



Contractors Can Risk Their Lien Rights by Not Acting Quickly to File Claims of Lien



By Tiffany M. Hurwitz

In today's real estate market, contractors must be very cautious and proactive in order to effectively assert and assure their lien rights. There are several potential loopholes in Florida law between the state's Lis Pendens Statute and Construction Lien Law, and the South Florida construction law attorneys at our firm believe that there is one specific discrepancy between the statutes that has the potential to be particularly troublesome for contractors.

Here's a common example that illustrates this problematic grey area for construction firms:

Under Florida's lien law, a contractor must record its claim of lien within 90 days of its last day of work, and it has one year in which to file suit to enforce that claim of lien. Let's say a contractor is performing work on a project where the lender files a foreclosure suit and lis pendens. If the contractor has not recorded its claim of lien as of the date of the recording of the notice of lis pendens and does not intervene in the foreclosure suit to enforce its claim of lien within 30 days of the bank's recording of the lis pendens, the contractor, potentially, could be forever barred from enforcing



its claim of lien based on Section 48.23, Florida Statutes. Since it is entirely possible that a lender could file a lawsuit to foreclose its mortgage and record a lis pendens without any actual notice to the contractors working on the property, this has the potential to be a very serious legal challenge for contractors performing work in the current market. Section 48.23, Florida Statutes states in pertinent part:

Except for the interest of persons in possession or easements of use, the recording of such notice of lis pendens, provided that during the pendency of the proceeding it has not expired pursuant to subsection (2) or been withdrawn or discharged, constitutes a bar to the enforcement against the

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CONSTRUCTION LAW

The construction law attorneys of Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., are nationally recognized as some of the leading providers of legal counsel and representation in the construction industry. We represent a diverse client base at all levels of the construction process, including owners and developers, design professionals, general contractors, construction managers, specialty trade contractors and material suppliers.

The firm's construction dispute lawyers bring years of experience to every type of project, both private and governmental, from the smallest residential or retail renovation to the largest mega-project, including airports, courthouses, stadiums, theme parks and urban high rises.

Our lawyers focusing on construction matters provide strategic legal counsel on matters involving project development and execution as well as dispute avoidance and resolution, including representation from bidding, contract negotiation, insurance claims, project support and claim presentation, through trial, arbitration or appeal.

Contractors Facing Serious Tribulations in Contending with Client Developer Bankruptcies

By Jeffrey S. Berlowitz



As the residential and commercial real estate markets continue their slow climb back to health, many of our client general contractors are now finding themselves working with developers whose ongoing financial viability has fallen into serious peril. Some of these developers have filed for Chapter 11 bankruptcy, typically to remain operating their projects and/or to stave off a lender foreclosure. The ensuing bankruptcy court litigation may take years to unfold and consume large sums in legal fees.

What should a contractor expect when a developer files for bankruptcy? First, it is important to quickly consult with an attorney specializing in bankruptcy. We emphasize "quickly" due to the fact that when a project owner files for bankruptcy, it is likely that certain significant decisions over what will occur with the project going forward and how the contractors will be paid may be made immediately after the bankruptcy is filed. There are crucial decisions that are made in the bankruptcy case which require that the contractors participate in the court process in order to best protect their ability to get paid.

It is prudent for the contractor to have a plan in place before a developer files bankruptcy in order to adequately preserve the contractor's rights. Generally, in bankruptcy, secured creditors get paid first and unsecured creditors get paid at a discount from what remains in the bankruptcy estate. Therefore, obtaining a security interest in the project or other assets of the developer provides an advantage to the contractor once the developer files bankruptcy.

Immediately upon the filing of a bankruptcy petition by the developer, its assets go into what is called the "bankruptcy estate" and the "automatic stay" goes into effect. The automatic stay prohibits creditors, such as contractors, from taking any action to collect amounts due from the debtor/developer, and it is broadly construed.

Collection activity in violation of the automatic stay is often met with sanctions being imposed against the creditor by the bankruptcy court.

