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A Study of the Florida Mechanics' Lien Law and Its Unsuspected Pitfalls

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COMMENTS

A STUDY OF THE FLORIDA MECHANICS' LIEN LAW AND ITS UNSUSPECTED PITFALLS

The Mechanics' Lien Act[1] seeks to protect not general creditors but specifically those[2] who have made improvements upon another's real property, the purpose being to afford protection by insuring payment through the medium of a lien.[3]

Locally, mechanic's liens constitute a material part of chancery practice inasmuch as construction is the major industry and the largest source of employment. Yet in many respects the protection via the lien law afforded persons engaged in this type of work is so ineffectual, as discussed hereinafter, that as a practical matter the law has caused irreparable harm. Unless drastic steps are taken to rectify it, the future holds nothing but confusion, fraud and hopeless conflicts.

GENERALLY

Where labor is performed and materials are furnished for another and the latter fails to pay, one of the remedies is an action of assumpsit, the common counts having been abolished.[4] The gist of the lien law is to provide an enforceable means of collecting from one whose property has been improved through a procedure of filing a lien against the property, thereby charging it with the debt.[5] The lien is potent in that it ties up, encumbers and affects the marketability of the property to which it attaches. It is well to note, however, that the owner may relieve the property so encumbered by substituting therefor a bond[6] in the amount of the lien claim filed, in which event the lien attaches to the security. Thus the enforcement of a lien is a strong weapon in the hands of a person who has performed, while a successful claimant in an action of assumpsit is faced with an empty claim.

The right to a lien is predicated on performance, not upon breach of contract,[7] thereby preventing unjust enrichment by one person at the expense of another. The lien attaches to the owner's right, title or interest,[8]

1. FLA. STAT. c. 84 (1949).
2. FLA. STAT. § 84.02 (1949) (contractor, sub-contractor, materialman, laborer).
3. Atkins v. Kendrick, 138 Fla. 776, 190 So. 248 (1939); Nat. Bank of Jacksonville v. Williams, 38 Fla. 305, 20 So. 931 (1896).
4. FLA. STAT. § 51.03 (1949), repealed by Fla. Laws 1951, c. 26962.
5. FLA. STAT. § 84.02 (1949).
6. FLA. STAT. § 84.24 (1949).
7. Golub v. DeLinardy Flooring Co., 44 So.2d 75 (Fla. 1950); London Operating Co. v. Continental Const. Co., 118 Fla. 15, 159 So. 33 (1935); Armstrong Cork & Insulation Co. v. Groman, 105 Fla. 553, 141 So. 754 (1932); Cooper v. Passmore, 103 Fla. 744, 138 So. 48 (1931).
8. FLA. STAT. § 84.03 (1949).

including an equitable interest,[9] at the time of performance. In the case of a lessee[10] who invites construction, the lien attaches to the lessee's interest in being at the time of the making of the lease. Conversely, where the lessee is required by the lessor[11] to make improvements, the lien attaches to the lessor's interest also. Similarly, mechanics' liens attach to homestead property[12] being improved. In the case of an estate by the entireties, the wife upon knowledge and notice that construction is in progress must make any objection thereto within ten days thereof, and failure to so object will entitle the claimant to perfect his lien.[13]

The lien accrues and relates back to visible commencement of operations except in cases of demolition.[14] Where the lienor is dealing directly with the owner, in order to perfect his lien it must be filed within ninety days from the last day of performance of labor or furnishing of materials.[15] However, where the lienor (except a laborer)[16] is not in privity[17] with the owner, he may, during the progress of work, but not later than thirty days after commencement, give the owner written notice of intention to claim a lien.[18] Such notice informs the owner of the possibility of a claim and if the owner should disregard it, he assumes the risk of paying twice for the same work.[19]

