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Trenam Kemker Kudos



Landlord Lien Liability for Tenant Improvements - Changes Coming: The Everglades Decision and Senate Bill 1196

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The 2011 Florida Legislature unanimously passed new legislation (Senate Bill 1196), which was signed into law by the Governor. The law, effective October 1, 2011, will significantly amend that portion of Florida's Construction Lien Law that enables landlords to protect their real property interests from lien liability for improvements made by tenants. Currently, Section 713.10, Fla. Stat., permits lessors to protect their interests from liens for improvements made by a lessee when: (1) the terms of the lease expressly prohibit such liability and the lease or a short form thereof is recorded in the clerk's office; or, when (2) all of the leases for the rental of premises on a parcel of land prohibit such liability and a statutory notice (a/k/a "blanket notice") is recorded in the public records. The blanket notice must set forth: (a) the name of the lessor; (b) the legal description of the applicable parcel of land; (c) the specific language contained in the various leases prohibiting such liability; and (d) a statement that all leases entered into for premises on the parcel contain the language identified in paragraph (c) When these

statutory requirements are followed, construction liens extend to, and only to, that right, title and interest of the contracting party which, for most tenants, is the leasehold interest.

The decision in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So. 3d 235 (Fla. 3rd DCA 2010), sent shock waves through the industry when the court permitted a sub-subcontractor to pursue its lien claim arising from tenant improvements against a landlord's real property interests despite the fact that lessor's leases prohibited such liability and a blanket notice had been recorded in the public records. Strictly construing s. 713.10(2), the court concluded that the protection afforded therein is available if, and only if, each and "every lease" for the parcel contains language prohibiting such liability and "the specific language contained in the various leases prohibiting such liability" is identically set forth in the recorded notice. The court ruled that lessor's blanket notice was defective because its language and the language prohibiting liability in one of the leases differed "significantly." Arguably, after *Everglades*, all lessors relying upon the blanket protections of s. 713.10(2) on a parcel remain exposed to lien liability for tenant improvements if one of their leases lacks the lien prohibition or the prohibitory language contained therein is not specifically (identically) restated in the recorded blanket notice and other leases on the parcel.

Senate Bill 1196 sought to lessen the potential adverse impact of *Everglades* on landlords while at the same time seeking to provide certain safeguards to contractors and lienors that make improvements for tenants. As amended, the newly renumbered s. 713.10(2)(b) provides, in relevant part, that the interest of

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Social Networking Websites Provide Information for Litigation

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People are sharing more of their personal lives than ever before on social networking websites like Facebook, MySpace and Twitter. As a result, these websites are becoming valuable tools for attorneys in litigation. A fully completed Facebook profile contains information about an opposing party's online and offline contact information, educational history, employment history, interests and clubs, as well as lists of friends, photographs, status updates and messages from others. Similarly, Twitter's "microblog" format encourages its users to share what they are doing or thinking at every minute. This often includes

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Landlord Lien Liability cont...

a lessor shall not be subject to liens for improvements made by a lessee when: 1. the lease, short form, or a memorandum of the lease that contains the *specific language in the lease prohibiting such liability*, is recorded in the official records of the county where the premises are located *before the recording of a notice of commencement for improvements to the premises*, and the terms of the lease expressly prohibit such liability; or 2. *the terms of the lease* expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records *before the recording of a notice of commencement for the improvements*. The blanket notice must include: (a) the name of the lessor; (b) the legal description of the applicable parcel; (c) *the specific language contained in the various leases prohibiting liability*; and (d) a statement that *all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability*.

As amended, a lessor is no longer absolutely required to ensure that “all leases” for a given parcel prohibit such liability or contain language identical to all other leases in order to avail itself of the “blanket notice” protections. As amended, a “majority of leases” prohibiting such liability for a parcel will suffice as long as the blanket notice, which must be recorded in the official records prior to the Notice of Commencement for the improvement, states as such. Note well, however, that to be effective the blanket notice must still set forth *the specific language contained in the various leases* and must state that *all or a majority of the leases*

expressly prohibit such liability. Failure to identically restate in the blanket notice the specific language contained in the various leases will render the blanket notice defective under *Everglades*. Note also that lessors wishing to avail themselves of the protections afforded by amended s. 713.10(2)(a)1 must also record their leases, short forms, or *memoranda of lease* in the official records *before the recording of notices of commencement for improvements*.

