IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,560

FLORIDA STEEL CORPORATION,

Petitioner,

v.

ADAPTABLE DEVELOPMENTS, etc., and others,

Respondents.

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Review of Opinion of the District Court of Appeal, Fourth District, Certifying a Question of Great Public Importance

Case No. 84-448

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case comes before the Court on a question certified by the Fourth District Court of Appeal to be one of great public importance. Florida Steel Corporation, a materialman, brought an action in the 15th Judicial Circuit, Palm Beach County, to collect the monies due it for reinforcing steel sold to Logan & Clark, an insolvent contractor, used in construction of a condominium in West Palm Beach, owned by Adaptable Developments, Inc., et al. ("King's Point") against whose property Florida Steel also sought foreclosure of its mechanic's lien. At trial, a default was entered against Logan & Clark. All material issues of fact were stipulated to by Florida Steel and King's Point. After presentation of the stipulated facts and legal argument on King's Point's liability, Judge Thomas Sholts entered judgment in favor of Florida Steel for the principal amount of Florida Steel's claim, plus pre-judgment interest. On re-hearing, the Court struck the award of pre-judgment interest.

Florida Steel appealed the denial of pre-judgment interest and King's Point cross-appealed the determination of liability. In January, 1985, the District Court of Appeal, with one dissent, reversed the trial court on the issue of liability but certified the principal issue to this court. The issue of pre-judgment interest was not reached.

In this brief, Florida Steel Corporation, the petitioner, will be referred to alternately as "Florida Steel"

or as "petitioner." King's Point Development Group will be referred to as "King's Point," "the owner," or "respondent." All persons not party to this appeal will be referred to by name.

Throughout this brief, the symbol "R" will stand for the Record on Appeal, and the symbol "A" will stand for the Appendix, separated from the brief by a tab. All emphasis in quotations or elsewhere is that of counsel, unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Florida Steel Corporation was a materialman to a now insolvent contractor, Logan & Clark, Inc., which contracted to construct the concrete shell of The Envoy, a nineteen story condominium building in West Palm Beach, Florida, owned by some ten Texas corporations, acting in a partnership known as King's Point Development Group ("King's Point"). Logan & Clark unilaterally terminated its work at The Envoy in April, 1981, and walked off the job, when only seven to ten of the nineteen floors had been erected.[1] (At termination, floors 7 through 10 were in various stages of completion.) By the time that Logan & Clark walked off the job, Florida Steel had delivered more than $300,000 of steel to the job site, $186,575.07 of which had not been paid for. (A. 6, and 7 at ¶ 3b(i) and (ii)). In timely fashion, on June 1, 1981, Florida Steel Corporation filed its Claim of Lien (A. 11, at ¶ 3b (xxviii))

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[1]Because it unilaterally terminated the contract by walking off the job, even though it had not been paid for work performed by it and its subcontractors and materialmen in February, March and April, 1981, Logan & Clark, in an arbitration proceeding with King's Point (to which Florida Steel was not a party), was found not entitled to recover on the contract it breached. (A. 21). In a subsequent attack on the arbitrators' award, again unrelated to this cause but included in King's Point's Appendix to its initial Fourth District Brief, it was held that Logan & Clark could not recover for the February, March and April, 1981 work under a theory of quantum meruit, because no quantum meruit claim was made. Logan & Clark, Inc. v. Adaptable Developments, Inc., 450 So.2d 1189 (Fla. 4th DCA 1984). There has never been a showing that there was no value added during the three months for which Logan & Clark was never paid. The parties have stipulated that King's Point never paid anyone for the work performed on, or materials furnished to, The Envoy during February, March and April, 1981. (A. 9 at ¶ 3b(xii)-(xiv)).

and notified King's Point of same. Prior to that, and after, Florida Steel, though not in privity with it, complained to King's Point that it had not been paid. (A. 9, at ¶ 3b (xv)).

Within a year of filing its Mechanic's Lien, Florida Steel brought an action in the lower court to foreclose it. After preliminary motions and agreements eliminating all other parties, Florida Steel and King's Point stipulated to all relevant facts (R. 3, 4, A. 5-13). The trial court determined the case on the stipulation of facts and argument of counsel.

Succinctly, the Stipulation provided as follows:

1. King's Point, as owner, through an agent, contracted with Logan & Clark, Inc. to build a concrete shell for The Envoy for $3,305,010. (A. 5, 6 and 11, at ¶ 3b (xxix)).