If a contractor continues to work on a project for an owner that has filed for Chapter 11 protection, then it is wise to undertake measures to protect the contractor's right to payment for current work. Although the automatic stay and preference rules prevent a contractor from collecting on pre-bankruptcy sums due, these rules do not apply to work that a contractor performs or materials furnished after the bankruptcy case is filed and while the case is pending. To best protect a contractor's interest, the bankruptcy case should be monitored to ensure that the claims against the developer are properly listed and classified (as secured, for example).



Another important element in a bankruptcy case for a contractor to look for is the Chapter 11 debtor's right to either assume or reject the construction contract at any time before the confirmation of the debtor's reorganization plan. This event could take several months. To assume the contract, the debtor is required to cure all defaults, which means paying the contractor and the contractor's subs and suppliers in full. Additionally, as a condition to assumption, the debtor is required to provide adequate assurances that it will make the future payments on the contract.

With that said, for the contractors with financially troubled developer clients, it's important

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Appellate Ruling Reaffirms That Courts Will Not Tolerate Delay Tactics in Construction Contract Disputes



By Nicholas D. Siegfried

A recent ruling by the Third District Court of Appeal affirmed the lower court's decision that a subcontractor used delay tactics in its dispute with the general contractor for a construction project at a Miami Beach elementary school. The appellate panel confirmed the trial court's decision that the subcontractor had been properly terminated.

The case stemmed from a breach-of-contract action filed by Mario's Enterprises Painting and Wallcovering, Inc. ("Mario's") against Veitia Padron, Inc., the general contractor which had contracted Mario's as a painting subcontractor for renovations at the Feinberg Fisher K-8 Center school in Miami Beach. Once the painting work began at the school, lead was discovered in the building that was being painted, and the general contractor notified the subcontractor of several deficiencies in its work. However, the subcontractor refused to return to the school to complete its work until the lead report on the entire project was completed, even though the tested levels in the building that had been painted were well below acceptable exposure limits.

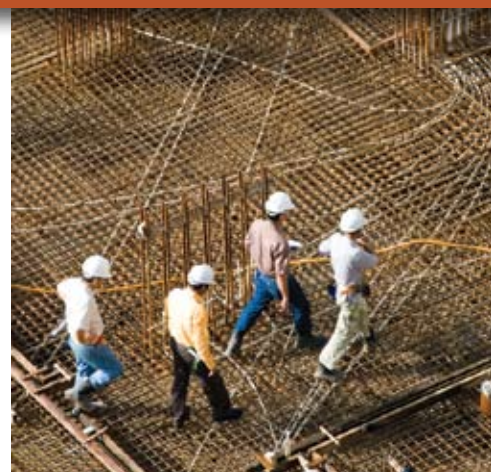
The general contractor notified the painter that if it did not return to the jobsite to continue working within 72 hours, the company would hire a replacement painting subcontractor to complete the project. After the painting was completed by

the new subcontractor, Mario's sued the general contractor for breach of contract. The trial court found in favor of Veitia Padron, and the appellate panel upheld the decision and noted in its ruling that "there is sufficient competent evidence in the



form of correspondence and witness testimony in the record to uphold the trial court's findings that the painter's actions were essentially delay tactics and that it was properly terminated."

This ruling reaffirms that the courts will not tolerate delay tactics by subcontractors after they are notified of deficiencies in their work and a dispute arises. Our attorneys who focus on construction law matters will continue to monitor and write about court decisions affecting the construction industry in Florida in our blog at www.florida-constructionlawyerblog.com, and we encourage industry followers to enter their e-mail address in the subscription box in the blog in order to automatically receive all of our blog posts. ■



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Basic Services

The corporate and construction law practice groups at Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., provide a full range of construction related services. Our construction attorneys are led by Fellows in the American College of Construction Lawyers, and we routinely offer counsel and representation involving:

- Preparation of Challenge of Public Bids Negotiation and Drafting of Construction Contracts and Related Bonds
- Project Support including Contract and Statutory Compliance Claim Recognition, Preparation, Presentation and Defense (Defect, Delay, Equitable Adjustment)
- Construction Lien and Bond Claim Perfection, Foreclosure and Defense
- Alternative Dispute Resolution
- Litigation, Arbitration and Appeal in all Tribunals

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that they give serious consideration to the possibility of negotiating a workout settlement for a lesser sum than they are owed in order to avoid being one of many creditors in a possible future bankruptcy. Once they get the first indication of financial strains from the developer, they should consider the possibility of meeting the situation head-on with their client and seek an out-of-court workout.

