

PAYMENT CLAUSES AND DISPUTES,
MECHANIC'S LIENS AND LITTLE MILLER ACT

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OUTLINE ON PAYMENT CLAUSES AND DISPUTES,
MECHANIC'S LIENS AND LITTLE MILLER ACT

I. Doctrine of Conditions

A. Rules: Basically derive from the contract.

1. Bilateral Contract: Party need not perform until other does (for example, truckload of materials: materialman wants to be paid before unloading, and buyer wants materialman to unload before paying).
2. Law must determine who comes first: general rule, performance before payment. 18th Century English Law.
3. Risks:
 - a. Financing costs of performance;
 - b. Risks that trivial deviations may justify withholding payments;
 - c. Failure to pay.

B. Progress Payments:

1. Purpose: To lessen the risks to the performing party.
2. Schedule of Values: Prior to first application, the contractor and owner agree on a schedule of values for each of certain designated stages or work of the project. This schedule determines the amount of the progress payment by referring to the stages completed and the values therefore.

C. Application for Progress Payments:

1. Designated days before payment due.
2. Accompanied by supporting documents.
3. AIA 9.3.2
 - a. Bills of sale for materials.
 - b. Insurance and materials stored off site.
4. Proof of payment to subs.
 - a. Releases or waivers of lien.
5. Formidable administrative requirements.

6. Certification of payment of all bills.
(Generally under oath.)

7. Conditions for withholding.

D. Compliance with Contract Documents:

1. Inspections to approve work as a condition to payment.

2. Certificate of Architect:

a. Work progressed to point reflected in request.

b. Quality - in conformance with contract documents.

E. Amounts Certified for Payment.

1. Depends on fixed price contract, costs plus contract unit price, etc. (Each may be with a retainage.)

2. Problems:

a. Incorporation of materials required
AIA 9.3.2 requires incorporation before payment unless it is stored off-site with the owner's agreement.

3. Partial Certificates for Payment.

a. Generally: where the work is not as complete as contractor says or does not conform with the contract documents.

(i) AIA 9.6.1 requires architect to notify contractor and give his reasons.

(ii) Revocation of previous certificate, for example, where architect discovers defective work which was basis of previous certificate.

F. Remedies For Non-Payment:

1. Termination - Powerful remedy.

a. Should not be premature.

b. Not for minor delay.

c. Is it a breach of contract?

- d. Has the party waived (for example, by not requiring prompt payment).
- e. Contractor entitled to interest from date payment was due.
- f. Sue for damages.
- g. Suspension of work:
 - (i) General Rule: No pay, no work [but]: contractor should not terminate where it does not seriously harm him; or, contract does not permit it. Shut down and start up is costly.
 - (ii) AIA - seven days after payment is due contractor must give seven days' notice of intention to stop work - failure to then pay justifies suspension and contractor receives reasonable cost for shut-down and start-up.
- h. Termination: Only if material breach
 - (i) Rule of Thumb: significant impact and indication of future breaches.
 - (a) Waiver: If contractor continues to work after nonpayments or reliance by owner; unless, told contractor advised the owner that he would only allow nonpayment for a few more days.
 - (ii) AIA 14.1.1 - Terminate after thirty days of stopped work, and seven days' notice of intent to terminate.
 - (iii) Damages:
 - (a) Restitution: Reasonable value of work - less payments made, or
 - (b) Contract damages: Contract amount less what it would cost to complete less progress payments made; or
 - (c) Alternative contract damages, expenditures and part performance and reasonable profits on entire project.

II. Completion, Final Payment, Inspection, Lien, Avoidance and Claims.

- A. Procedure: Notice and application for final payment.
- B. AIA 9.9.4 - Payment waives all owner claims except:
1. Unsettled liens;
 2. Faulty or defective work;
 3. Failure of work to comply with contract documents;
 4. Warranties.
- C. Contractor's Claims: Final payment waives all claims except those previously made in writing and identified as unsettled.
- D. Punchlists:
1. Is it exclusive? i.e., does it bar the owner from defects not on the list.
- E. Substantial Performance:
1. Most substantial performance cases involve construction contracts.
 2. Complex Process - strong likelihood of minor deviations. Exact quantities and qualities are difficult to determine for both the contractor and owner because of numerous other parties involved in the construction process. Additionally there are many interpretation questions that arise and a breaching party cannot take back partial performance.
- F. Breach of Contract Where Substantial Performance. Old cases held that there would be no recovery where there is a wilfull breach. Modern trend is to permit recovery under a quantum meruit theory even where the contractor has breached the contract.
1. Proof - Contractor must prove substantial performance to recover the contract price. The burden then shifts to the owner to show his damages.