Within ninety days after the last day of performance the lienor must file his claim of lien with the clerk of the circuit court wherein the property is located.[20] A claim of lien may be amended at any time during the time allowed for filing the same.[21] Further, the lienor must, within ten days, serve a copy of the recorded lien upon the owner by registered mail, return receipt requested. If the owner cannot be located within such period the posting of a copy within the prescribed ten-day period in a conspicuous

9. Arbuthnot v. Moody Co., Inc., 115 Fla. 503, 155 So. 840 (1934).

10. Robert L. Weed, Architect, Inc. v. Horning, 159 Fla. 847, 33 So.2d 648 (1948); Masterbilt Corp. v. S. A. Ryan Motors, Inc., 149 Fla. 644, 6 So.2d 818 (1942).

11. Lehigh Structural Steel Co. v. Joseph Langner, Inc., 43 So.2d 335 (Fla. 1949).

12. Lamb v. Ralston Purina Co., 155 Fla. 638, 21 So.2d 127 (1945); Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925); Giddens v. Dickenson, 60 Fla. 320, 53 So. 929 (1910); *But cf.* Lewton v. Hower, 18 Fla. 872 (1882).

13. FLA. STAT. § 84.12 (1949), Leroy v. Reynolds, 141 Fla. 586, 183 So. 843 (1940); Velasquez v. Suarez, 113 Fla. 856, 152 So. 708 (1934); Mead v. Picotte, 101 Fla. 325, 134 So. 57 (1931).

14. FLA. STAT. § 84.03 (1949).

15. Roughan v. Rogers, 145 Fla. 42, 199 So. 572 (1940); Hendry Lumber Co. v. Bryant, 138 Fla. 485, 189 So. 710 (1939); State v. Chillingworth, 126 Fla. 645, 171 So. 649 (1936).

16. FLA. STAT. § 84.04(4) (1949).

17. Spinney v. Sanford-Orlando Kennel Club, 123 Fla. 113, 166 So. 559 (1936); *But see* Stowers v. Wheat, 78 F.2d 25 (5th Cir. 1935); First Nat. Bank of Tampa v. Southern Lumber & Supply Co., 106 Fla. 821, 145 So. 594 (1932).

18. FLA. STAT. § 84.04 (1949), Tallahassee Variety Works v. Brown, 106 Fla. 599, 144 So. 848 (1932).

19. Investors Syndicate v. Henderson, 148 Fla. 696, 6 So.2d 629 (1941); Hendry Lumber Co. v. Bryant, *supra* note 15.

20. FLA. STAT. § 84.16 (1949), Florida Fruit Co. v. Shakelford, 145 Fla. 216, 198 So. 841 (1940).

21. FLA. STAT. § 84.17 (1949).

place upon the property improved is deemed proper service within the meaning of the statute.[22]

In this jurisdiction, enforcement of a lien in equity by means of foreclosure must be commenced[23] within one year from the date of the filing of the claim of lien. A special summary proceeding at law enables laborers to obtain a judgment within five days, an exclusive and expeditious remedy peculiar to this class of lienors.[24]

Notice Of Intention To Claim A Lien

Those persons who are not in privity of contract with the owner,[25] with the exception of laborers,[26] are required to send cautionary notice. In theory, cautionary notice serves a dual purpose. It places the owner on notice that the contractor has not paid some of the lienors, impounding in the owner's hands monies that otherwise might be paid to the contractor to the detriment of the lienor had no notice been given. This protects the owner from paying for the same services twice.[27] It also gives the lienor the right to priority of payment over those not giving such notice.[28] The aggregate amount of the liens cannot exceed the contract price.[29] The rights of the lienor are subrogated to those of the contractor inasmuch as cautionary notice only secures that portion of the monies due and owing to the *contractor* at the time of service of the notice and only in the amount set forth therein. It follows, therefore, that under a contract wherein payment is made in installments as the work progresses, if a contractor submits an affidavit to the effect that at this stage of construction all subcontractors have been paid,[30] and the owner relying on this affidavit then makes payment, which is deemed "proper payment,"[31] cautionary notice sent the next day would be fruitless. The *quaere* that naturally arises as to why cautionary notice was not sent can be answered by the analogy of a private in the Army sending a letter to his commanding officer complaining of the inefficiencies of his first sergeant. The moment a lienor or prospective lienor sent notice to the owner, the contractor would without hesitation fire him on the spot for placing him in a questionable position with the owner.

