

SO YOU WANT TO DO IT YOURSELF?

An Overview of Potential Pitfalls for the Do-It-Yourself Lienor

One of the most important and effective laws a contractor can use to ensure that it is paid for its work is Florida's Construction Lien Law. While a contractor's lien right is a useful tool, it can easily be lost given Florida's extremely complex and ever-changing lien law. Yet, despite its complexity, many contractors choose to prepare and record their own liens. This article is written with the do-it-yourself lienor in mind and is designed to identify a few of the common pitfalls in the law that pose problems for the lienor who tries to go it alone.

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Missed Procedural Requirements

Florida's lien law imposes numerous procedural requirements, many of which will render a lien unenforceable if not strictly satisfied. An often overlooked requirement is that the lienor must serve a Notice to Owner within 45 days from the first furnishing of labor, services or materials or prior to final payment being made in reliance on a final contractor's affidavit, whichever occurs first, if the lienor did not directly contract with the owner. Equally important, a lien must be recorded within 90 days of the last day the lienor furnished labor, services or materials to the property. These requirements, and many others, are very technical and must be completed within specific time frames, or a contractor's lien rights might be lost.

Inclusion of Unlienable Costs

The most frequent mistake made by the do-it-yourself lienor is including amounts for unlienable items in the claim of lien. Far too often contractors view a lien as a magical sword that will help them recover limitless sums for any reason imaginable. To the contrary, many costs cannot be included in a lien. In fact, in many cases, the amount allowed is less than the amount which the lienor is owed. This does not mean that contractors are barred from recovering the full amount to which they are entitled, but rather that they might not be able to lien for the full amount they are owed. Many lienors are simply unaware that there are other ways in which they can recover the full amount. Without that understanding, many lienors improperly inflate their lien amount as a "catch-all" to ensure they are fully reimbursed. Doing so can result in the lien being declared invalid, the lienor being held liable to the owner for monetary damages, and it is even possible for the lienor to be criminally prosecuted for a fraudulent lien.

While the lien law does not specify every possible category of cost or clarify what costs may be included, costs incurred for labor, services, or materials which permanently improve

the property are usually lienable. Lost profit, administrative overhead and restocking fees, on the other hand, are usually not lienable. In between lies a vast gray area generating an enormous amount of litigation and potentially dire consequences for the lienor who does not pay careful attention.

Recording in Wrong County

Even when all prerequisites are satisfied and the amount of the lien is proper, a claim of lien must be properly recorded to establish the contractor's lien. In Florida, a claim of lien must be recorded in the official records of the county where the property is located, not, for example, the county in which the lienor maintains its principal place of business. If a lien is recorded in any other county, the lien is void and unenforceable.

Superior Mortgages

Even if a lien is valid and enforceable, it might not get the lienor paid. While a lien can be a useful tool, lienors must remember that a lien only gives the lienor a security interest in the owner's property and does not guarantee that a lienor will recover any money. Very often there will be at least one mortgage on the subject property which will almost always take priority over the lien. With its inferior status, even an otherwise valid and enforceable lien will be essentially worthless if there is no equity in the property. Especially in the current real estate market, it is important for a lienor to consider whether there is equity in the property before spending the considerable time and money necessary to initiate a lien foreclosure action.

Do-it-yourself lienors would be wise to recognize the complexity of Florida's lien law. It is certainly possible to record and prepare your own liens - many lienors do it every day - but in doing so you must be mindful of the common mistakes and potential risks that exist. If you choose to prepare and record your own liens, the best advice is to seek the advice of qualified counsel to protect one of your most valuable rights as a contractor in Florida.