



How to Pull a Rabbit Out of a Hat: Little Known Tricks that Might Save Your Lien Claim

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Everyone “knows” that in order to preserve a lien or a claim against a payment bond, certain notices have to be provided on time, and failure to provide all of the notices means the lien or bond claim is invalid. It should be no surprise that nearly every day we get calls from clients and acquaintances asking for help collecting money for work that was performed. What is surprising is that many times the call for help starts out with a statement along the lines of, “My secretary missed the Notice to Owner date or the Notice of Nonpayment date, so I know we can’t file a lien, but maybe there is something you can do...” Most of the time, a missed notice does mean the lien/bond claim is indeed dead, but sometimes we can pull a rabbit out of the hat (it’s magic!), and enforce a lien or bond claim even if a notice was missed. There are a number of loopholes in the lien/bond law that may mean a facially dead claim is still alive, but you need to know where to find the loopholes.

The first thing we try to do is obtain all of the facts regarding the project. For example, was it a public or private project? What type of project was it? What were the first work date and the last work date? Was a bond posted and was a copy provided to the claimant? Was the bond recorded? How much money is owed and of that amount, how much

is for retainage? Where does the claimant live in the food chain, i.e. a subcontractor, sub-subcontractor, etc.? Once we have all the facts, we can see if the facts will allow us to resuscitate what appears to be a dead claim.

The notice provisions specified by the Florida Statutes governing liens and payment bonds are fairly similar. Most statutes require some sort of notice at the start of the claimant’s work, followed by additional notice of non-payment or the filing of a lien after the work has been completed. For example, Florida Statutes, Chapter 713, requires a lienor who does not have a contract with the property owner to give the owner a Notice To Owner within 45 days of the lienor’s first work informing the owner that the lienor is on the project and expects to be paid. Chapter 713 also requires all lienors to record the lien within 90 days of last work date. Miss either and the lien is dead, right? Not necessarily.

If the work was part of improvements for a subdivision, then Chapter 713 also states that the 45 day Notice to Owner is not required. Subdivision improvements are defined by the statute to include, but not be limited to, grading, leveling, excavating and filling of land, including the furnishing of

fill soil; the grading and paving of streets, curbs and sidewalks; the construction of ditches and other area drainage facilities; the laying of pipes and conduits for water, gas, electric, sewage and drainage purposes. This is the type of work that all our members perform and if any new subdivisions are ever built again in Florida, then this loophole may be useful and you too can pull a rabbit out of the hat and save your lien claim.

Here is another potential “magic trick.” Florida Statutes, Section 713.23, allows a bond to be posted which will serve in the place of the dirt as security for the work performed improving the dirt. In other words, instead of attaching a lien to the property, if a 713.23 bond has been posted, then the claim is made against the payment bond. Sometimes private owners will require the prime contractor to post a 713.23 bond to keep liens off of their property. Section 713.23 states in part that, “a lienor is required, as a condition precedent to recovery under the bond, to serve a written notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of labor, services or materials by the lienor.” The statute further states, “No action for the labor or materials or supplies may be

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instituted or prosecuted against the contractor or surety unless both notices have been given.” Sounds pretty bleak—miss either notice and your claim is dead. That conclusion would be correct unless you know where to look for the loophole. Elsewhere, the statute states that if the claim is for retainage, then the 90 day Notice of Nonpayment is not required.

How about a situation where a subcontractor on a public works project has posted a bond? It’s rare, but it happens. The common mistake is that all bonds posted on public projects are “statutory bonds” and the strict notice provisions of Florida Statutes, Sections 255.05 or 337.18, or others apply. Miss one of the statutory deadlines, and your bond claim is dead. However, even though a bond is posted on a public project that does not mean the bond necessarily is subject to the statutory provisions of F.S. 255.05 or F.S. 337.18 which govern most public works projects. The notice provisions of F.S. 255.05 and F.S. 337.18 only apply to bonds posted by a prime contractor. Thus, a bond posted by a subcontractor, even on a public project, is not a statutory bond. Sections 255.05 and 337.18 require a prime contractor to post a bond, but say nothing about a subcontractor’s bond. Thus, the notice provisions of Sections 255.05 and 337.18 do not apply to a subcontractor bond. Instead, the notice provisions set forth in the bond itself control, and sometimes the provisions in the bond are much more lenient than the provisions in the statutes.

So, next time an owner or prime contractor tells you your lien or payment bond claim is dead, don’t be too quick to accept defeat. You

can always make a claim for breach of contract, and sometimes you can make some magic happen by pulling a rabbit out of your hat and revive what appeared to be a dead bond or lien claim.

George Spofford is a shareholder in the Tampa office of the GrayRobinson law firm. Spofford has represented the construction industry since 1985 and serves as General Counsel to the UUCF. GrayRobinson, P.A. (gray-robinson.com) is a full-service business law firm with over 270 attorneys and 10 offices across Florida. If any member has specific questions relating to this topic or any topic they would like to see addressed in future editions, please feel free to contact George at (813) 273-5000 or george.spofford@gray-robinson.com.

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and who has not owned property in the previous 3 calendar years to which the Florida homestead exemption applied. The additional homestead exemption shall apply to all levies except school district levies. The additional exemption is an amount equal to 50 percent of the homestead property’s just value on January 1 of the year the homestead

is established. The additional homestead exemption may not exceed an amount equal to the median just value of all homestead property within the county where the property at issue is located for the calendar year immediately preceding January 1 of the year the homestead is established. The additional exemption shall apply for the shorter of 5 years or the year of sale of the property. The amount of the additional exemption shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under Article VII, Section 4(d), whichever is greater. Not more than one such exemption shall be allowed per homestead property at one time. The additional exemption applies to property purchased on or after January 1, 2011, if approved by the voters at a special election held on the date of the 2012 presidential preference primary, or to property purchased on or after January 1, 2012, if approved by the voters at the 2012 general election. The additional exemption is not available in the sixth and subsequent years after it is first received. The amendment shall take effect upon approval by the voters. If approved at a special election held on the date of the 2012 presidential preference primary, it shall operate retroactively to January 1, 2012, or, if approved at the 2012 general election, takes effect January 1, 2013. (5) This amendment also delays until 2023, the repeal, currently scheduled to take effect in 2019, of constitutional amendments adopted in 2008 which limit annual assessment increases for specified nonhomestead real property. This amendment delays until 2022 the submission of an

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