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FLORIDA MECHANICS' LIEN LAW — VISIBLE COMMENCEMENT

MARK SILVERSTEIN*

INTRODUCTION

The purpose of this article is to examine the Florida Mechanics' Lien Law¹ as it pertains to the development and improvement of housing subdivisions, and to determine who has a superior lien, the mortgagee or the lienors. Under consideration, then, is the land developer who intends to build many houses on an extensive tract of land, and who, in general, pursues the following course of action:

1. He buys a large tract of acreage which is overrun with trees and brush, and has a survey and a plat made by an engineer showing the land laid out in lots, blocks and streets; the plat is filed for record, and the trees and brush are removed.

2. Having filed the plat, he hires a road builder to cut and lay the streets and roads as shown on the plat.

3. He then builds one or more "model houses", depending on the size of the development, and he is now ready to sell lots on which he agrees to construct a house according to the appropriate "model house"; or he proceeds to construct houses, hoping to obtain buyers while the houses are being constructed or shortly after they have been completed.

At some stage in the development of the project, the land developer will require financing. If the loan is consummated and the mortgage properly filed for record before the land is cleared, then the mortgagee probably need not be concerned with the problems posed in this article.

However, in many instances, the land developer will not seek financial help until after he has cleared the land. He will then proceed to place a mortgage, or mortgages, as follows:

1. He may obtain sufficient funds in a single loan to complete the entire project; or

2. He may borrow enough money to build one group of houses and, when they have been completed, borrow enough money to build another group, and so on until the entire project has been completed.

At this point, it will be well to study the background of the Florida Mechanics' Lien Law. In 1925, Herbert Hoover, then Secretary of Commerce, appointed a committee for the purpose of considering a "Standard State Mechanics' Lien Act". The National Conference of Commissioners

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1. FLA. STAT. C. 84 (1951).

on Uniform State Laws designated a committee to cooperate. After several drafts had been presented, the final draft was approved in 1932 and was designated as the "Uniform Mechanics' Lien Act".

In 1935, the State of Florida substantially adopted the "Uniform Mechanics' Lien Act," thereby repealing all acts or parts of acts inconsistent therewith.²

In August 1943, the "Uniform Mechanics' Lien Act" was withdrawn from the active list of Model Acts recommended for adoption by the states at the National Conference of Commissioners on Uniform State Laws. At that time, Florida was the only state which had adopted the Act, and it seemed unlikely that the Act would be more widely accepted.

PROBLEM I

The land developer first cuts the trees and clears off the brush. He next borrows money sufficient for the entire project, and duly records a mortgage encumbering the entire subdivision. Then he proceeds to cut and lay streets and roads, and to construct houses. Before all of the houses are completed the mortgagor defaults and the mortgagee forecloses.

Section 84.03 of the Statute fixes the attaching date of liens:

All liens provided by this chapter shall relate to and take effect from the time of the visible commencement of operations except that, where demolition work is involved in the work of improving, liens other than for demolition shall relate to and take effect from the visible commencement of operations excluding demolition and delivery of materials for such demolition.

The effect of this section is that a lienor, regardless of when he first does his work or furnishes his material, has a lien dating from the time of the visible commencement of operations.³ For example, assume that the time of visible commencement of operations is January 1, 1953, and that on August 15, 1953, the roofer starts work. Under the provision of section 84.03 the roofer's lien takes effect as of January 1, 1953. If demolition work is involved, those liens connected with the demolition work (and only those liens) take effect from the visible commencement of demolition.

This was not the law in Florida prior to the enactment of the Mechanics' Lien Law. Formerly, liens did not relate back to the commencement of construction regardless of who began work.⁴

Section 84.20 provides for the priority of liens:

Liens provided by this chapter shall have priority over a . . . mortgage . . . which was not recorded, docketed or filed at the time of visible commencement of operations.

Therefore, in the instant problem, it becomes necessary to determine whether the tree and brush removal was "the visible commencement of

2. FLA. LAWS 1935, c. 17097.

3. *W. T. Price Dredging Co. v. Suarez*, 147 Fla. 253, 2 So.2d 740 (1941).