Because of the theoretical importance of cautionary notice and its practical ineffectiveness, consider for a moment the ensuing hypotheticals

22. Fla. Stat. § 84.18 (1949).
23. Fla. Stat. § 84.21 (1949), Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577 (1930); *But see* note 5, Miami L. Q. 521, 522 (1951).
24. Fla. Stat. § 86.06 (1949).
25. Pinellas Lumber Co. v. Lynch, 140 Fla. 559, 192 So. 475 (1939); Hendry Lumber Co. v. Bryant, *supra* note 15.
26. Florida Fruit Co. v. Shakelford, *supra* note 20.
27. Hardee v. Richardson, 47 So.2d 520 (Fla. 1950).
28. Fla. Stat. § 84.06 (1949), W. T. Price Dredging Corp. v. Suarez, 147 Fla. 253, 2 So.2d 740 (1941).
29. Fla. Stat. § 84.02 (1949), Southern Paint Mfg. Co. v. Crump, 132 Fla. 799, 182 So. 291 (1938); Schilling v. Harrington, 135 Fla. 466, 186 So. 222 (1936).
30. Dodson v. Florida Nursery & Landscape Co., 138 Fla. 887, 190 So. 695 (1939).
31. Fla. Stat. § 84.05 (1949), Florida Fruit Co. v. Shakelford, *supra* note 20.

wherein the lien law, a creature of the statute designed to protect lienors, can be used as a legal club to perpetrate fraud on a wholesale basis:

> Three persons, a construction corporation (A), the owner of the land (B) and the mortgagee (C), conspire to build one hundred homes with a bare capital of $40,000. The property is examined, a mortgage placed of record, and construction begins with work being pushed along as rapidly as possible by A and token payments being made from time to time to stultify in the initial stage of construction any suspicion of collusion. The lienors, desperate for payment yet fearing the practical results stemming from the giving of cautionary notice, abstain therefrom and are legally enticed and forced into the collusive trap, shielded by judicial misconception, attorneys' confusion and the porous construction of the Mechanics' Lien Law. When the project nears completion, A abandons construction, B purposely fails to make payments on his mortgage to C who steps in and forecloses it as planned, thereby divesting the lienors of their rights. C with a total investment of $40,000 then acquires 100 homes fully completed, valued at approximately $200,000, his only encumbrance being a three-way split among the parties in pari delicto. Not only has the lienor lost the fruits of his labor, but his entire investment is thereby extinguished and he is without remedy. To add insult to injury, decisions have established that there can be no attorneys' fees awarded to a successful claimant,[32] except in summary proceedings[33] discussed above, on the basis that such award is unconstitutional. This factor would further deter a defrauded and remediless lienor from pursuing litigation where the possibility of a successful prosecution of his cause is remote.
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> The second hypothetical revolves around an overzealous contractor (K) and a negligent owner (O) where K in an effort to complete a project without sufficient capital falsely executes affidavits that all lienors have been paid. O accepts these affidavits from K and thereafter is considered as having made "proper payment." For the reasons mentioned above, the lienors again withhold giving cautionary notice. The climax is reached when K, operating on an insolvent level, is forced to throw up his hands and abandon the project. Thus, the lienors whose rights are subrogated to those of K have no alternative but to file an information with the Solicitor's office against K for false and fraudulent practice. This meets with no success, for the criminal courts have repeatedly stated that they will not act as a "collection agency", and the poor lienor is left holding the proverbial "bag".