A completely new provision has been inserted at s. 713.10(3) giving contractors and lienors under contract to furnish improvements being made by a lessee the right to make a written statutory demand on lessor for a verified copy of the lease provision prohibiting lien liability. Any lessor who fails to serve a verified copy of same “within 30 days after demand,” or who serves a false or fraudulent copy, will subject its interests to the requesting party’s perfected construction lien unless such lienor had “actual knowledge” of the prohibition. The written demand must include a statutory warning in conspicuous type, identify the lessee and premises being improved, cannot be included in lienor’s Notice to Owner, and must be served in accordance with s. 713.18.

Finally, Senate Bill 1196 also amends s. 713.13, that portion of Florida’s Construction Lien Law that governs Notices of Commencement. As amended, a lessee contracting for leasehold improvements is expressly deemed an “owner,” as that term is defined under s. 713.01(23), and must identify itself as the owner and identify its ownership interest as being a leasehold interest within the Notice of Commencement. The statutory form of the Notice of Commencement is further revised in several additional respects, the

most notable of which involves its expiration date. As amended, the Notice of Commencement’s expiration date “may not be before the completion of construction and final payment to the contractor, but will be 1 year from the date of recording unless a different date is specified.” This amended expiration language appears designed to fix the conflict between s. 713.132(3), which provides that an owner may not terminate the Notice of Commencement until after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro-rata per s. 713.06(4), and s. 713.13, which in its present state provides for the automatic expiration of the Notice of Commencement 1 year after recording, unless otherwise designated, without regard to completion of construction or final payment.

In light of *Everglades* and Senate Bill 1196, which will go into effect October 1, 2011, lessors are encouraged to (1) obtain a legal review of their lease forms and otherwise ensure compliance with s. 713.10 and (2) be on lookout for written demands for verified copies of the lease provisions to ensure timely and proper compliance with such demands. Contractors and lienors are encouraged to serve statutory demands for verified copies of the lease provisions as a standard procedure when contracting with tenants. All parties should familiarize themselves with the amendments to s. 713.13 and the changes to the Notice of Commencement form.

Trenam Kemker welcomes the opportunity to answer any questions you may have concerning these recent developments in the law.



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Social Networking cont...

comments on business disputes and litigation.

The amount of personal information shared online is likely to increase with applications for smart phones like the iPhone or Blackberry. For example, the Foursquare application has attracted more than 7.5 million users since it launched in 2009. Foursquare is a location-based network that allows users to enable their phone's GPS to "check in" at various businesses and other locations. After a user checks in at a location, he can unlock information and tips from other users who have checked in at the same place. He can also send updates about his location to his friends via Twitter, Facebook or other social networks. Facebook has a similar "Places" application that allows Facebook users to "check-in" at various places.

This detailed level of information about a person's daily activities has previously never been available, and may provide very useful information for litigation. For example, in noncompete litigation, an employer may discover that his former employee often "checks in" at the same restaurants as the employer's customers. In divorce cases, Facebook messages may establish that a romantic relationship began before the end of a marriage. In employment cases, an employee's negative comments about his employer may be used as evidence of cause for termination. In personal

injury cases, photos of the plaintiff skiing or hiking can help defend against the seriousness of the claimed injuries. Many lawyers also research their potential jurors on various social networking sites. A juror in Michigan was recently disciplined for posting a comment about jury duty on Facebook before the trial was over.

Because social media provides so much useful information, many attorneys are requesting social media information from opposing parties in litigation. Although the majority of courts that have considered the issue have determined that opposing parties can only obtain information that is relevant to the pending litigation, many courts are dealing with social media issues for the first time. It is difficult to predict how they will resolve all discovery issues. Thus, it is important to keep these things in mind when sharing information on social networking websites:

- **Even if your social networking profiles are designated as private, you may still be required to produce them in litigation.** Don't assume that just because your profile is private, no one can gain access to it. At least one court has determined that you have no privacy interest in information you share on the internet.
- **Remember that you don't have complete control**

over your social networking profiles. Even if you don't post information or photos on your profile, your friends can share information on your wall, tag you in photos or "check you in" if they are with you at the same location. This is difficult to control, but you should monitor your profile to ensure that friends don't post damaging or embarrassing information.

- **Never share information about any communications you have had with your attorney.** Although this may seem obvious, if you share any communications you have had with your attorney, you risk a waiver of your attorney-client privilege.
- **Never discuss pending litigation or the opposing party.** Litigation is stressful, and you may want to vent about it to friends and family. However, flippant or angry comments may be damaging to your case.

There are many benefits to social media, but it is important to remember that any information you share is out of your hands and may show up again in your litigation. Be cautious about the information you share on your social networking profiles. You may want to share your cruise pictures with friends and family, but do you really want them to end up in opposing counsel's file?

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