2. Florida Steel provided Logan & Clark, Inc. with specially fabricated reinforcing steel bars which were incorporated into the shell. For shipments during November and December, 1980 and January, 1981, King's Point paid Florida Steel for the steel by check jointly made payable to Logan & Clark and Florida Steel. (A. 8 at ¶ 3b(vii)). King's Point has not paid Florida Steel, or Logan & Clark for Florida Steel's February, March and April, 1981 deliveries of steel. (A. 9 at ¶ 3b(xiv)). By the time Logan & Clark walked off the job, Florida Steel had delivered to the jobsite, but had not received payment for, $186,575.07 of steel. (A. 7 at ¶ 3b(iii)).

3. By early April, 1981, when Logan & Clark stopped working on The Envoy, King's Point had properly paid $782,100

of Logan & Clark, Inc.'s $3,305,010 contract amount, either to Logan & Clark, Inc., or to suppliers or subcontractors of Logan & Clark, Inc. on its behalf. (A. 11 at ¶ 3b(xxix)).

4. Florida Steel, on June 1, 1981, timely filed its Claim of Lien for $186,575.07. Florida Steel completely complied with all aspects of the Mechanics' Lien Law (including the original Notice to Owner). (A. 11 at ¶ 3b(xxviii)).

5. King's Point interviewed potential replacement contractors in March, 1981, before Logan & Clark terminated. (A. 10 at ¶ 3b(xx). No replacement contractor was hired until King's Point contracted with Rogers & Ford to complete Logan & Clark, Inc.'s work for more than the $2,522,010 remaining under the Logan & Clark, Inc. contract. Work resumed after a new Notice of Commencement was filed on January 6, 1982. (A. 11 and 12 at ¶ 3b(xxvii), (xxix) and (xxxi)). In essence, therefore, between what it paid Logan & Clark, Inc. and its suppliers ($782,100), together with what it obligated itself to pay Rogers & Ford to complete the shell, King's Point ended up paying more for the concrete shell than the $3,305,010 which Logan & Clark, Inc. had agreed to construct it for. (A. 11 at ¶ 3b(xxix)). On top of that, since Florida Steel had not been paid, it demanded $186,575.07 more from King's Point on account of the Mechanic's Lien it filed for steel supplied during the "Logan & Clark, Inc. era."

6. Although, as required by F. S. § 713.13, King's Point filed a new Notice of Commencement prior to Rogers & Ford's recommencement of work in January, 1982 (A. 12 at ¶

3b(xxxi)), (the abandoned project having been idle since April, 1981), it never filed nor served upon lienors, an Affidavit of Intent to Recommence pursuant to F. S. § 713.07(4) (A. 12 at ¶ 3b(xxxii)).

The trial court found as a matter of law that since Logan & Clark terminated work at The Envoy in April, 1981, and since King's Point did not resume work until January, 1982, after a nine month abandonment of the project, King's Point had an obligation per F. S. § 713.07(4) and F.S. § 713.06(3)(e) to either pay lienors in full or pro rata, or to file an Affidavit of Intent to Recommence Construction, and that since it had done neither, it was liable to Florida Steel for the $186,575.07 due it, because there was enough money in King's Point's hands at the time of abandonment of the improvement (i.e. a balance of more than $2,522,910 left under the Logan & Clark, Inc. contract), to pay all lienors in full. Since King's Point did not pay from the funds found to have been in its possession on the date the lien was filed, the Court entered judgment for Florida Steel for the $186,575.07, plus pre-judgment interest at the statutory rate from June 1, 1981 (the lien date) until the date of the Final Judgment, which interest amounted to $41,542.96. (R. 80-82). After a Motion for Rehearing was filed by King's Point, on January 31, 1984, the Court deleted the pre-judgment interest award of $41,542.96. (R. 105-108). The denial of pre-judgment interest precipitated Florida Steel's Notice of Appeal filed on February 27, 1984. King's Point then cross-appealed the principal

award, arguing that since completion costs for the 1982 contract are proper payments under Alton Towers, Inc. v. Coplan Pipe & Supply Co., they should be subtracted from the balance left under the Logan & Clark contract, leaving nothing to pay Florida Steel. On January 22, 1985, a two judge majority of the Fourth District agreed, and reversed the trial court in a short opinion (A. 1-2), but, with the dissenter, certified the following question to this Court as one of great public importance:

> DOES THE RULING IN ALTON TOWERS, INC. v. COPLAN PIPE & SUPPLY CO., 262 So.2d 671 (Fla. 1972) APPLY TO A SITUATION WHERE A CONSTRUCTION PROJECT IS INTERRUPTED FOR A SIGNIFICANT PERIOD OF TIME BY THE CONTRACTOR'S ABANDONMENT OF THE JOB SITE?

