

**DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA**

CASE NO. 4D10-3054

L.T. Case No. 10-10181 CACE 13

**MHB CONSTRUCTION SERVICE, LLC, a Florida limited liability
company,**

Appellant,

v.

**RM-NA HB WATERWAY SHOPPES, LLC, a Florida limited liability
company,**

Appellee.

On appeal from the Seventeenth Judicial Circuit Court
in and for Broward County, Florida

***AMICUS CURIAE* BRIEF OF THE SOUTH FLORIDA ASSOCIATED
GENERAL CONTRACTORS
IN SUPPORT OF APPELLANT'S INITIAL BRIEF**

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STATEMENT OF INTEREST

SFAGC is a local chapter of the Associated General Contractors of America (“AGC”). AGC is the oldest and largest commercial construction trade organization in the United States. It is composed of contractors and construction industry related companies. AGC’s purposes include providing guidance and education on matters important to the industry, encouraging the use of latest technologies, and generally promoting further opportunities and the advancement of the construction industry.

SFAGC has approximately 115 contractor and associate member companies. The members of SFAGC have a substantial interest in the outcome of this action, and specifically the interpretation and administration of Florida’s Construction Lien Law, including § 713.10, as tenants routinely hire its members to perform construction on leased premises, and thus are engaged in the type of transaction at issue in this appeal. Namely, the members of SFAGC have a significant interest in the application of § 713.10 in a matter involving a contractor that seeks to foreclose on its lien where work was performed pursuant to a contract with a tenant, the property owner executed the Notice of Commencement, and the improvements contracted for were, at least in part, improvements made in accordance with the terms of the subject lease. Thus the proper resolution of this case is of great interest to the SFAGC.

STANDARD OF REVIEW

Amicus Curiae agrees with Appellant that the standard of review is *de novo* for both an order granting a motion to dismiss, *see Goodall v. Whispering Woods Center, LLC*, 990 So.2d 695 (Fla. 4th DCA 2008), and where the issue involves a matter of statutory interpretation. *See Mastaler v. Hollywood Ocean Group, LLC*, 10 So.3d 1114 (Fla. 4th DCA 2009).

SUMMARY OF THE ARGUMENT

If the trial court's ruling is allowed to stand, property lessors will be permitted to mislead laborers and materialmen through deft use of a statutory § 713.13 notice of commencement in conjunction with a statutory notice of lien prohibition pursuant to Florida Statute § 713.10. To avoid this outcome, these two statutory provisions should be read to compliment on another, and thus avoid either of them being used as a potential tool of exploitation. In order to effect a fair reading of Florida's Construction Lien Law, and specifically §§ 713.10 and 713.13, a notice of lien prohibition should be deemed ineffective where a contractor has detrimentally relied upon a property lessor's execution of the notice of commencement. Here, where the Appellee/property lessor executed the subject Notice of Commencement, and specifically invited statutory notices to owner (which serve as a precursor to a lien claim) to be directed to it, the prior dated

Notice of Lien Prohibition should not act as a bar to Appellant/contractor's lien foreclosure action.

Additionally, the action set forth in the Complaint alleged that Appellee/Landlord itself improved the property, and indeed participated in the funding of the improvements and directed the tax consequences associated with such improvements. In light of these allegations, a notice pursuant to § 713.10 should not be deemed a barrier to a contractor's action on its lien.

Finally, the Notice of Lien Prohibition at issue may be defective in that it fails to include all the various lien prohibition provisions contained in the various leases on the subject property.

ARGUMENT

I. DISMISSAL OF A LIEN FORECLOSURE ACTION AGAINST A LANDLORD BASED ON FLORIDA STATUTE SECTION 713.10, WHERE THE CONTRACTOR/LIENOR ALLEGES THE NOTICE OF COMMENCEMENT WAS SIGNED BY THE LESSOR, IS CONTRARY TO A SENSIBLE APPLICATION OF FLORIDA'S CONSTRUCTION LIEN LAW, WRONGLY PERMITS LESSORS TO USE SEC. 713.10 AS A SHIELD, AND RESULTS IN UNJUST ADVERSE EFFECTS ON CONTRACTORS.

