



CONSTRUCTION LAW ALERT

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The 90-Day Statutory Deadline to File a Construction Lien: Determining When the Clock Begins to Tick

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Construction participants, such as contractors, subcontractors, material suppliers, engineers and surveyors, have a short window of opportunity to perfect their construction lien rights. The Florida construction lien statute requires that a construction lien be recorded within 90 days from the last date that the lienor furnishes labor, services or materials. Stated differently, lienors have 90 days from the “final furnishing” of labor, services or materials to record a lien.

There has been much litigation over the years over whether or not lien was timely filed. Until recently, there was no definition of “final furnishing” in the Florida construction lien statute.

Questions often arise as to when was the last work performed, or when were the last materials furnished. What happens if a lien claimant returns to a job site or property to do additional work or furnish additional materials after the 90-day lien filing period has passed? What happens if the additional work or materials is in the nature of repair or warranty work? Does this extend the time for the filing of a lien?

The Florida Courts Address These Issues

Case law provides guidelines to determine what constitutes the “final furnishing” of labor, services or materials for purposes of Florida’s construction lien statute. In determining whether work performed qualifies as a final furnishing of labor for purposes of the 90-day time period for the recording of a claim of lien, the test to be applied is whether the work is done in good faith, within a reasonable time, in pursuance of the terms of the contract, and whether it is necessary to a finished job.

One Florida appellate court has held that a construction lien claimant finally furnished a cast-stone mantel for purposes of meeting the 90-day lien filing requirement when it reinstalled a modified (cured) cast stone mantel in a newly constructed home. The mantel that was initially furnished was rejected by the owner as non-confirming. The court held that the contract could not be considered complete until a satisfactory product was delivered.

In another Florida case, a surveyor brought an action

against property owners seeking to impose a construction lien. The surveyor performed survey work on the property to accomplish a complete resurvey of an entire tract of land and a complete replatting to allow the property to be approved as a subdivision and so that one acre parcels could be sold. The plat prepared by the surveyor was submitted to the county but was rejected because it did not comply with the regulations of the subdivision. Additional survey work was then performed. After the surveyor’s invoices were not paid, the surveyor filed a claim of lien.

The trial court awarded the surveyor a lien on the property. The appellate court affirmed the trial court’s judgment holding that the lien was not recorded more than 90 days after the surveyor’s final furnishing of services, and, therefore, the lien was timely. The appellate court reasoned that the additional survey work that was undertaken by the surveyor was a continuation of the prior work and the additional work was necessary only because the county rejected the plat.

Florida courts have also held that the 90-day statutory time period to record a construction lien is

not extended by the furnishing of additional, insubstantial work, or where the work is not needed to complete the contract or to make the project suitable for its intended purpose. Remedial work in the nature of correction or repair, such as warranty and punch list work, does not extend the time for filing the claim of lien because the contract is already complete, and any additional work performed is merely incidental to the executed contract.

In a case involving a contract requiring the construction of an air-conditioned residence, after the home was completed, substantial work was performed on the air conditioning unit, which malfunctioned shortly after its installation. The contractor filed a construction lien within 90 days after completing the air conditioning warranty work, but more than 90 days of the occupancy and completion of the punch list items. The court held that the lien was not timely filed because services in the nature of repair or correction, such as warranty work, does not constitute the final furnishing of labor or materials and does not extend the 90-day deadline to file a lien.

In another case, a subcontractor sued a contractor and a payment bond surety for payment and

on a construction lien. The issue was whether the lienor's (subcontractor's) final inspection and testing, warranty work, and completion of "punch list" items extended the 90-day deadline for asserting a statutory payment bond under the construction lien law. In affirming the trial court's entry of summary judgment in favor of the surety, the appellate court held that remedial work in the nature of correction or repair did not extend the time for filing the lien. The court distinguished remedial work from work done in actual fulfillment of the contract which is necessary to complete the contract. The latter extends the time for filing a construction lien.

The Florida Legislature Amends The Lien Statute

Prior to July 2007, there was no specific definition of "final furnishing," also known as the "last day of work". However, following the existing case law, the Florida Legislature amended Section 713.01 (the definition section of the Florida construction lien statute) to include a definition of "final furnishing."

The statute states "final furnishing" is not to be measured by such standards as the issuance of a certificate of occupancy or certificate of final

completion. Final furnishing does not include "correction of deficiencies in the lienor's previously performed work or material supplied." This means that final furnishing does not include punch list and warranty work. In addition, final furnishing for rental equipment is the date the rental equipment was last on the job and "available for use."

Conclusion

The Florida construction lien statute and Florida appellate decisions reinforce the importance of accurately documenting a lien claimant's last day of work on a job and filing a claim of lien within 90 days if the claimant is not paid. Florida courts will not permit the 90-day period to be extended even when there are extenuating circumstances or if the claimant makes a good faith attempt to record the lien with 90 days. The failure to timely file a claim of lien will result in a claimant's loss of all lien rights. As soon as work on a job is complete, a lien claimant should keep track of the 90-day period, particularly if there are concerns about payment. ■

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