The Notice to Invoke this Court's discretionary jurisdiction was filed with the Fourth District Court of Appeal on February 12, 1985.

ISSUES PRESENTED FOR REVIEW

FIRST ISSUE

WHETHER, WHERE CONSTRUCTION ON A PROJECT IS INTERRUPTED FOR A SIGNIFICANT PERIOD OF TIME, AND THE OWNER FILES A NEW NOTICE OF COMMENCEMENT AFTER DEFAULT OR ABANDONMENT, THE RULING IN ALTON TOWERS, INC. V. COPLAN PIPE & SUPPLY CO., 262 So.2d 671 (Fla. 1972) IS INAPPLICABLE, OR RATHER, WHETHER THE CLEAR LEGISLATIVE DICTATE OF F. S. §713.06(3)(e) APPLIES, REQUIRING THE OWNER TO PAY ALL LIENORS IN FULL OR PRO RATA, PRIOR TO RECOMMENCEMENT?

SECOND ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING PRE-JUDGMENT INTEREST TO THE PLAINTIFF LIENHOLDER, WHERE NO QUESTION EXISTED ABOUT THE VALIDITY AND AMOUNT OF PLAINTIFF'S CLAIM, AND THE MECHANIC'S LIEN LAW REQUIRED THE DEFENDANT-OWNER TO PAY THE PLAINTIFF THE LIQUIDATED SUM IN FULL TWO AND A HALF YEARS BEFORE TRIAL?

SUMMARY OF THE ARGUMENT

When construction of an improvement ceases, restarting the job usually adds to project costs. Whether an owner can deduct the extra costs suffered in restarting the job is covered by Florida Statutes §713.06, which deals with "proper payments." If payment of the extra costs is ultimately deemed proper, then their amount may be taken from the "contract price" which the owner has with the contractor, to determine how much of a fund exists for payment of mechanics' liens. If their payment is not deemed proper, then the fund will not be reduced accordingly.

Alton Towers, Inc. v. Coplan Pipe & Supply Co., 262 So.2d 671 (Fla. 1972), holds that extra costs in completing the work under the contract of a bankrupt contractor may be deducted by an owner to diminish the funds in its hands left to pay unpaid mechanics' lienholders. The rule in Alton Towers, however, does not address all situations of cost overruns or project interruption, because that case did not deal with cost overruns incurred in restarting abandoned improvements. It dealt only with an abandoned contract.

It was unnecessary for this Court to reach the issue of abandoned improvements in Alton Towers, because the case did not deal with it. Accordingly, the situation specifically treated by Florida Statutes §713.06(3)(e) was not addressed, nor, obviously, was the policy clearly embodied in Florida Statutes §713.07(4). These two statutes deal with the owner's liability, on abandonment of an improvement, to pay all

lienors, the full amount of their claims, up to the amount that there are funds left in the owner's hands under the general contract on which construction ceased. As a result, it was the obligation of the owner in this case to pay all lienors, specifically Florida Steel, the $186,575.07 stipulated to be the amount of its perfected lien claim.

Simply stated, the issue is one of priority, which is clearly set forth in §713.07 which is titled "Priority of liens." Under the clear language contained there, all mechanics' liens relate back to the Notice of Commencement filed by the owner at the start of the job. Where a second Notice of Commencement is filed, all liens arising under the contract referred to in that notice relate back to the second Notice of Commencement, which, by definition, will be second in time, and therefore, second in right. Monies due on the contract referred to in the first Notice of Commencement must first be paid to first priority lienholders. There is no authority under the Mechanic's Lien Law for "jumping" second in time lienors, or their claims, to a priority over the liens which are first in time. Alton Towers does not provide that authority, for it does not deal with the situation where the owner files two successive Notices of Commencement, to commemorate two separate job starts -- here, one in 1980 and a second in 1982. While there is a procedure (F. S. §713.07(4)) which allows an owner to reverse natural priorities by filing and serving an "Affidavit of Intent to Recommence," the owner in this case stipulated that it did not file such an Affidavit.

Finally, because an owner's obligation is to pay liens on abandonment of an improvement, a sum certain was due to Florida Steel on a date certain, from a definite fund. Accordingly, Florida Steel should receive pre-judgment interest.

