

HOMEBUILDING AND CONSTRUCTION INDUSTRY ALERT

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"60 Days" Means 60 Days - Appellate Court Reiterates Construction Lien Law Will Be Strictly Construed

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Lienors beware – when the Florida lien law says “60 days,” the Florida lien law means 60 days.

On April 8th, a Florida Court of Appeal confirmed once again that the deadlines set forth in Florida’s construction lien law will be strictly construed by the courts. In *Hiller v. Phoenix Assoc. of South Fla., Inc.*, 2016 WL 1386642, the District Court of Appeal, Second District, held that a lienor’s failure to timely commence an action against a surety resulted in an extinguishment of the lienor’s right to make a claim on the bond, even though the lienor had already commenced an action to foreclose its construction lien on the real property. In *Hiller*, Phoenix Associates of South Florida, Inc. sued Georgia Hiller for breach of contract, unjust enrichment and foreclosure of construction lien alleging that Hiller failed to pay Phoenix for construction work on Hiller’s property. Phoenix had recorded a claim of lien under Chapter 713, Florida Statutes, and timely commenced an action to foreclose the lien against Hiller. However, after Phoenix filed its action, Hiller posted a transfer bond, as allowed under the lien law, transferring the lien on the real property to a surety bond. Hiller then filed a notice of contest of lien under Section 713.22, Florida Statutes, which shortened the time within which Phoenix had to commence an action on the transfer bond from one year to 60 days.

Phoenix did not immediately move to amend its lien foreclosure complaint to add a claim on the transfer bond with the surety as a party, presumably thinking that a later amendment would relate back to the time of the filing the action on the real property lien. After the shortened 60-day period ran with no amendment, Phoenix filed a motion to amend to add the surety of the transfer bond as a party to the proceeding. Hiller filed a motion for an order releasing the bond, under the presumption that the transfer bond is automatically extinguished by operation of law after the 60 days elapses. At the hearing on these motions, Hiller argued that Phoenix was required to commence an action against the surety within 60 days of the notice of contest, regardless of the previously filed lien foreclosure action against Hiller, and since Phoenix failed to do so, the lien on the transfer bond was extinguished automatically by operation of § 713.22 (2). Hiller relied on *Cool Guys, LLC v. Jomar Properties, LLC*, 84 So. 3d 1076, 1078 (Fla. 4th DCA 2012). Phoenix argued that it only needed to add the surety to its pending action “at some point,” relying on *American Fire & Casualty Co. v. Davis Water & Waste Industries, Inc.*, 377 So. 2d 164 (Fla. 1979). The trial court agreed with Phoenix, even though, after *Davis Water & Waste*, the Florida legislature amended the Florida Statute concerning transfer bonds to include a requirement that an action be commenced to recover against the bond, when a lien is transferred to a bond during a proceeding to enforce the lien. Regardless, the trial court found that the suit to enforce the lien on the transfer bond was timely filed.

The Second DCA disagreed, focusing on the strict nature of deadlines under the construction lien law and quoting the Florida Supreme Court:

The purpose of the fixed periods provided in such statutory remedies as the one here involved of the Mechanics’ Lien Law was to make definite and certain the time within which the matter can be considered as ended. It affects more than the immediate parties in many instances; there are lenders, buyers and others who rely on the fixed periods of time in the lien law. This assurance should not be destroyed by an “open-ended” right of

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amendment by a lienor beyond the period provided by statute. A correction or change by way of an amendment to a basic claim or of a timely suit upon that claim is of course allowable, but such an amendment does not toll the statutory times to file the lien or suit.

Jack Stilson & Co. v. Caloosa Bayview Corp., 278 So. 2d 282, 283 (Fla. 1973).

Thus, because Phoenix failed to amend its complaint to include an action on the bond within 60 days of the notice of contest, Phoenix could no longer pursue an action on the bond or the real property. The Court of Appeal reasoned that this comported with the purpose behind the lien law, namely that owners and lienors alike receive timely and certain resolution to Chapter 713 litigation. So, owners and lienors alike should strictly comply with all deadlines under Florida's lien law. Otherwise, they may be left without the lien law's protections.

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