4. *Palm Beach Bank v. Lainhart*, 84 Fla. 662, 95 So. 122 (1922).

operations." It is apparent from reading section 84.03 and section 84.20 together, that if the time of visible commencement dates from the time when the trees were cut and the brush removed, then the mortgagee's lien is inferior to the liens of all of those mechanics who have thereafter done work or furnished materials even though the work and materials may have been done and furnished long after the mortgage was recorded.

We are, therefore, impelled to examine the Mechanics' Lien Law for the definition of "visible commencement of operations."

"Visible commencement of operations" means the first actual work of improving upon the real property or the first delivery to the site of the improvement of materials which remain thereon until incorporated in the improvement, of such manifest and substantial character as to notify interested persons that the real property is being improved or is about to be improved.⁵

This latter definition furnishes the following tests:

1. The first actual work of improving; or
2. The first delivery of materials; and
3. Of such manifest and substantial character as to notify interested persons that the real property is being improved or is about to be improved.

In order to determine whether cutting down trees and removing brush is part of the actual work of improving we should examine the definition of "improve":

"Improve" means build, erect, place, make, alter, remove, repair or demolish any improvement upon, connected with, or beneath the surface of any land, or excavate any land, or furnish materials for any of such purposes, . . . or perform any labor or services or furnish any materials . . . in grading, seeding, sodding or planting for landscaping purposes, or in equipping any such improvement with fixtures or permanent apparatus.⁶

Is the cutting down of trees and the removing of brush part of the actual work of building and erecting an improvement on the land? Obviously, a house cannot be built on the land until it has been cleared; but none of the work of clearing the land goes directly into the house itself. The person who cuts down the trees and removes the brush cannot point to any part of the completed house and say, "This is the part on which I worked."

In the case of *Central Trust Co. v. Cameron Iron & Coal Co.*,⁷ the owner cleared the land, took out the stumps, and removed the brush. The court said that all of this work was of a preliminary nature preceding the commencement of the building. Speaking to like effect in *New Hampshire Savings Bank v. Varner*,⁸ the court said:

5. FLA. STAT. § 84.01 (1951).

6. *Ibid.*

7. 47 Fed. 136 (D.C. W.D. Penn. 1891).

8. 216 Fed. 721, 728 (C.C.A. 8th 1914).

It is also claimed that Underwood cleaned the premises of some shrubbery and a few trees during the holidays; but such work if done is no indication of the beginning of a building. By the use of the phrase "actual work of improving", the Act recognizes that at some stage of improving the property the work will be less than "actual". Clearing the land to prepare it for the construction of houses would appear to be something less than "actual" work of improving.

It is not intended, hereby, to imply that because cutting trees and removing brush does not fix the time of visible commencement of operations that persons doing this type of work are to be denied a lien under the Act. Section 84.02 provides that a contractor, sub-contractor, materialman or laborer shall have a lien for money owing for labor or services performed or materials furnished. If this section is read together with the definition of visible commencement of operations, it becomes clear that the lien dates only from the visible commencement of operations.

The right of laborers to a lien for clearing the land was apparently taken for granted in *Florida Fruit Co. v. Shakelford*.⁹ In that case the question involved was whether laborers who cleared the land could force the owner to pay them after he had paid the contractor although they had failed to file the cautionary notice.

Laborers who clear off land on which the owner does not intend to build are entitled to a lien.¹⁰

PROBLEM II

The trees have been cut, the brush removed; the streets and roads have been cut and laid. The land developer then borrows sufficient money for the entire project. After the mortgage encumbering the entire subdivision has been duly recorded, the land developer proceeds to construct houses. Before all of the houses are completed, the mortgagor defaults and the mortgagee forecloses.

The statutory definition of "improve", as seen in the discussion under Problem I, includes "grading".¹¹ One does not have to be an engineer to know that cutting streets and laying roads involves grading. However, if need be, we may turn to the dictionary and the decisions of the courts for confirmation.

Webster's New International Dictionary, Second Edition, Unabridged, defines the verb "to grade" as follows:

To reduce to a level or to an evenly progressive ascent, as the line of a canal or road.

Courts which have been called upon to decide questions of law pertaining to "grading" have consistently stated that grading means to remove or add earth.¹² They have said that "grading" as used in its commonly accepted meaning is a physical change of the earth's structure by scraping

9. 145 Fla. 216, 198 So. 841 (1940).