ARGUMENT ON THE CERTIFIED QUESTION

WHERE CONSTRUCTION ON A PROJECT IS INTERRUPTED FOR A SIGNIFICANT PERIOD OF TIME, AND THE OWNER FILES A NEW NOTICE OF COMMENCEMENT AFTER DEFAULT OR ABANDONMENT, THE RULING IN ALTON TOWERS, INC. v. COPLAN PIPE & SUPPLY CO., 262 So.2d 671 (Fla. 1972) IS INAPPLICABLE; RATHER, THE CLEAR LEGISLATIVE DICTATE OF F. S. §713.06(3)(e) APPLIES, REQUIRING THE OWNER TO PAY ALL LIENORS IN FULL OR PRO RATA, PRIOR TO RECOMMENCEMENT.

When work on a construction project stops, restarting the job usually adds to the overall cost. On study, it is clear that Florida Statutes § 713.06, in part, deals with whether the cost to complete may be taken from the general contract, as a proper payment, or whether the owner bears the cost. The distinction is made by determining whether the improvement is abandoned (after work stoppage) until such time that the owner gets the job going again, or whether the owner keeps the job going, without abandoning the improvement. Where the latter situation occurs, the owner, who is without fault, will not be forced to "pay twice," that is, more than the original contract price. An example is found in Alton Towers, Inc. v. Coplan Pipe & Supply Co., 262 So.2d 671 (Fla. 1972), where a plumber with a direct contract with the owner went bankrupt. The cost to complete the plumbing contract with a replacement contractor, together with the already paid monies to the bankrupt, were such that the owner's total cost for the plumbing work exceeded the amount of the contract with the bankrupt. This Court applied the clear language of F. S. §713.06(1) and denied the bankrupt's creditor recovery under

his properly filed mechanic's lien.

It must be emphasized, however, that Alton Towers demonstrates a non-owner cessation of work, and no abandonment of an improvement. Neither this Court, nor any district court, has interpreted those sections of the Mechanics' Lien Law which Florida Steel maintains control this case. As a result, indiscriminate application of Alton Towers, which does not distinguish between the two types of construction cessation, conflicts with the plain meaning of F. S. §713.06(3) and §713.07(4), which will be more fully addressed below. The fact is, Alton Towers did not address the same situation as is presented here.

The Parties' Positions:

Florida Steel's position is simply that the Mechanic's Lien Law allows for only one answer to the certified question: "No. Alton Towers only applies where the initial construction is completed without interruption, under a single Notice of Commencement. Sequential Notices of Commencement establish sequential 'anchor dates' to which lien claims relate. Subtraction of payments made to Phase II[1] claimants from what remains from the contract to pay Phase I claims violates the clear legislative intent manifested in F. S. §713.07(4). In a

[1]As used throughout this brief, "Phase I" lienors will refer to those contractors, materialmen, etc. who provide services and materials to an improvement before work stoppage and idling of the improvement; "Phase II" lienors will be those who provide labor, materials, etc. after work on the abandoned improvement has been recommenced.

case where a second Notice of Commencement is filed, as here, without an Affidavit of Intent to Recommence, Alton Towers is inapplicable, and the owner must follow F. S. §713.06(3)(e) by paying all liens in full at the time of abandonment, or, if there is insufficient money remaining in the contract at the time of abandonment, then pro rata according to the priorities set forth in §713.06(4)."

King's Point, conversely, responds to the certified question, "Yes, in all cases where a proper new Notice of Commencement is filed, the reasonable cost to complete must be subtracted from the contract price to see if the 'Phase I' lienors will get paid, because otherwise if not so subtracted, the owner may end up paying more, in violation of F. S. §713.06(1). Alton Towers, Inc. v. Coplan Pipe & Supply, 262 So.2d 671 (Fla. 1972), is a 'winner take all' precedent for the instant case, as it is identical to the present one in all material respects."

Florida Steel's position must be upheld because Alton Towers is easily distinguishable from the case at bar. In Alton Towers, it is true, the owner, as here, directly hired the defaulting contractor, and had to pay another contractor (to finish the first contractor's work) an additional amount such that when the cost to finish was added to the proper payments already made to the defaulting contractor, the owner's cost for such work exceeded the original contract price. Thus, in Alton Towers, when the bankrupt contractor's supplier filed a lien against the project, the owner was held not liable.