In general, most contractors will typically fare better by negotiating a workout settlement rather than going through the Chapter 11 bankruptcy process to collect on their debt. Once the developer is in bankruptcy, all bets are off. There will be a number of creditors, and the entire matter is under the control of a federal bankruptcy court and, perhaps, a Chapter 11 trustee assigned

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property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.

Generally, a lienor recording a claim of lien will not do a title search of the property until it files its foreclosure action. The lienor has one year from the date of recording its claim of lien to file its foreclosure action. Consequently, a lender can file a foreclosure action and record a lis pendens, and the lienor will have no actual knowledge of the lis pendens until a title search is performed at the time of the filing of the lawsuit. If the lis pendens was recorded more than 30 days before, it appears that Section 48.23 of the Florida Statutes could bar the enforcement of the lienor's claim of lien.

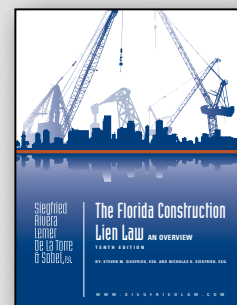
This application of Section 48.23, Florida

Statutes can be detrimental to contractors, subcontractors and other lienors as defined in Chapter 713 who are working to improve the property that is secured by the mortgage, which, arguably, benefits the lender. The lienors may not have reason to know that the lender has started foreclosure proceedings and, pursuant to the Construction Lien Law, the lienors may still be within their rights to record a claim of lien even after a lis pendens is recorded.

There is little case law dealing with the interplay between these two important statutes. Accordingly, lienors working on projects in this uncertain economic climate should make every effort to keep a close and careful eye on the financial and legal status of the project, and they should act quickly to record their claim of lien as soon as appropriate after non-payment. In addition, it is vital for the lienors to work with a qualified and experienced construction industry attorney and perform title searches on the property in order to determine whether a lender (or other lienor) has recorded a lis pendens that could impact their ability to foreclose their claim of lien. ■

10th Edition of "The Florida Construction Lien Law" By Steven and Nicholas Siegfried Now Available

The 10th edition of "The Florida Construction Lien Law, an Overview" by the firm's Steven M. Siegfried and Nicholas D. Siegfried has now been



published and become available. Originally published in 1986 to provide lienors in Florida with important information to comply with the state's complicated lien statute, the book has become a valuable resource for all of the participants in the construction process, including lenders, owners, design professionals, contractors, subcontractors, suppliers and attorneys. It includes a complete copy of the Florida lien statute and all of the forms that are needed to comply with the lien law.

The book is priced at \$90, and orders can be placed via e-mail at info@siegfriedlaw.com or by calling us at 1-800-737-1390. ■

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to administer the developer's case. Also, the developer's legal fees will erode a great deal of the funds that it has remaining to pay its debts, and the entire process could take years to complete. Contractors should give careful consideration to making a smart business decision and settling for less than they are owed before they get embroiled in the bankruptcy proceedings.

If an out-of-court workout cannot be reached and the developer files for bankruptcy,

contractors need to be sure to make every necessary effort to establish their claim and play an active role in the entire process. They should work closely with both construction law and bankruptcy attorneys to ensure that they follow through on every detail in pursuing the matter. Once a contractor is deemed by the bankruptcy court as a secured creditor, they may have a claim for their attorney fees to be redeemed in the bankruptcy if there is any remaining equity in the property.

However, if there is no equity, then the lender will have full priority over the property, and the contractor will be forced to pay its own legal fees, which can become substantial for large and complicated Chapter 11 cases.

Our South Florida construction lawyers and I are working very closely with many of our contractor clients to help them to make the soundest legal and business decisions in their dealings with financially troubled developers. ■