10. FLA. STAT. § 85.04 (1951), *O'Harra v. Frazier*, 54 So.2d 688 (Fla. 1951).

11. See note 5 *supra*.

12. *Nassau County v. O'Connell*, 37 N.Y.S.2d 1009 (Sup. Ct. 1942).

and filling in the surface of the highway to reduce to a common level.¹³

The Mechanics' Lien Law, however, requires that the work of improving shall be done upon the real property, and the definition of real property excepts property owned by the state, county, municipality or other such public bodies.¹⁴

At common law, the owner of a lot holds in fee simple to the center of the street, and the public merely has an easement to pass over it,¹⁵ even though the right-of-way has been dedicated to the public.¹⁶

There should be no serious question as to the road builder's right to a lien under the Mechanics' Lien Law; but does his lien attach to the abutting lots?

In case decisions in which the Uniform Mechanics' Lien Act is not applicable, the courts have not been wholly in agreement as to whether persons laying streets and roadways are entitled to a mechanic's lien on the abutting property. The Florida Court has said that material men and laborers who furnished material and labor for walks and driveways were entitled to a lien on the abutting lots because the walks and driveways were constructed upon the tract of land as part of the development of the property and were essentially appurtenant to and, in a sense, were part of every house or building erected upon the plat and included in the contract for the erection of the structures.¹⁷

Texas has decided that a contractor who paved a street was entitled to a lien on the property abutting the street on the theory that, in Texas, the grantee owns his lot in fee simple up to the center of the street and the public merely has an easement to pass over it.¹⁸ But in Iowa it was held that a mechanic holds no lien for constructing a sidewalk, reasoning that a sidewalk is a public improvement rather than a private improvement.¹⁹

Missouri Valley Cut Stone v. Brown,²⁰ a Missouri case, stated that the mechanics' lien law must be strictly construed and that, unless the statute provides for a lien for a sidewalk, the parties themselves could not create a statutory lien. The court then held that there was no lien for laying a driveway from the street to the house because the contract for its construction was not connected with the contract for the erection of the house.

The right to a lien for laying brick in a sidewalk on the public street adjacent to a building was recognized in *McDermott v. Claas*²¹ because the

13. *Louisville & N.R.R. v. State*, 137 Tenn. 341, 193 S.W. 113 (1917); *Musto-Keenan Co. v. City of Los Angeles*, 139 Cal. App. 506, 34 P.2d 506 (1934); *Ryan v. Dubuque*, 112 Iowa 284, 83 N.W. 1073 (1900).

14. FLA. STAT. § 84.01 (1951).

15. *Lewis v. Roach Manigan Paving Co.*, 184 S.W. 680 (Tex. Civ. App. 1916).

16. *State Road Department v. Bender*, 147 Fla. 15, 2 So.2d 298 (1941).

17. *Palm Beach Bank v. Lainhart*, 84 Fla. 662, 95 So. 122 (1922), decided under Rev. Gen. Stat. §§ 3495, 3496 (1920).

18. *Lewis v. Roach Manigan Paving Co.*, 184 S.W. 680 (Tex. Civ. App. 1916).

19. *Coenen v. Staub*, 74 Iowa 32, 36 N.W. 877 (1888).

20. 50 Mo. App. 407 (1892).

21. 15 S.W. 995 (1891).

contract between the owner and the general contractor included the construction of the sidewalk.

In construing a Michigan statute which permitted liens for labor and materials used in any house, building, wharf . . . or sidewalks or wells, the court held that this designation would not include roadways or parking grounds.²²

Under the Florida Mechanics' Lien Law, a lien is given on the real property improved. "Real property" is defined as the land that is improved.²³ Query—when a street is cut and laid, what land is improved? Is it only the land that is bounded by the street lines, or is it all of the abutting land? The Supreme Court of Florida would probably use the *Palm Beach Bank* case²⁴ as a precedent and hold that persons cutting streets and laying roads are entitled to a lien against the abutting lots, especially if the contract for this work was made pursuant to a single plan to build houses on the lots.