However, a universal principle such as "lienors on the pre-abandonment 'phase' always get paid after post abandonment recommencement lienors" may not be extrapolated from Alton Towers and used here, because in Alton Towers it was a plumber who abandoned his contract, but the improvement itself was never abandoned! Alton Towers was not a "Phase I vs. Phase II" case. This Court's 1972 opinion does not tell us that when this one contractor (albeit with a direct contract) went into bankruptcy and abandoned the contract, at the same time the electrical contractor, the mechanical contractor, the structural workers, the masons, the glass contractors, the roofers, and everybody else walked off the job, ceased construction, ground action on the multi-story apartment building to a halt, and caused the improvement to sit idle for many months until a new Notice of Commencement was filed. No, the opinion neither states that, nor implies it. No mention is even made that the plumbing work was abandoned. Simply, one contractor left the job, but apparently the building continued without seriously missing a beat.

In Alton Towers the Court was faced with allocation of a given amount of money for a plumbing contract among those who worked on the same contract, and whose claims all have the same effective date, i.e. the single Notice of Commencement which was filed at the beginning of the project, back to which all lienors' claims relate. F. S. §713.07(1). Thus, when persons claiming under the plumbing contract made claims, all such claims related back to that singular Notice of Commencement.

In the case at bar, a Notice of Commencement was filed in the Fall of 1980,[2] to which Florida Steel's lien related, and a new second Notice of Commencement was filed on January 6, 1982 (A. 12, at ¶3b(xxxi)) to which all completion lienors' claims related. By filing a new Notice of Commencement, without reversing the priorities (established chronologically by the two "starts" on the project) the "completion liens" were second in time, second in right to Florida Steel's lien, which had the earlier effective date of the Fall of 1980. The owner had no right to use monies for claims attaching to the property as of the Fall of 1980 to satisfy claims which did not attach to the property until January, 1982, without taking advantage of the priority switching mechanism of Fla. Stat. §713.07(4). In Alton Towers, Coplan's lien was not prior to the finishing contractor's lien, as they all related back to the same Notice of Commencement date. The issue in that case was allocation of a limited amount of money to a greater number of claims, all equal in dignity, unlike the instant case.

The Alton Towers opinion unequivocally recites that "both parties complied with the requirements of the Mechanics' Lien Law," 262 So.2d at 671, and further quotes, and high-

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[2]The record is silent as to the exact date of the first Notice of Commencement for The Envoy. However, that a proper Notice of Commencement was filed is not disputed. Since the first payment was made for November, 1980 work, for that payment to be proper, as stipulated, the Notice of Commencement had to have been filed before then, but not earlier than 30 days before that. F. S. §713.13(2). The notice was therefore filed, probably, in October, 1980, but will be referred to as "the Fall of 1980" hereafter.

lights, certain portions of Fla. Stat. §713.06(1),[3] which forecasts the distinguishing circumstances of the case at bar.

Subsection (3) of the section, in particular Section 713.06(3)(e) provides that

> If the improvement is abandoned before completion, the owner shall determine the amount due each lienor giving notice and shall pay same in full, or prorate in the same manner as provided in subsection (4).[4]

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[3]The portion of the statute quoted in Alton Towers, reprinted in this footnote, is essentially the present form of the section; a few words are changed, but the meaning is unaltered:

> (1) A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor who complies with the provisions of part I of this chapter and is subject to the limitations thereof, shall have a lien on the real property improved for any money that shall be owing to him for labor, services or materials furnished in accordance with his contract and with the direct contract. The total amount of all liens allowed under part I of this chapter for furnishing labor, services or material covered by any certain direct contract shall not exceed the amount of the contract price fixed by said direct contract except as provided in subsection (3) of this section. [Emphasis supplied in the original].

It is submitted that subsection (3), discussed next at text, provides the exception.

[4]Plainly, the statute would be clearer if it read ". . . The owner shall determine the amount due each lienor at the time of abandonment." The question for the owner is simple "When work on my improvement was abandoned, how much steel of yours was on my property for which you were not paid?" Section 713.06(3)(e) directs the owner to determine the amount due, but it does not say precisely when this determination must be made. As will be argued shortly, it contravenes policy to

There is no similar requirement for post-default full payment when a contractor merely defaults or abandons a contract but the improvement is not abandoned. This section springs to life only when the improvement is abandoned, which is the case here. Alton Towers involves a plumbing contract abandonment. The statute, under the facts of this case, required the owner to do certain things which the statute, under the facts of the Alton Towers case, did not require the owner to do there. Thus, this Court could correctly say in Alton Towers, "Both parties complied with the requirements of the Mechanics' Lien Law," but the same cannot be said of the owner here. Here it was only stipulated that Florida Steel complied with the Mechanics' Lien Law. (A. 11 at ¶3b(xxviii)).