In this case, a contractor, MHB Construction Services, LLC ("Contractor") was hired by a commercial tenant, Rebecca L. Shortt, Inc. ("Tenant"), for improvements to Tenant's space in a strip mall owned by lessor, RM-NA HB Waterway Shoppes, LLC ("Owner" or "Landlord"). Specifically, Tenant

contracted with Contractor for the build out of a preschool facility. (R. 3). The Complaint alleges such contract was entered into on July 28, 2009. (R. 3).

Approximately two years prior, on February 21, 2007, Landlord recorded a “Notice of Lien Prohibition” pursuant to Florida Statute § 713.10, which purported to provide notice that all the leases related to the subject property prohibited liens against the property due to tenant improvements. (R. 6). In June 2009, Landlord and Tenant entered into the subject lease in which, it is alleged, Landlord agreed to the construction and funding of the preschool build out. (R. 2). On July 20, 2009, Landlord executed a Notice of Commencement pursuant to Florida Statute § 713.13, which was recorded on the same day as Contractor’s contract with Tenant, July 28, 2009. (R. 12). After the work was completed, and Tenant failed to complete its payment obligations, Contractor brought an action against Landlord to foreclose on its lien against the fee simple interest in the property. (R. 1). Landlord responded with a motion to strike “as a sham pleading,” the gravamen of which argued that Landlord’s Notice of Lien Prohibition insulated it from a lien against its fee simple interest notwithstanding its execution of the Notice of Commencement or the content of the lease. (R. 73). The lower court, treating the

motion to strike as a motion to dismiss, dismissed the lien foreclosure action against Landlord.¹ (R. 228).

This case involves, among other things, a balancing of two provisions of Florida's Construction Lien Law – sections 713.10 (permitting notices of lien prohibition) and 713.13 (notices of commencement). The undersigned is unaware of any Florida decisional law which addresses the interplay of these two statutes, including the legislative intent behind them, in the context presented here.

While unambiguous statutory text typically ends a court's inquiry in ascertaining legislative intent,

if a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the Court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent.

E.A.R. v. State, 4 So.3d 614, 629 (Fla. 2009). The doctrine of *in pari materia* provides the “principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.” *Id.* (quoting *Fla. Dept. of State v. Martin*, 916 So.2d 763, 768 (Fla. 2005)).

¹ The lower court entered a second order on June 30, 2010, clarifying its first order by making clear that the dismissal of the lien foreclosure count (Count I of the Complaint), applied only to the action against Landlord and the lien foreclosure action against Tenant remains pending. (R. 231).

This court has explained that the “fundamental purpose of the mechanics lien statute is to provide a procedure whereby laborers and materialmen may obtain payment for the work that they furnish to another’s property.” *Sasso Air Conditioning, Inc. v. United Companies Lending Corp.*, 742 So.2d 468, 470 (Fla. 4th DCA 1999). The lien law is consequently “construed favorably to accomplish its beneficial purpose.” *Id.* Indeed, although Florida’s lien law is strictly construed, mere substantial compliance by a lienor is sufficient “where material acts or omission by the owner have caused circumstances of detrimental reliance.” *Roof Structures, Inc. v. Picou*, 544 So.2d 1138, 1139 (Fla. 4th DCA 1989).

Further, the purpose of the portion of the lien law concerning notices of commencement, § 713.13, is to provide “all the details necessary to complete a Notice to Owner.” *Sasso Air Conditioning, Inc. v. United Companies Lending Corp.*, 742 So.2d 468, 470 (Fla. 4th DCA 1999) (quoting *Symons Corp. v. Tartan-Lavers Delray Beach, Inc.*, 456 So.2d 1254, 1259 (Fla. 4th DCA 1984)). As this court explained,

Indeed, Section 713.13(1)(a), Florida Statutes, requires with Notice of Commencement information including the name and address of the owner and contractor. Thus, the legislature contemplated that the Notice of Commencement would provide the lienor with the current names and addresses of the owner and contractor, so that the lienor could properly mail the Notice to Owner. If no Notice of Commencement was ever posted or recorded by the owner as mandated by the statute, a lienor may have difficulty in obtaining the names and addresses of the owners and contractor.

