

Practice Update

Steps Every Landlord Should Take to Prevent Liens By its Tenants' Contractors

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Defending claims of lien recorded by tenant improvement contractors can be costly, time consuming, and lead to protracted litigation. However, with a little planning and the right contract language, landlords can protect their properties from such liability. Below is a summary of various strategies a landlord can implement to avoid liens from its tenants' improvements.

Include No-Lien Language in all Leases and Record A Notice Thereof

Under Florida law, when a lease between a landlord and a tenant requires the tenant to make improvements to the tenant's premises, if the tenant ends up failing to pay its contractor for the tenant improvement work, then the contractor can file a claim of lien (and eventually foreclose) against both the tenant's leasehold interest and the landlord's fee simple interest in the property in an attempt to recover payment. However, under Section 713.10, Florida Statutes, the landlord can prevent such claims of lien and foreclosure actions, even if the improvements are the "pith of the lease," by taking a few proactive steps.

First, the landlord must include express "no-lien language" in its lease that states that the interest of the landlord shall not be subject to liens for

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improvements performed in the premises by or on behalf of the tenant. Use very specific language and bold font. The best practice would be for the landlord to establish a form clause containing the no-lien language, and then to instruct anyone who negotiates the form lease on its behalf not to make or allow any changes to such language during negotiation.

Second, the landlord must record, prior to the date of recording of the notice of commencement (NOC) for the tenants' work, either (a) a copy of the entire lease at issue; (b) a short form memorandum of the lease at issue that includes a copy of the express no-lien language; or (c) if all or a majority of the landlord's leases for the premises on the parcel of land/building expressly prohibit the interest of the landlord from being subject to liens for improvements by tenant contractors, a statutory notice as provided in Section 713.10(2)(b)(2), Florida Statutes, that includes the express no-lien language from each such lease (this notice is sometimes called a "notice of non-responsibility" or "713.10 notice").

A Landlord Should Not Sign Tenants' Permit Applications and Notices of Commencement

On many occasions, we have heard about tenants dropping off their tenant improvement permit applications and NOCs at the landlord's management office for signature by the landlord prior to recording or submission to the building department. However, although the landlord should definitely review and approve the form and content of these documents before the tenant records or files them (because many times the tenant or its contractor has filed them out incorrectly), the landlord should absolutely not sign these documents. If the landlord signs a tenant's NOC or permit application as the "owner," by doing so, it could give the tenant's contractors and other lower tiered subcontractors and suppliers the unintended impression that the landlord ordered the work and is therefore responsible for paying for same.

Rather, when a tenant hires a contractor to perform improvements in its leased premises, under Florida law, the tenant is deemed the “owner” for purposes of applying for permits and recording a NOC for its project. The landlord should be listed as the “fee simple owner” on those documents, but it is the tenant who, as “leasehold owner,” should be listed as the owner therein and who should sign these documents. If the building department requests something from the landlord authorizing the tenant to pull the permit, the landlord can simply provide the tenant with a letter of authorization addressed to the building department stating that the landlord grants its permission for the tenant improvement work. This is typically more than sufficient to satisfy the needs of the applicable government official.

Other Lien Avoidance Techniques

There are a number of other techniques that a landlord can implement to insulate its property from the liens of its tenant’s contractors. For instance:

1. Landlords should consider adding language to form leases that require tenants to use a pre-approved form NOC for their tenant improvement work. The form NOC can be attached to the lease as an exhibit, and should specifically contain the same no-lien language found in the lease. This way, contractors (who may be the ones actually recording and posting the NOC) and their subcontractors are put on additional notice that the landlord has expressly disclaimed all liability for such improvements.
2. Landlords should consider adding language to form leases that require the tenant to notify, in writing, all contractors making tenant improvements that landlord’s interest in the property is not subject to construction liens. The lease should also require that the tenant include language in its construction contracts whereby the applicable entities acknowledge receipt of such no-lien notice and agree that they will not

lien the landlord's interest in the property for tenant improvement work.

3. Landlords should consider adding language in form leases that require the tenant to submit all tenant improvement contracts to the landlord for prior review and approval so that the landlord can make sure that the tenant has complied with the foregoing terms.
4. Landlords should consider adding language in form leases that require the tenant to obtain unconditional lien waivers and releases from its contractors and all of their lower tiered subcontractors, material suppliers and laborers prior to making payment for tenant improvements, and to provide copies of same to the landlord (especially if the landlord is contributing any kind of tenant allowance).
5. Landlords should consider adding language in form leases that require the tenant to remove, satisfy or bond off any claims of lien recorded against the landlord's interests by the tenant's contractors, and to indemnify, defend and hold the landlord harmless with respect to such liens. The landlord may even want to consider adding a provision that requires the tenant to pay the landlord a liquidated daily fee until the lien is satisfactorily removed. This type of provision creates an urgency on the part of the tenant to take care of the issue as soon as possible — and has proven to be quite effective in the past.

While the above examples are not an exhaustive list, by implementing the above recommended tools into a landlord's procedural toolbox, it can better protect its properties from the liens of tenant contractors.

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