King's Point's natural response to this is that while King's Point may not have paid the lien in full, it otherwise complied by paying Florida Steel a pro rata amount of what was left under the direct contract (after determination a few years later), i.e., there was nothing left, so a pro rata amount of nothing is zero. This is the legerdemain that is so crucial to be wary of. By assuming its conclusion, that owners have an

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[fn.4 (con't)] allow the owner to make the determination of how much is due months or years after abandonment, so a statutory construction that the determination and payment should be made at the time of abandonment is the only logical one. F. S. §713.07(4) provides some insight into the ambiguity. It dictates that "the owner . . . may pay all lienors . . . prior to recommencement . . . ." (or file an affidavit prior to recommencement). In either event, the owner is required to take action with respect to Phase I lienors prior to recommencing construction.

inalienable right to subtract completion costs (whenever determined, whenever incurred) on abandoned improvements, it shifts the focus from the basic priority issue: who comes first? The focus should be on the interplay between §§713.06(3)(e) and 713.07(4) -- dealing with what an owner is to do on abandonment of an improvement.

Clear Legislative Intent -- F. S. §713.07(4)

Section 713.07 is entitled "Priority of Liens." It is elementary that the recording of a Notice of Commencement establishes the date back to which all liens relate. F.S. §713.07(1). Where a new Notice of Commencement is filed, under §713.13(1), the liens for work referred to in that new notice (§713.13(1)(a)) relate to the date of the new (later) notice. Nothing in the mechanics' lien law or in any case cited by King's Point alters the age old real property recording axiom, first in time, first in right. The fact is, Florida Steel's June, 1981 claim of lien related back to the Fall of 1980 Notice of Commencement and had priority from that date. The contractor and other lienors claiming under the January, 1982 new Notice of Commencement relate back to January, 1982, clearly inferior to Florida Steel's claim of lien. A limited option is provided under F. S. §713.07(4) whereby owners can "reverse" the normal first in time first in right priority, by shortening the normal 90 day period a lienor has to file a claim of lien, which subordinates the "non-filers" to the second notice lienors. (This is exactly what King's Point is

trying to effectuate here, although (a) Florida Steel did file a lien, and (b) King's Point did not try to take advantage of the mechanism to begin with). Under §713.07(4) the owner, if he wishes to recommence construction, and give "Phase II" lienors priority over unclaimed "Phase I" lienors, may:

> (a) pay all lienors in full or pro rata, or
>
> (b) file an affidavit of intent to recommence which shortens unpaid lienors' time to file a lien to 30 days. If they do not file a lien in that period, then they will be inferior to those claiming under the new Notice of Commencement.

What is the purpose of this provision? As will be discussed below, King's Point figures it to be a Clerk's Relief Act, a statutory provision designed to increase the volume of courthouse filings, but to serve no other purpose.[5] In reality, the purpose is to protect lenders to construction projects, and to allow funding for, and resumption of, construction of stalled projects. It recognizes the inherent superiority of liens filed under the earlier Notice of Commencement, and provides some relief against the harshness.

Basically, a lender who will secure its loan by a mortgage wants to be sure that the mortgage is recorded before

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[5]This stems from King's Point's argument below that "Phase II" lienors are always paid ahead of "Phase I" lienors, in full, under the misapplication of Alton Towers. Although King's Point argues that filing an Affidavit of Intent to Recommence is strictly optional, it never discusses what happens when the "option" to file is not exercised, implying however, that there never is a negative effect of non-filing.

the Notice of Commencement, so that if liens subsequently appear, they will relate back only as far as the later recorded Notice of Commencement. So, too, when a lender is willing to finance the re-start of an abandoned job, it needs the assurance that a mortgage which it files will not be "primed" by subsequently filed mechanics' liens which relate back the even earlier recorded Notice of Commencement. By filing an Affidavit of Intent to Recommence construction, the owner can assure title examiners for the prospective mortgagee that 31 days after the Affidavit is filed, no subsequent lien for work done under the prior Notice of Commencement will "come out of the woodwork" to "prime" the mortgage, and that all lienors on the recommenced portion will get priority over the earlier recorded Notice of Commencement lienors who have not filed claims in the thirty day period. Thus, the statute has a way of reversing the normal first in time first in right rules, because if the statute is employed, a "first place" lienor who files on the 32nd day will be deemed inferior to the lienors claiming under the new Notice of Commencement, even if the new notice is not filed until the 35th or 75th day.[6]

King's Point offers no meaning to F. S. §713.07(4)

If §713.07(4) does not mean that without the affidavit -- or payment in full or pro rata -- the Phase II liens are