Some ingenious lienors have attempted to lessen the effect of complying with cautionary notice provisions by enmeshing the requirements in the form of a courteous letter.[34] In most reported cases the force and effect

32. Union Terminal Co. v. Turner Const. Co., 247 Fed. 727 (1918); Franklin Savings & Loan Co. v. Fisk, 98 Fla. 683, 124 So. 42 (1929); Martin v. Rothar, 94 Fla. 207, 113 So. 713 (1927).

33. Hunter v. Flowers, 43 So.2d 435 (Fla. 1949).

34. Salomon v. Galinsky, 103 Fla. 417, 137 So. 386 (1931); Ramsey v. Hawkins, 78 Fla. 189, 82 So. 823 (1919).

of the letter was so throttled that it fell below the essential statutory requirements, thereby leaving the lienors helpless.[35]

Those states which adopt the "Direct Lien" system, also known as the "Pennsylvania" system,[36] proceed on the theory that the lien conferred on a subcontractor, laborer or materialman is categorically a charge upon the property so improved, completely eliminating therefrom any thought of subrogation rights or indebtedness as between the original contractor and the owner. The underlying rationale is based on any one of the following theories: (1) that the contract is important in that the contractor is impliedly deemed an agent invested with the power to insure payment for labor performed and materials furnished in accordance with the terms of the contract;[37] or (2) that the owner ratifies the acts of the contractor in re labor hired and materials furnished;[38] or (3) that the law affords protection to the deserving claimant by preventing unjust enrichment where property has been improved.[39] Thus, the purpose of the "Direct Lien" statutes is to abrogate the giving of cautionary notice, with protection afforded the lienors from collusive enterprises[40] by insuring faithful performance of the terms of the contract by both the owner and contractor.

Lastly, in completing the poorly engineered framework of cautionary notice, it is noted that where a contractor had assigned to a third person all monies due him from the owner, the supreme court, sensing the inequities that could be imposed upon the lienor, held[41] that such an assignment did not affect the lienor's rights, reversing an attitude[42] theretofore existing that such action would bar his rights. However, the lienor is in no better position by this ruling and the supreme court failed again to visualize that he is forced to preserve his employment by forbearing to file notice rather than to perfect his lien by such filing.

Visible Commencement of Operations and the Mystery of the Doctrine of Relation Back

Although there are a few cases in other jurisdictions[43] which collectively show a cleavage point, the courts have given a clear picture and definition of what constitutes "visible commencement of operations"; *i. e.*, that type of improvement that takes on the appearance that positive construction is in

35. Truelsen v. Southern Lumber Co., 87 Fla. 327, 100 So. 267 (1924); Langford v. Southern Florida Lumber & Supply Co., 63 Fla. 484, 59 So. 12 (1912); De Soto Nat. Bank v. Arcadia Elec. Light, Ice & Tel. Co., 59 Fla. 479, 52 So. 612 (1910).

36. Alabama, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Montana, Nebraska, North Carolina, New Mexico, Ohio, Pennsylvania, South Dakota, Texas, Wyoming.

37. Boise-Payette Lumber Co. v. Felt, 44 Idaho 377, 258 Pac. 169 (1927).

38. Houston-Hart Lumber Co. v. Neal, 16 N.M. 197, 113 Pac. 621 (1911).

39. Pomeroy v. White Lake Lumber Co., 33 Neb. 243, 49 N.W. 1131 (1891).

40. Ballou v. Black, 21 Neb. 131, 31 N.W. 673 (1887).

41. Florida East Coast Ry. v. Eno, 99 Fla. 887, 128 So. 622 (1930).

42. *Id.* at 623.

43. Kiene v. Hodge, 90 Iowa 212, 57 N.W. 717 (1894); Security Stove & Mfg. Co. v. Sellards, 133 Kan. 747, 3 P.2d 481 (1931); Erickson v. Ireland, 134 Minn. 156, 158 N.W. 918 (1916).

progress. This has not caused as much confusion as the employment of the doctrine of relation back. The statute in question[44] is very clear and reads as follows:

> All liens . . . shall relate to and take effect from the time of the visible commencement of operations except that, where demolition is involved . . .