If, however, the visible commencement of operations dates from the time when the roads were laid, then this could be disastrous to the mortgagee. If the roads have been laid in front of every lot in the subdivision, then the lien of the mortgagee is inferior to the liens of every lienor who thereafter performs labor upon and furnishes materials to the houses to be erected.²⁵

Cutting streets and laying roads may not be "actual work of improving . . . of such manifest and substantial character as to notify interested persons that the real property is about to be improved." The owner may be getting ready for a campaign to sell unimproved lots. Many subdivisions have been platted into lots and the streets laid without any improvements being constructed thereon. It is unfair to the lending agency, and puts it at the mercy of an unscrupulous land developer, to require it to inquire whether the streets were laid as part of a house-building program.

It is no protection to the mortgagee if he asks for, and receives, positive proof that the road builder has been paid in full; for if the cutting of streets and laying of roads fixes the time of visible commencement of operations, then all liens take effect from that time and it is immaterial that the lienor who did the first actual work of improving has been paid.

The better rule would appear to be that the road builder has a lien on the abutting lots dating from the time of visible commencement of operations, but that cutting streets and laying roads does not of itself fix the time of visible commencement of operations.

PROBLEM III

The trees and brush have been removed; the streets have been cut and the roads laid; a "model house" has been built. The land

22. *Bezold v. Beach Development Co.*, 259 Mich. 693, 244 N.W. 204 (1932).

23. FLA. STAT. § 84.01 (1951).

24. See *Palm Beach Bank v. Lainhart*, 84 Fla. 662, 95 So. 122 (1922).

25. See *W. T. Price Dredging Co. v. Suarez*, 147 Fla. 253, 2 So.2d 740 (1941).

developer then borrows sufficient money for the entire project and a mortgage encumbering the entire subdivision is duly recorded. The land developer proceeds to construct houses according to the "model house". Before all of the houses are completed, the mortgagor defaults and the mortgagee forecloses.

Before a lending institution will disburse any of the mortgage funds after its mortgage has been recorded, it should require an engineer's "no work affidavit" as assurance that there has been no visible commencement of operations. This affidavit will probably state that the engineer has seen no evidence of construction on the lots encumbered by the mortgage.

But what about the "model house"? Suppose before the land developer started to build the model house he entered into a contract with a general contractor for the entire project including the model house? The statute defines visible commencement of operations as the "first actual work of improving upon the real property."²⁶ If the general contractor has a contract to improve the entire subdivision, is the construction of the model house the first actual work of improving the *entire* subdivision? If so, and if it is also of such manifest and substantial character as to notify interested persons that the entire subdivision is being improved or is about to be improved, then the erection of the "model house" is the visible commencement of operations of the entire subdivision.

Visible commencement of operations also includes the first delivery to the "site of the improvement" of materials which remain thereon until incorporated in the improvement.²⁷ "Site of the improvement" means the real property which is being improved.²⁸ If the realty being improved is the entire subdivision, then the visible commencement of operations as to the entire subdivision dates from the first delivery of materials to the site of the "model house".

If the work of constructing, or the delivery of materials to the model house, is the commencement of visible operations as to the entire subdivision, then the lending institution has cause to worry, for we have seen that all liens date back to the visible commencement of operations. In the instant problem this would mean that all liens of the entire project would be superior to the mortgage.²⁹

In the case of *Security Stove Co. v. Sellards*,³⁰ an owner obtained two mortgages from the same mortgagee encumbering two lots. Building operations were commenced on the first lot, and both mortgages were recorded six days later. Several weeks after this building operations were commenced on the second lot. The lienors contended that the commencement of building on the first lot was likewise the date of commencement of building

26. FLA. STAT. § 84.01 (1951).

27. *Ibid.*

28. *Ibid.*

29. See *W. T. Price Dredging Co. v. Suarez*, 147 Fla. 253, 2 So.2d 740 (1941).

30. 133 Kan. 747, 3 P.2d 481 (1931).

on the second lot. In language which did not entirely foreclose future contentions such as were made by the lienors, the court, in refusing to recognize that the commencement date of the first lot was also the commencement date of the second lot, said:

This theory is inconsistent with the attitude of all the parties to the case all the way through including the lienholders. Their claims and their judgments were separate and distinct as to the two lots when they should have put them together as one claim and one judgment if they expected to consider their lien as only one on both lots, to take advantage of the earlier commencement of work on the other lot. No authorities are cited to support this theory and we are not inclined to accept it as applicable to the facts in this case.