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[6]Without the shortening of time under §713.07(4), lienors have 90 days from contractor's default or termination to file. F.S. §713.08(5).

inferior to the Phase I liens, what in the world does it mean? If non-compliance with §713.07(4) means that second in time liens unconditionally still get paid first, then King's Point's position throughout is correct since (a) compliance or non-compliance with the statute has no effect and (b) the owner should always pay the recommencement lienors first -- as it did here -- and wait until the end of the job (which conceivably under King's Point's theory could be at the end of an unanticipated Phase III, or Phase IV, etc.) to see whether there is money left to pay the first phase lien claimants. This, of course, renders the first part of §713.07(4) -- that owners pay lienors in full or pro rata without waiting for the filing of claims of liens,[7] absolutely meaningless, since, again, King's Point argues, there is no obligation whatever to pay "Phase I" lienors until the end, as the new Notice of Commencement always and unconditionally primes the first Notice of Commencement. King's Point has argued that since Florida Steel filed the claim of lien in 1981, filing the Affidavit -- in this case -- 30 days prior to filing the new Notice of Commencement (i.e. filing the Affidavit in December, 1981) would not have done it any good because Florida Steel would have already been covered. Thus, King's Point has argued that it did not have to comply here because compliance, in this case where Florida Steel (the only lienor) acted promptly, would

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[7]Recall that a "lienor" is one who has a claim under a contract whether or not a claim of lien is actually filed. §713.01(10). Perhaps "claimant" would be a better word, because that is its meaning throughout the Mechanics' Lien Law.

have been useless. Note, though, that if the affidavit were filed in April, 1981 and Florida Steel still did not file until it did on June 1, 1981, Florida Steel would have been rendered subordinate to the Phase II lienors. King's Point seeks the same benefit here although it simply ignored the statute. Nothing in the statute prevented King's Point from filing an Affidavit in April, 1981, if it truly intended to recommence construction after the contractor walked off, withholding filing of the new Notice of Commencement until much later. Predictably, King's Point will again maintain that the filing of the Affidavit of Intent to Recommence on abandonment is optional under F. S. §713.07(4). It is; but payment of Phase I lienors is not, unless (a) there has been an Affidavit filed and (b) a lien has not been filed within 30 days after that.

The general proposition, implicit in King's Point arguments to date, that all liens under the second (new) Notice of Commencement, as long as monies disbursed under the contract therein are proper payments, are automatically superior claims to the proper claims of those under the original Notice of Commencement, not only takes all viability from F. S. §713.07(4) -- an improper construction -- but is inherently unsound. Such argument simply makes no sense, for it suggests that the only reason the legislature invented the concept of the Affidavit is to expose owners to additional liability if they comply with the statute, or keep them immune from liability if they ignore the statute!

Why Alton Towers cannot apply where there has been abandonment for a significant period: testing the principle against legislative intent and commercial reality.

Let us apply Alton Towers to a few hypotheticals, presupposing abandonment, as the Fourth District classified the instant one, "for a significant period of time."[8]

Example 1: In 1982, the owner of real property solicits bids for construction of a 30 story highrise condominium. A contract is given to the lowest bidder to start work in the middle of 1983. A Notice of Commencement is filed in the summer of 1983. Because sales are sluggish, or for whatever other reason, under a term in its contract with the contractor, the owner abandons construction in the Spring of 1984 and stops payments altogether. Liens are filed within 90 days of the last work, and all are filed by the summer of 1984. The statute of limitations gives these lienors one year to file suit to foreclose their claims of lien, F.S. §95.11(5)(b), thus, actions are all filed by the Spring of 1985. The owner denies that payment is due, because he "knows" that in the future he will recommence work, and "knows" that the cost of completion will exceed the balance due under the general contract. As proof, when the matters come to trial in late 1986, he finds a contractor who testifies that if work commences in 1987 or 1988, it will cost much more to complete

[8]In analyzing Judge Glickstein's "loss of innocence," as set forth in his dissent, the obvious may sometimes not seem so. A contractor does not abandon a job for a significant period. He abandons it only once, except that it is forever. Abandonment of an improvement for a period of time is something an owner does to his own project.

than was left to pay on the contract negotiated in 1982. Therefore, "Phase I" lienors lose because, under King's Point's theory, all persons claiming under the "proposed" new (1987 or 1988) Notice will get paid from remaining funds on the abandoned project before those who built the abandoned job in 1983 and 1984 will be paid.[9] Strict application of Alton Towers does not promote a healthy construction industry and seriously violates F.S. §713.37, by giving the owner an extremely liberal construction, and some immunity from inflation and the increased costs from starting up idled projects.