Id. Accordingly, in preparing a Notice to Owner pursuant to Florida Statute § 713.06 – the purpose of which is to notify a property owner that improvements are being made on its property and a lien may be perfected against such property, *see Fla. Stat. § 713.06* – lienors “ought to be able to rely upon the information contained” in the Notice of Commencement. *Sasso Air Conditioning*, 742 So.2d at 470.

In practice, contractors rely on the Notice of Commencement, and specifically the identity of the signatory thereto, to ascertain which entity’s interest is available to perfect a lien against in the event full payment for the improvements is not received. This practice comports with the statutory purpose of a notice of commencement as described by this Court in the case cited above.

Here, Landlord seeks to utilize a notice of lien prohibition pursuant to § 713.10 as an absolute shield to deflect liability where it entered into a lease specifically providing for the build out of its unit, and where, most importantly, it (rather than Tenant) executed the Notice of Commencement, thus putting contractors on notice that Landlord was the entity to whom contractors should direct notices to owner and by extension their perfected lien claims. Indeed, in paragraph 8 of the Notice of Commencement, where it identifies the entity “upon whom notices and other documents may be served,” Landlord listed its own agent. (R. 12). Landlord could have allowed Tenant to execute the Notice of

Commencement, and provide specifically that notices to owner should be served upon Tenant. It is common in the industry for a lessee to complete and sign a notice of commencement. Such a practice effectively places contractors on notice that the title holder's fee simple interest is not exposed to a potential lien, and the contractor may then make an informed decision as to whether the job should be accepted. But here, Landlord itself executed the Notice of Commencement, and for it to do so and then seek to hide behind the purported protection of a notice of lien prohibition is a practice which begets ambiguity that should not be condoned.

Simply put, Landlord would urge this Court to effectively disregard the fact that it executed the Notice of Commencement, and that it designated its own agent as the entity to which notices to owner may be served. The SFAGC submits that in a case such as this a harmonious reading of Florida Statutes §§ 713.10 and 713.13 does not result in the outcome urged by Landlord. A notice of lien prohibition, while a perfectly valid mechanism for a fee simple owner to protect itself from liens where it does not confuse, mislead or otherwise act in a manner to negate the effect of such notice, should not be employed as an iron clad blockade where the owner's conduct serves to contravene the very purpose of the lien law. The intent of the lien law is to provide a framework within which laborers and materialmen may secure payment for their work. If a fee simple owner signs a notice of commencement and notifies the public that a notice to owner – the understood

precursor to a lien claim – should be directed to it, particularly where, as here, such notice of commencement post-dates the notice of lien prohibition, contractors should be permitted to rely upon such notice of commencement in maintaining a lien claim.

Landlord's other arguments, made in its pleadings below, do not alter the result sought here. Landlord argued in its motion to strike that the Notice of Commencement was not signed by it, but rather by its management agent "on behalf of the Tenant." (R. 77). A reading of the Notice of Commencement shows clearly that in paragraph 4 it states that "RM-NA HB Waterways Shoppes, LLC" is listed as the "Fee Simple Title Holder," and on the document's signature line, the same entity is listed as the signing party, with its authorized management agent providing the signature. (R. 12). Aside from the seeming absurdity that an owner's property manager would somehow transform into a tenant's authorized agent, the signatory on the Notice of Commencement was clearly acting as the agent of the entity whose name was listed above it as the party executing the document – in this case, Landlord.