Unfortunately, there are no decisions to give vitality to this section. The Mechanics' Lien Law is analogous to the Negotiable Instruments Law in that various sections must be read together and tempered with custom and usage of trade. It is first noticed in the section[45] entitled 'Definitions' that "visible commencement of operations" means the first actual work of improving on the property which is notice that construction is in progress. The only remaining sections[46] of value deal with priorities of lienors among those improving the property and priority of liens as between conveyances, mortgages, attachments, judgments or other encumbrances.[47]

It is clear that the matter of crucial concern in the section in question[48] relates to the proper interpretation and construction of the expression "all liens relate to and take effect from . . . ." No other logical conclusion can be reached from the language of this section when considerd in connection with other sections and the known history than that regardless of when *particular* work is performed the lien relates back to the time that *any* work was started on the property. Therefore, one section[49] clearly establishes a priority among the lienors themselves while the other section[50] segregates the lienors from other encumbrancers, thereby sustaining the proposition herein set forth.

This section is definitely broad enough in its language to overcome the presumption established under the previous Mechanics' Lien Law, under which it was held[51] that liens related back only to the time when the specific lienor performed and that the relation back operated as to his lien only if a continuing contract was involved. Also, under the previous Act, where work had commenced and a mortgagee desired to have priority he could make full payment of all liens up to date, receive a general release of liens from all who performed and then record his mortgage which had priority over any subsequent liens or encumbrances.[52] Further support for this premise is found in the fact that the attaching date of a lien or right to a lien is similar to a wife's dower right in that it is inchoate, and only upon full compliance with the statute does it become a vested right and relate back to commencement of operations. Any other result would be to place

44. FLA. STAT. § 84.03 (1949).
45. FLA. STAT. § 84.01 (1949).
46. FLA. STAT. § 84.06 (1949).
47. FLA. STAT. § 84.20 (1949).
48. FLA. STAT. § 84.03 (1949).
49. FLA. STAT. § 84.06 (1949).
50. FLA. STAT. § 84.03 (1949).
51. North Bay Shore Land Co. v. Perry, 68 Fla. 322, 98 So. 139 (1923); Palm Beach Bank & Trust Co. v. Lainhart, 84 Fla. 662, 95 So. 122 (1922).
52. Palm Beach Bank & Trust Co. v. Lainhart, *supra* note 51.

the class of lienors such as roofers, painters and glaziers, who of necessity are the last to perform, in an inferior position to those who were fortunate enough to begin work earlier.

The present provisions as to "visible commencement of operations" are not as harsh as they may seem when considered in light of the fact that a diligent mortgagee can assure himself of the property by obtaining an engineer's certificate to the effect that construction has not commenced before recording his mortgage, thereby enabling him to achieve a superior lien affording ample protection. The lienors, on the other hand, must ascertain who is the true owner of the premises and thereafter actual construction notice of their rights.

BASIC FOUNDATION OF THE LIEN LAW: CONTRACT VS. STATUTORY COMPLIANCE

The cases are replete with the statement that the lien is acquired by performance and not by breach of contract,[53] that the right to the lien is not created by contract but is purely a creature of the statute[54] and that there must be full compliance with the lien law before a lien can be acquired.[55] On the other hand, the rule has been announced that a contract with the owner or his duly authorized agent is essential as a basis for the lien.[56] In reconciling the cases the question arises: What is the real basis for the lien?

Performance is the essential prerequisite to the creation and acquisition of a lien, while no rights are conferred for mere breach of contract.[57]

The only reported exception[58] arose where a *contract* called for certain prefabricated materials which had to be specially made. The court there held that because of the uniqueness of the materials prepared, a valid lien was created upon the purchaser's refusal to accept delivery.