III. Conditional Payment Clause.

- A. Question: Does the contract between a subcontractor and contractor make payment to the contractor by the owner a condition precedent for payment from the contractor to the subcontractor.
- B. Examples of language used to establish this condition are:
1. Payment shall not be due unless and until . . .
 2. Payment to subcontractor is wholly contingent upon . . .
 3. As a condition precedent to payment to subcontractor . . .

In each of these cases the subcontractor's debt does not come into existence until the contractor is paid, as opposed to merely postponing payment to which he is already entitled.

- C. Where the clause is unclear or fixes only the time for payment on a certain condition and that a condition does not occur, payment therefore must be made at a reasonable time after the work is completed. (Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977)).

IV. Mechanic's Lien Law.

A. In General.

1. Rules of Construction.
2. Applicable Only to Private Projects.

B. Property Interests.

1. Applicable Statute. Sections 713.10, 713.12, and 713.121, Florida Statutes.
2. Definition of Owner.
3. Contract Vendee.
4. Purchaser's Interest.
5. Leasehold Property.
6. Lessor's Interest.
7. Condominium Property.

C. Persons Entitled to Lien/Types of Liens.

1. Applicable Statutes. Sections 713.01, 713.02, and 713.03, Florida Statutes.
2. Definition of Lienor. Section 713.01(10).
3. The Contractor. A contractor is a person other than a materialman or a laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor the entire remaining work under such a contract.

D. Establishing and Enforcing a Lien.

1. Notice of Commencement.
 - a. Applicable Statute. Section 713.03, 713.135 and 713.07, Florida Statutes.
 - b. Purpose.
 - c. Priorities Affected.
 - d. Provides Information.
 - e. Proper Payments.
 - f. Time Limitations - The notice of commencement is "void" if the improvement

described in the notice of commencement is not commenced within thirty days.

- g. Loss of Relation Back After One Year.
The notice of commencement is not effectual against any conveyance, transfer, mortgage or lien on the real property or against creditors or subsequent purchasers for valuable consideration, after one year from the date of recording the notice of commencement.

2. Notice to Owner.

- a. Applicable Statute. Section 713.04, 713.06, Florida Statutes. Concept of privity.
- b. Persons who need not file liens.
 - (i) Laborers
 - (ii) Persons in privity with owner "direct contract".
 - (iii) Lienors who provide labor, services or materials for subdivisions.
 - (iv) Professional lienors.
- c. Lienors Who Must Serve a Notice to Owner.
- d. Form of Notice to Owner. Found in Section 713.06(1)(2)(a).
- e. Who Must Be Served with a Notice to Owner.
 - (i) The owner must be served. A copy must be served upon the contractor by a sub-subcontractor; on the contractor and subcontractor by a materialman to a sub-subcontractor.
- f. When Must a Notice to Owner and Copy be Served. The Notice must be served before commencing but not later than 45 days from commencing.
- g. How Must Service be Made?
 - (i) By method of serving process.
 - (ii) Actual delivery.

(iii) Mailing the Notice registered or certified mail.

(iv) If none of the foregoing can be accomplished, by posting on the premises.

h. Evidence of Delivery.

i. Effect of Failure to Serve Notice to Owner. It is a complete defense.

3. Claim of Lien and Mistakes in Lien.

a. Applicable Statute. Section 713.05, 713.08 and 713.09, Florida Statutes.

b. In General. A claim of lien establishes priority and gives the owner notice of the existence of a lien. It is a prerequisite to perfection and enforcement of the mechanic's lien.

c. When Must the Lien be Recorded. Ninety days after the final furnishing of labor, services or materials.

(i) Failure to record claim of lien within the ninety day period renders the lien unenforceable.

d. When Must Lien be Served Upon the Owner. Either before recording or within fifteen days of recording the claim of lien.

V. Contractor's Affidavit.

- A. Applicable Statute. Section 713.06, Florida Statutes. A "contractor" must provide a contractor's affidavit to the owner prior to final payment.
- B. Failure to give affidavit renders the contractor in default and cannot obtain final payment. It also prevents the owner from making final payment until it receives the contractor's affidavit unless the owner complies with Section 713.06, Florida Statutes.

