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The Law Office of Kevin F. Jursinski & Associates, P.A.
COMMERCIAL LEASE NEWSLETTER

CONSTRUCTION LIENS EFFECTING COMMERCIAL LANDLORD'S
PROPERTY TENANT IMPROVEMENTS

Commercial landlords and property managers should be keenly aware of the impact and effect of construction liens based upon tenant improvements. Specifically, in today's current economic climate in which many landlords are letting tenant inducements for tenants to take occupancy of premises, both the tenant's and the landlord's property could be subject to construction liens. Even more compelling is the fact that there has been a recent change in the controlling Florida Statute on this particular subject, Florida Statute 713.10, which alters slightly the rights, duties and obligations of the parties in regard to tenant improvements. I previously wrote on this subject and the following is a refresher and update on the issue of construction liens for tenant improvements which may impact the tenant's property or the landlord's property.

Here is a background and refresher on this particular subject:

If the tenant contracts for certain work to be performed by the general contractor, the general contractor may provide a Notice to Owner to the landlord claiming that the contractor is looking to the real property owner for the work contracted for by the tenant. If the tenant is authorized to perform such work, which generally arises under the lease agreement (and in fact may often be a leasehold obligation by the tenant per the lease, the "Pith of the Lease") then the contractor argues that this contractual obligation creates an authorized agency relationship between the tenant and the landlord to contract for such services and subjects the landlord's interest to a construction lien in the event that the contractor is not paid.

As indicated, given these turbulent economic times, there are numerous defaults occurring, tenants failing to maintain operations and evictions. However at the same time, such tenants are leaving behind a number of unpaid bills inclusive of bills for improvements made to the subject premises. The case of A. N. Drew, Inc. v Frenchy's World Famous Cajun Café, Inc., et al., 517 So.2d 766, 1988 Fla. App. indicates that in the event that the leasehold improvements are being contracted for by the tenant and are the "Pith of the Lease" (roughly interpreted as being a central component of the lease) then in such event the landlord's real property interest

may be subject to the tenant's claim. This issue, which has always faced landlords, is even more compelling in today's marketplace. The question that needs to be answered is:

“What can a landlord or real property manager do to prevent the landlord's real property from being subjected to a construction lien in the event of a tenant's default and non payment of its contractor?”

When a tenant is doing build-out of the lease premises, there may be a problem as to the payment to the contractor, subcontractor or material supplier. The problem arises when a contractor, laborer or material supplier attempts to assert a construction lien against the landlord's interest in the premises as a result of work being performed by the tenant in accordance with the contract. The landlord should be advised to comply with Florida Statute §713.10, which requires that all leases contain the language identified in Florida Statute 713.10 or a memorandum be recorded in the Public Records of the County where the construction is taking place, indicating a restriction on liens being implemented as against the interest of the landlord to the subject premises.

The prior version of Florida Statute 713.10 indicated the elements for a commercial landlord to protect its interest in reference to construction liens.

Effective October, 2011 there has been a new revision of the Statute which slightly alters the rights, duties and obligations of the landlord and provides that in order for a landlord to be relieved of liability for a construction lien it must do the following:

The revised Statute provides for recordation of the lease or memorandum before the recording of the Notice of Commencement. It also requires a statement that the majority of leases at the building/center contain the disclaimer. Further, an entire new Section was added that states:

“...3. Any contractor or lienor under contract to furnish labor, services, or materials for improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, which copy shall be verified under s. 92.525. The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in s. 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, is subject to a lien under this part by the contractor or lienor who made the demand if the contractor or lienor has otherwise complied with this part and did not have actual notice that the interest of the lessor was not subject to a lien for improvements made by the lessee. The written demand must include a warning in conspicuous type in substantially the following form:

WARNING

YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.”

The key point on all of this is for the landlord (if it wants to protect itself from construction liens), to be diligent in providing such notification and recording its position in the Public Records of the County where the construction is taking place.

There are certain circumstances in which a construction lienor will pursue the tenant's improvements at the premises and the potential lease agreement since they have an inherent financial benefit to the construction lienor to impress the lien against the tenant's interests. The purpose of the statute is to afford protections to the commercial landlord who doesn't want the landlord's real property interest to be subject of such lien.

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