a copy of the written assignment of the claim of lien to its complaint to enforce the lien. See Fla. R. Civ. P. 1.130(a) ("All . . .

contracts . . . upon which action may be brought . . . , or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.").

### **Conclusion**

Assignments of construction liens, when properly done, can benefit both the assignee and the assignor. However, due diligence should be performed by an assignee which seeks to enforce an assigned lien. If an assigned lien willfully exaggerates the amount for which such lien is claimed, willfully includes a claim for work not performed upon or materials not furnished for the property, or is compiled with such willful and gross negligence as to amount to a willful exaggeration, recovery on the assigned lien is remote and the assignee may be liable for compensatory and punitive damages. This is the case even though the assignee did not prepare the lien or assume the assignor-contractor's liabilities or obligations.

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.



### **Jeffrey S. Wertman**

jwertman@bergersingerman.com  
(954) 627-9912

Jeffrey S. Wertman is a member of Berger Singerman's Dispute Resolution 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.