VI. Equitable Liens.

- A. Definition. An equitable lien is a cause of action recognized by equity which gives a lienor a right or special equity in a particular fund or real property in order to prevent in equity or unjust enrichment of one party over another. Crane vs. Fine, 221 So.2d 145 (Fla. 1969).
- B. When is it Possible to Perfect an Equitable Lien?
1. Misrepresentation, fraud or reliance in good faith. Rinker Materials Corp. vs. Palmer First National Bank and Trust Co., 361 So.2d 156 (Fla. 1978); or
 2. An agreement with the owner that the property improves stands as security for monies due the lienor either expressly or impliedly.
 3. Owner inducement to not perfect its mechanic's lien.
- C. Funds and the Equitable Lien. The claimant need only show "unjust enrichment".
1. Concept of Constructive Trust. One case has held
"no right, title or interest in any funds remaining except the security for the payment of materialmen, servicemen, or laborers who, . . . remain unpaid by reason of a breach of contract by a subcontractor, and the court will not permit retention by the owner or general contractor of funds which in equity or good conscience belong to an unpaid supplier."
Peninsular Supply Co. vs. C. B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3d DCA 1982).

VII. Enforcement of Lien Within One Year/Procedure.

A. Applicable Statute. Section 713.22, 713.21,
Florida Statutes.

B. Time Considerations.

1. One year from last furnishing labor of services.
2. Notice of Contest of Lien - sixty days from service.
3. Order to show cause - twenty days to either institute its foreclosure action or answer the complaint and give cause why a lien should not be vacated and cancelled.

VIII. Proper Payments and Priorities: Owners and Lienors Protections

- A. Applicable Statutes. Sections 713.06; 713.14; 713.16; and 713.27, Florida Statutes.
- B. Application of Payment to Materials Account. Section 713.14.
- C. Proper Payments and Owner's Protection. If an owner makes proper payments pursuant to lien law he has a complete defense to a lien action.
- D. Making Proper Payments.
 1. Retainage.
 2. Progress Payments.
 - a. Procedure. Must pay or cause to be paid all lienors giving timely notice. No obligation to pay lienors whose time for giving notice has expired, even though they may be listed on the progress payment affidavit.
 3. Requirements of Waivers or Releases. The owner should require, as a condition for payment, that the lienor furnish a waiver or release of lien; or the owner should use joint checks with release of lien language.
 4. Prelitigation Discovery.
 - a. Demand for sworn statement of the lienor's account under Section 713.16, Florida Statutes, and
 - b. Demand for copy of lienor's contract, Section 713.16.
 5. Final Payment.
 - a. Contractor's Affidavit.
 - b. Failure or refusal to provide contractor's affidavit.
 6. Proper Payment Defense. When a project has been completed and the owner obtains a contractor's affidavit, the owner is responsible only to those lienors who timely serve notices to owner before disbursement of the final payment. If a lienor has not served his notice within this time period, his

rights are lost. Section 713.06(4)(3)(d)(2), Florida Statutes. However, lienors who have not given notice but who are listed on the contractor's affidavit and whose time has not expired for the filing of the notice to owner must be paid in full.

IX. Fraud or Collusion.

A. Applicable Statutes. Section 713.31, 713.35,
Florida Statutes.

B. Consequences of Fraudulent Lien.

1. Complete defense.
2. Punitive damages.
3. Actual damages.

See Associated Distributors, Inc. d/b/a West Building materials vs. Delaney Mix, 440 So.2d 516 (Fla. 4th DCA 1983); Hobbs Construction & Development, Inc. vs. Presbyterian Homes of Synod of Florida, 440 So.2d 673 (Fla. 1st DCA 1983).

X. Attorney's Fees.

- A. Applicable Statutes. Section 713.29, Florida Statutes.
- B. Prevailing party. Rule.
- C. Affect of offer of judgment.

XI. Public Projects Payments Bonds/Little Miller Act.

A. Applicable Statutes. Section 255.05(1), Florida Statutes.

1. Price of contracts in excess of \$25,000.00.

B. Applicable Procedure and Notice Requirements.

1. Preliminary notice - All materialmen and subcontractors not in privity with the contractor must serve a preliminary notice on the contractor stating "their intent to look to the bond for protection" within 45 days after commencing to furnish labor, materials or supplies.
2. Final Notice to Contractor and Surety. Claimants not in privity with the contractor who have not received payment must, within ninety (90) days' after performance of labor or after complete delivery of materials and supplies, deliver to the contractor and to the surety, written notice of the performance of labor or delivery of materials or supplies and of the nonpayment.
3. Failure to Serve Notice. Failure to serve either the preliminary or final notice is a complete defense for the bringing of the lawsuit.
4. Filing the Suit. The action against the contractor and surety must be commenced within one (1) year of the last performance of labor or delivery of materials.
5. Attorney's Fees. The lienor (not contractor or surety) may recover a reasonable attorney's fee pursuant to Section 627.428, Florida Statutes (1978).