Section 84.02 of the Act states that the contractor, subcontractor, material man or laborer shall have a lien on the real property improved; and section 84.03(2) provides that the lien shall extend to the owner's title in the real property at the time of the visible commencement of operations not exceeding forty acres of land. This means that in the case of rural and farm lands not plotted into building lots, if one is entitled to a lien, the lien covers forty acres even though the building erected may only have been a small house.

What if the real estate has been plotted into lots? Although the law is silent in this respect, the Committee on the Uniform Mechanics' Lien Act stated: "Where the improvement is upon a lot or lots in a city or town it is intended that the whole lot or lots with all improvements thereon shall be subjected to liens and the integrity of the property preserved."³¹ The implication is that the erection of a house on a lot creates a lien on the entire lot, rather than on a part of it. The purpose is to avoid cutting up a lot by giving a lienor a lien on a portion of the whole, or to prevent giving him a lien on the house exclusive of the land.

Section 84.15 permits the lienor to file a single claim of lien for labor or services performed, or for material furnished for more than one improvement, to be operated as a single plant, but located on separate lots. The purpose of this section is to reduce to a minimum the number of liens to be filed.³² It does not indicate an intention to date the visible commencement of operations from the time when the first lot is improved.

The same section also provides that the lienor shall file a separate claim of lien against each lot if two or more lots are improved under the same contract and the improvements are not operated as a single plant.³³ But here again, the purpose of the section is to keep clear the individual records of each lot,³⁴ and not to indicate an intention that, in cases where several lots are improved under the same contract, the visible commencement of

31. UNIFORM MECHANICS' LIEN ACT, n. 34.

32. UNIFORM MECHANICS' LIEN ACT, n. 100.

33. FLA. STAT. § 84.15 (1951).

34. UNIFORM MECHANICS' LIEN ACT, n. 101.

operations shall be divisible. As for the lienor, he may lose his lien if he files a single claim of lien when he should have filed a separate claim of lien against each lot.³⁵

Quite often after the "model house" has been completed the land developer will have an engineer drive stakes into the ground to show the corners of each lot so that a prospective buyer may better visualize the size and location of his lot. Does staking off the lots in this fashion constitute a visible commencement of operations?

Most decided cases not under the Uniform Mechanics' Lien Act hold that staking off the lot does not amount to the commencement of building.³⁶

Staking off the lot, if done as a preliminary step to starting construction, is part of the work of improving the real property. But if the sole purpose is to indicate the size and location of a lot, without any intention to build, staking off is not part of improving the real property. It is an undue burden on a prospective lending agency to require an inquiry as to the land developer's intent when he had the stakes driven. Furthermore, even if the land developer makes an affidavit that he did not have the stakes driven in as a preliminary step in the commencement of the building, he may later change his story to the disadvantage of the mortgagee. The mortgagee should not be bound by another person's intention.

The better rule is that the driving in of stakes to show the corners of a lot is not part of the actual work of improving the land; or, that if it is part of the actual work of improving, then it is not of such manifest and substantial character as to put interested persons on notice. However, when the contractor drives in stakes at the corners of the lot and then nails on lengths of boards connecting all the corner stakes, so as to enclose the lot, he probably has done some actual work of improving of such manifest and substantial character as to notify interested persons that the real property is being improved, or is about to be improved.

We may conclude that, when several lots are being improved, each lot has a separate identity insofar as the amount of land covered by the lien is concerned, and that liens do not extend beyond the lot lines of the particular lot which is being improved. But this is not the same as saying that the time of visible commencement of operations is applicable only to the particular lot which is being improved and that each lot has its own time of visible commencement of operations.

PROBLEM IV

The trees and brush have been removed; the streets have been cut and the roads laid; a "model house" has been built; a mortgage has been obtained and recorded encumbering a group of lots

35. *Maule Industries v. Trugman*, 59 So.2d 27 (Fla. 1952); *Todd v. Gemert*, 223 Pa. 103, 72 Atl. 249 (1909).

36. *Brooks v. Lester*, 36 Md. 65 (1872); *Hagenman v. Fink*, 19 Pa. County Ct. 660 (1894).

referred to as Group A, and construction has been started on this group of lots. Thereafter, while Group A is under construction, the land developer obtains a mortgage encumbering a second group of lots referred to as Group B. After the mortgage on Group B has been recorded the land developer starts to build on Group B, but before all the houses on Group B have been completed the mortgagor defaults and the mortgagee forecloses his mortgage on Group B.

