



## CONSTRUCTION LAW ALERT

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### Construction Lien Claims For Tenant Improvements

*by Jeffrey S. Wertman, Esq.*

Improvements to property made pursuant to a lease agreement between a lessor and a lessee raises a number of issues. The most common issue is whether a construction lien recorded against the property for an unpaid debt extends to the owner's interest in the property. Florida law allows construction liens for tenant improvements, but the rules are restrictive.

An owner of leased property can protect itself from liens by including a special provision in its master lease agreement and recording the agreement or a notice thereof in the public records. If the landlord avails itself of these provisions, a lienor's claim of lien will only attach to the leasehold interest of the lessee.

#### **The Lease Determines Whether a Lien for Tenant Improvements Attaches to the Lessor's Interest**

In the majority of cases, if a contract between a tenant and a contractor, subcontractor, material supplier or other construction participant provides for the improvement of a leased property, a construction lien will attach only to the tenancy, not the underlying interest of the lessor or owner.

In Florida, when an improvement is made by a lessee in accordance with an agreement between the lessee and his lessor, the lien will also extend to the interest of the lessor. For example, where the lease between the lessor and the lessee requires that the lessee make certain improvements to the property, a lien claimant is entitled to a construction lien against the lessor's interest in the property. In other words, the terms of the lease must require the work to be done or it must be obvious that the improvements are the "pith of the lease."

Improvements constitute the "pith of a lease" if the terms of the lease indicate that either the lessee or the lessor contemplated the improvements by agreeing to enter into the lease on the condition that the improvements would be made.<sup>1</sup> Improvements do not constitute the pith of the lease when the lease merely grants the lessee the option of constructing improvements.

In one Florida case, although the parties to a lease contemplated that the lessee would make certain renovations, including electrical work, the court found that the lessor's interest was not subject to the electrical contractor's construction lien claim. The lease

did not require the improvements, the improvements were for the benefit of the lessee, and the lessors did not especially desire renovation because it tended to convert the building from a general use property to a special use property, thereby reducing its marketability. The court also stated that the failure of the lessee to make the improvements would not have constituted a breach entitling the lessor a legal remedy.

In another case, a claimant made improvements to real property pursuant to a contract with a lessee. When the claimant was not paid, it sought to assert a lien against the landlord's interest in the property. The lease, however, only "permitted" the lessee to make improvements. Therefore, the court held that the claimant was not entitled to a construction lien against the landlord's interest in the property.

In contrast, a contractor's complaint alleging that the lessee agreed to lease the premises only if major renovations could be made to the existing premises was sufficient to allege that the renovations were to be undertaken in accordance with the lease and foreclose the construction lien on the lessor's property.

## The Disclaimer

Even if the landlord requires that improvements are to be made and those improvements are the pith of the lease, the landlord may exempt his property interest from liens by: (1) providing in the lease that there may be no liens against the landlord's interest; and (2) recording the lease, or a memorandum of the lease that there is a prohibition against liens attaching to the interests of the landlord. (Florida Statutes §713.10.)

The notice containing the exculpatory language required under Section 713.10, Florida Statutes, or the lease itself, should state that: (1) the interest of the landlord in the premises is not subject to any liens, including construction liens, for improvements to or other work performed in the premises by or on behalf of the tenant; (2) the tenant does not have any authority to create or permit any lien to attach to the estate or reversion of the landlord in the premises; (3) all contractors, subcontractors, material suppliers and other parties contracting with the tenant or the tenant's agents, representatives or privies are on notice that they must look directly to tenant to obtain payment for any work done or materials furnished; and (4) the landlord and tenant acknowledge

and agree that there is no requirement under the lease for the tenant to make any alterations or improvements to the premises.

In one case, a construction contractor was not entitled to a construction lien against the lessor of a space to a night club. Although neither the night club owner nor the lessor informed the contractor that they filed the lease which prohibited construction liens on for improvements on the property, the renovations were not vital to the lease's perpetuity, and nothing in the lease indicated that the renovations were the "pith of the lease."

## Conclusion

Construction liens for tenant improvements are permitted under certain circumstances. However, the landlord may exempt his property interest from liens if the lease between the landlord and tenant prohibits such liability.

Contractors, subcontractors, and other construction participants involved with tenant improvement work should first ascertain whether the improvements to the premises are the pith of the lease and then determine whether the lease, a short form of the lease or a disclaimer has been recorded by the landlord in the public records of the county in which the property is located.

Landlords should make sure that the lease or a short form of the lease with language expressly prohibiting lien liability for tenant improvements is properly recorded. ■

<sup>1</sup> The term "improvement" includes excavation, demolition, construction, and landscaping. (Florida Statutes §713.01(13).)

## CONSTRUCTION LAW UPDATE

### U.S. Supreme Court Holds that Parties Cannot Expand Judicial Review of Arbitration Awards

The December 2007 Construction Law Alert discussed whether parties can expand judicial review of arbitration awards and the case of *Hall Street LLC v. Mattel Inc.*, No. 06-989, which was pending before the United States Supreme Court. On March 25, 2008, the Supreme Court declined, 6-3, to expand the role of the judiciary in reviewing arbitration awards under the Federal Arbitration Act. The Supreme Court held that the provisions of the Federal Arbitration Act are exclusive and cannot be expanded through contractual agreement. This opinion reaffirms that judicial review of arbitration awards is limited.

## 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.

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