Additionally, in another filing below, a reply brief, Landlord argued that after it began to receive notices to owner related to the work at the subject property, it sent letters in response to advise the contractors of the existence of the Notice of Lien Prohibition, and it copied Contractor on such letters. (R. 178).

First, there are no allegations concerning these letters in the operative Complaint, nor are they attached to the Complaint, and consequently, for purposes of a motion to dismiss (which is what the lower court considered Landlord's motion to be) it is improper to consider matters outside the four-corners of the complaint. *Bell v. Indian River Memorial Hospital*, 778 So.2d 1030, 1032 (Fla. 4th DCA 2001) (in ruling on a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint). And notwithstanding, after a fee simple owner signs and records a notice of commencement, contractors accept and begin to engage in work on the property in reliance on such notice, and send statutory notices to owner, it is difficult to imagine that the owner could gain immunity from liability by sending a letter to the contractors weeks or months later which disclaims liability.

It is an unfortunate reality in the marketplace – particularly amidst today's challenging business environment – that the best and many times the only real security a contractor has to guarantee payment for its work is a lien against the subject property. Moreover, although no one is accusing Landlord in this case of crooked intent, if the recording of a notice of lien prohibition is permitted to act as a complete bar to fee simple lien claims irrespective of whether the fee simple owner executes the notice of commencement and invites laborers to submit notices to owner directly to it, an unscrupulous property owner could intentionally mislead contractors in a manner wholly inconsistent with the purpose behind the lien law,

all the while receiving the benefit of the labor and materials provided to its property. This type of exploitation of contractors, many of which are small businesses without teams of legal counsel or other sophisticated advisors, should not be permitted by the statutory framework. Conversely, construing Florida Statutes §§ 713.10 and 713.13 in a manner such that an owner seeking the lien prohibition provided under § 713.10 may not execute a notice of commencement in a manner suggesting it is subjecting its fee simple interest to lienor's claims, allows § 713.10 to serve its purpose of insulating property owners who properly comply with its requirements, while also upholding the main function of a notice of commencement. The SFAGC respectfully submits that the purpose of Florida's Construction Lien Law, and common sense, dictate this result.

II. DISMISSAL OF A LIEN FORECLOSURE ACTION AGAINST A LANDLORD BASED ON FLORIDA STATUTE SECTION 713.10, WHERE THE COMPLAINT ALLEGES THE LESSOR HAS ESSENTIALLY MADE THE CONSTRUCTION IMPROVEMENTS FOR ITSELF THROUGH THE USE OF ITS TENANT AS A CONDUIT IS IMPROPER AND RESULTS IN UNJUST ADVERSE EFFECTS ON CONTRACTORS.

Contractor alleged in this action that despite the fact that Tenant technically entered into the improvement contract with Contractor, Landlord sought the improvements to the property for itself, thus essentially alleging that Landlord utilized Tenant as a conduit to obtain the improvements without exposing its fee simple interest to a lien. (R. 2). Namely, it was alleged in the Complaint that

through its relationship with Tenant, Landlord itself “agreed to construct and fund construction of select preschool facilities located on property for its own benefit.” (R. 2).² Moreover, Contractor attached to the Complaint certain lease provisions demonstrating Landlord obligated itself to fund the improvements, at least to a certain sum, and reserved some attendant tax consequences. (R. 2, 10). Based on these allegations, Contractor is setting forth a claim that in essence contends it was Landlord itself which contracted for the improvements. Florida Statute § 713.10 does not shield a lessor’s property interest from liens where it is the lessor itself who improves the property. A contrary finding would effectively permit a property owner/lessor to collude with a tenant/lessee such that the lessor could obtain and fund property improvements while avoiding the most effective form of security a contractor has to ensure payment – a lien against the fee simple interest. Section 713.10 does not provide for such a result, nor would such an outcome promote the lien law’s core objective. In the instant matter, Contractor should be permitted to prosecute and take discovery on its claim that it was, for all intents and purposes, Landlord who contracted for the improvements at issue. To permit dismissal of such a claim, and deny a contractor the opportunity to even conduct discovery on the issue, is at odds with a central purpose of Florida’s Construction Lien Law – allowing laborers and materialmen to secure payment for their work.