The holder of the mortgage on Group B is, of course, confronted with all of the situations discussed under Problem III.

Usually, although the land developer obtains separate mortgages on separate groups of lots, he makes a single contract for the entire subdivision, and the general contractor sets up a work shop on one or more of the centrally located lots and uses these "workshop lots" to store materials for the entire subdivision. Also, the general contractor starts ordering material in large quantities because, if he has an excess after completion of one group of lots, he will use it on another.

During the erection of Group A, the general contractor and the subcontractors may be performing labor and services on the lot or lots which have been selected as a workshop, in furtherance of the improving of Group B. For example, the carpenter subcontractor may deem it expedient to build forms at the "workshop lot" and distribute them to the various groups of lots. The plumbing subcontractor may desire to cut and thread pipes at the "workshop lot" and distribute them to the various groups. The plasterer may mix the plaster on the "workshop lot" for groups A and B. Some of this labor at the "workshop lot" may have been performed before the mortgage on Group B has been recorded and the mortgagee of Group B may be ignorant of this work.

Visible commencement of operations means the first delivery of materials to the site of the improvement;³⁷ and "site of the improvement" includes any land immediately adjacent to the land being improved on which labor and services are performed in furtherance of the operations of improving such property.

This means that the engineer's affidavit that he has seen no evidence of construction on the lots encumbered by the mortgage may be misleading; and if a mortgagee regards such an affidavit as an "all clear signal" he may later learn to his dismay that the men, working so diligently on the immediately adjacent land, were performing labor and services on material in furtherance of operations to improve the lots covered by his mortgage.

CONCLUSION

The Florida Mechanics' Lien Law makes it possible for persons to do work upon land, before a mortgage has been recorded, which will entitle them to a lien, and yet the lien will be inferior to the mortgage. This is so because all liens date from the time of visible commencement of operations,

37. FLA. STAT. § 84.01 (1951).

and any liens for work done prior to the visible commencement of operations do not relate back to the time when the work was done. Liens for clearing the land fall into this category.

Conversely, the same law makes it possible for persons to do work of improving land long after a mortgage has been recorded, and yet have a lien which is superior to the mortgage. This is so because all liens under the statute relate back to the visible commencement of operations.

Persons who perform labor in cutting streets and laying roads have a lien against the abutting lots dating from the visible commencement of operations; but cutting streets and laying roads is not part of the actual work of improving and, therefore, does not establish the time of visible commencement of operations. A mortgage recorded after the roads have been laid is superior to the mechanics' liens.

Driving in stakes to indicate lot lines is not any actual work of improving; and, if it is, then it is not of such manifest and substantial character as to notify interested persons that the real property is being improved or is about to be improved. A mortgage recorded after these stakes have been driven in is superior to the mechanics' liens. But if boards are nailed to the stakes enclosing the entire lot, the actual work of improving has begun and a mortgage recorded subsequent thereto is inferior to the mechanics' liens.

The construction of a "model house", or of a group of houses, does not of itself fix the time of visible commencement of operations for any other lot in the subdivision upon which actual work has not yet begun. If, however, in conjunction with the construction of the "model house" or group of houses, the contractor or subcontractor has set up a warehouse and workshop on another lot, and mechanics do work on materials on these so-called "workshop lots" in furtherance of operations of improving all of the lots in the subdivision, then the subsequent mortgagee had better beware. Certainly, if there is a "workshop lot" contiguous to a lot on which he plans to take a mortgage, his mortgage will be inferior to the mechanics' liens as to that contiguous lot.

The Florida Mechanics' Lien Law is complicated³⁸ and much of it still requires clarification. However, it has been in effect since 1935 and the Supreme Court of Florida has rendered many decisions which help to guide attorneys. It would, therefore, be unwise to scrap the Act now and enact a new mechanics' lien law, thus throwing overboard what it took years to develop.

The best solution would be to amend the existing Mechanics' Lien Law so that it clearly spells out the respective rights of the mortgagees and the lienors.

38. *Shaw v. Del-Mar Cabinet Co.*, 63 So.2d 264, 267 (Fla. 1953).