The cases cited above were evidently decided on the basis of Sections 84.15 and 84.09. Section 84.09 requires that when materials are furnished on an open account, the lienor, upon receipt of monies, shall demand instruction as to the application of payments so made, and failure to make such a demand will cause a forfeiture of his lien rights.[59] Under Section 84.15, the decisions are clear that if work is done under a single contract, a single claim of lien is sufficient.[60] If the contracts be separate, then the liens must be filed against the several parcels of land.[61] Hence, whether a

53. Shad v. Arnow, 155 Fla. 164, 19 So.2d 612 (1944); Thompson v. Wyles, 111 Fla. 202, 149 So. 769 (1933).
54. Spinney v. Live Oaks Manor, 120 Fla. 465, 162 So. 864 (1935); Tallahassee Variety Works v. Brown, *supra* note 18.
55. Howland v. Gore, 152 Fla. 781, 13 So.2d 303 (1942); Buker v. Webster, 140 Fla. 471, 191 So. 835 (1939).
56. Lee v. Sas, 53 So.2d 114 (Fla. 1951); Price v. J. P. Guerry & Son, 133 Fla. 754, 183 So. 1 (1938); Hogue v. Morrison Const. Co., 115 Fla. 293, 156 So. 377 (1934).
57. Cooper v. Passmore, *supra* note 7.
58. Lehigh Structural Steel Co. v. Joseph Langner, Inc., *supra* note 11.
59. Biscayne Trust Co. v. Wolpert Realty & Improvement Co., 100 Fla. 1070, 130 So. 611 (1930).
60. *Ibid*; Florida Fruit Co. v. Shakelford, *supra* note 20.
61. Biscayne Trust Co. v. Wolpert Realty & Improvement Co., *supra* note 59.

lien attaches to one or more buildings depends upon the contract entirely.[62] Therefore, the lien is created upon performance and rendering of services, but the amount of money secured by the lien and the parcels of land encumbered are controlled by the terms of the contract.

This contention finds support in an Arkansas decision,[63] the court saying, " . . . although the lien is a creature of the statute, it must have its foundation in a contract, and on this account must correspond with the contract."

Close scrutiny of the Florida decisions reveals no clear understanding as to when the contract comes into play as against the provisions of the statute, but it is interesting to note the reaction of a Kansas court[64] when confronted with this problem. Sensing the fundamental distinction, it held that " . . . mechanics and materialmen (who) maintain and enforce their liens separately on two lots belonging to the same party, on which buildings are being constructed at the same time, cannot on the second lot, claim the advantage of the earlier commencement of the building on the other lot to give them a priority over an (intervening) mortgagee." The court went on to point out, however, that the rule as enunciated was such only because the lienors filed their liens improperly and had the proper procedure been followed, the results of the case would have been different.

Conclusion

In an attempt to rectify the inadequacies of the present Mechanics' Lien Law a bill was introduced at the 1951 session of the Legislature, the purpose of which was to repeal the section requiring the giving of cautionary notice to the owner by substituting therefor a requirement that "proper payment" can only be established by the owner upon presentment to him of receipted bills and/or releases of liens. This requirement would delegate to the owner an important essential preventive obligation, to which the decisions pay lip service.[65] It does not, however, change the primary character of the function of cautionary notice, but by this innovation a legal biopsy is performed whereby the malignancies heretofore existing in the form of subrogation rights between the contractor and owner and the acceptance by the owner, *without diligent inquiry*, of false affidavits from the contractor, are removed. The enactment of this bill would simulate our system to the Direct Lien or Pennsylvania system, discussed above, but the bill was never passed for reasons not reflected on the legislative rolls.

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62. *Ibid.*
63. Burel v. East Arkansas Lumber Co., 129 Ark. 58, 195 S.W. 378 (1917).
64. Security Stove & Mfg. Co. v. Sellards, *supra* note 43.
65. Florida Fruit Co. v. Shakelford, *supra* note 20.