

Protecting Landlords from Liens for Tenant Improvements

These days, commercial tenancies are complicated, and lengthy written leases are generally not an easy reference for the layperson when disputes arise. More importantly, despite these long-winded written leases (addressing seemingly endless “what-ifs”) landlords would be surprised to know they may remain exposed to claims against their property where tenant improvements, which are typical under commercial leases, are involved. Specifically, even an airtight lease cannot protect a landlord against claims by tenant contractors who have not been paid unless that lease is accompanied by landlord action in the form of a recorded instrument. To avoid the nuisance and, more critically, obstacles to conveyance and collateralization presented by a contractor lien, Florida law has developed a framework comprised of two components: (1) ensure the lease has the necessary provisions; and (2) record a notice regarding that lease (or the property, depending on the case) in the public records.

The necessary lease provisions concern tenant improvements and must specifically provide that the interest of the landlord (i.e., the land and the building) will not be subject to liens for tenant improvements. Good practice (not necessarily Florida law) also dictates that this provision also: (1) contractually obligate the tenant to notify its contractors that the lease contains this prohibition; and (2) require the tenant to defend and indemnify the landlord in the event a claim is made by a tenant’s contractor against the leased property.

In order for a landlord to gain the full protection of the law against such liens, the landlord must follow through with the recording in the public records of a “Notice of Lien Prohibition” or other memorandum of lease. The law’s requirements as to the content of such a notice have changed over time. As of 2014, however, it suffices to do any of the following:

- (1) Record a full copy of the lease.
- (2) Record a memorandum of the lease.
- (3) Record a notice that all of the leases at a property contain the lien prohibition.

Landlords are reminded to be hasty in recording the necessary notice or memorandum after signing leases. This is because such notice or memorandum will only relate to work performed after its recording date. A landlord is not protected from liens arising out of any work performed for a tenant under a notice of commencement that pre-dates a recorded notice of lien prohibition.

As always, the landlord-tenant relationship is complicated enough and due care should be taken when memorializing critical terms, like tenant improvements. Obtaining the advice of an experienced legal counselor will help simplify the process and ease concerns for all parties involved.

Provided by CREW PB/TC member, Tracy White, Partner, Klein Glasser Park & Lowe, P.L.