² Contractor, in its arguments below, referred to this tactic as using a tenant as a “strawman.” (R. 163).

III. LANDLORD'S NOTICE OF LIEN PROHIBITION MAY BE DEFECTIVE

This Court, in the recent case *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA 2010), held that a landlord's § 713.10 notice of lien prohibition was defective, and thus summary judgment in favor of the landlord's assignee was improper, where all the leases on the subject property did not contain precisely the same language prohibiting liens, and the landlord's blanket notice of lien prohibition did not contain all the differently worded provisions. This court stated,

Everglades Electric contends that Paraiso Granite could not use subsection 713.10(2) because not every lease it had signed contained the same language prohibiting liens. Paraiso Granite argues in response that all of its leases contained a lien prohibition, even though they were worded slightly differently from each other or from the section 713.10 notice. We agree with Everglades Electric. *A lessor can avail itself of the blanket notice provided for in subsection 713.10(2) only if, as the plain language of the statute states, "[a]ll of the leases entered into by a lessor ... prohibit such liability" and the lessor files a notice containing "[t]he specific language contained in the various leases prohibiting such liability."* Here, the ostensibly lien-prohibiting language in the May 2005 lease was significantly different, and more conditional, than the language in the section 713.10 notice. Thus, not all of the leases contained the notice language. Therefore, GKK-Pembroke did not comply with section 713.10 and its notice was defective.

Id. at 237-38 (emphasis added).

In the instant matter, Landlord's Notice of Lien Prohibition appears to state that not all the leases on the subject property contain precisely the same language

as the prohibition language contained in its notice. Namely, the Notice of Lien Prohibition, immediately preceding an exemplar lien prohibition lease clause, provides that all the leases “contain the following section *or substantially the same language* prohibiting liability for and excluding the Property from liens” (R. 6). However, under *Everglades Electric*, and the strict interpretation required in analyzing compliance with the lien law and § 713.10(2), a blanket lien prohibition notice such as the one Landlord attempts to rely on here must set forth:

- (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 of land contain the language identified in paragraph (c).

Florida Statute, §§ 713.10(2)(c) and 713.10(2)(d).

Landlord’s Notice of Lien Prohibition appears to fail to comport with either subpart (2)(c) or (2)(d) as it does not contain the specific language contained in the various leases, nor does it contain a statement that *all* leases contain the language set forth within it. Indeed, it acknowledges that the various leases have *either* the language contained in the notice “or substantially the same language.” It is not enough to say that the other leases have “substantially the same” provision. *Everglades Electric* teaches us that if other leases on the property are “worded slightly differently,” and the notice did not provide such varying provisions, the notice is defective.

The SFAGC notes that this issue typically would be more fully developed during the discovery process in that a contractor would usually request production of other leases on the property (and contractors normally do not have access to such leases prior to the discovery process). However, as Contractor notes in its initial brief, no discovery on other leases occurred here because this matter was disposed of at the motion to dismiss stage. *Appellant's Initial Brief, at 1, n.1*. In cases, like this one, where a landlord/owner seeks to rely on a notice of lien prohibition, but no discovery concerning other leases occurs because the case is dismissed, a complete analysis of the propriety of the notice cannot be verified by the contractor. Contractor should be permitted to prosecute its lien action against, and obtain discovery from, Landlord in the instant matter.

CONCLUSION

For the reasons expressed in this *Amicus Curiae* Brief and the Initial Brief filed on behalf of Appellant, SFAGC, the *Amicus Curiae*, respectfully requests that this Court reverse the lower court's dismissal of the claim against Landlord in Count I of the Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been
furnished by United States Mail this 22nd day of November, 2010, to:

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CERTIFICATE OF FONT SIZE

The undersigned hereby certifies that this brief is printed in Times New Roman 14-point font and is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a).



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