Example 2: Another owner of the same type project stops progress on the job because he realizes the luxury type residential units he planned to offer would not sell. Rather than waiting until 1985, he converts the project to a hotel, and has the plans and zoning approved in 1983. The actual "cost to complete" (as opposed to the Example 1 theoretical cost) exceeds the original cost to complete. Does the owner "stiff" first lienors or is this an exception to the Alton Towers rule, that is, a change in plans or design does not always allow a Phase II lienor to prime a Phase I lienor? From where in Chapter 713 or Alton Towers is there authority for that?

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[9]Florida Steel presumes here that King's Point's theory does not require the owner to invest the contract balance during the period of abandonment to increase the balance of the fund held.

Example 3: The owner of a 19 story condominium in West Palm Beach starves out a contractor in 1981 by not funding draws for two consecutive months, on the grounds that the contractor has not acquired a payment and performance bond as required by their contract.[10] The owner decides to stop honoring progress payment applications after the contractor's January, 1981 draw request, although it does not tell the subcontractors or materialmen of its intention (A. 10 ¶ 3b(xxi) and 3b(xxii)). The owner is aware that a reinforcing steel supplier which has been delivering steel to job site continues to deliver steel in February, March and April, 1981, but does not want to pay the steel supplier -- whose steel is incorporated into the structure -- because the general contractor did not post a payment and performance bond. The owner and contractor arbitrate and, lo and behold, the contractor is found to be in default for not posting a bond. The owner, although it is interviewing replacement contractors before the general "walks off," (A. 10 at ¶ 3b(xx)), is aware that condominium sales in West Palm Beach are pitifully soft in 1981, and thus waits nearly a year to enter into a contract and start up the replacement contractor. Under Alton Towers -- if construction costs go up in the year it waits to recommence the job, pre-abandonment lienors lose, although admittedly the

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[10] If the facts in this example sound extremely similar to this case and to facts in Logan & Clark, Inc. v. Adaptable Development, Inc., 450 So.2d 1189 (Fla. 4th DCA, 1984), it is because they are exceedingly similar, if not identical.

owner did not pay for, but knowingly accepted the value of, the lienors' materials. This approach also gives owners an incentive to lull, if they can, lienors into working longer without disbursements, because that way they can be assured of a greater "cushion" against higher prices when they resume work, because there will be less for the completion contractor to do.

Since it is axiomatic that courts will construe statutes in such a fashion to give all parts of the statute meaning, King's Point's proferred, but unsupported, construction of §713.06(3)(e) and §713.07(4) -- that owners need not pay any lienors any money when an improvement is abandoned until such time as can be determined what the cost of completion is, so that those who contribute to the completion will get paid in full first -- is unacceptable. If that were true, the statute would simply state:

> After abandonment of an improvement, determination of claims of, and payment to, all lienors shall be held in abeyance until such time as the owner decides to recommence and obtains a contract for completion of the improvement, but if the owner does not obtain such a contract or decides not yet to complete, then all foreclosure actions shall clog the dockets until he does. Claims of lien filed after the recording of a second (or third, etc., whichever is the latest) Notice of Commencement shall be at all times and in all cases superior to all liens filed under earlier notices of commencement, in inverse chronological order. All lienors in Florida are hereby put on notice to watch out for owners who abandon projects for a while because the mechanics' lien law favors those owners who abandon and later hire expensive completion contractors (i.e. the

> owners will be completing the structure with your money), or simply do not hire any contractors until the statute of limitations on lien foreclosures passes.

It is clear that the owner in Alton Towers was in a different posture from King's Point. Nothing in the Alton Towers opinion suggests that work was halted, that the project was abandoned for a period of time, or that a new Notice of Commencement was ever filed. Accordingly, this Court did not have to address the issue of improvement abandonment which is the subject of F. S. §713.06(3)(e), nor the policy behind §713.07(4), which expressly contemplates the situation here. Application of the Alton Towers precedent to the extended abandonment here not only contravenes the applicable legislation, but seriously threatens the predictability and stability of Florida's construction industry.

POINT II -- PRE-JUDGMENT INTEREST

A CLAIMANT DUE A LIQUIDATED AMOUNT, AS OF A DATE CERTAIN, FROM AN ESTABLISHED FUND CONTAINING A SUM CERTAIN, IS DUE INTEREST ON THE CLAIM FROM THE DATE THE MONIES BECAME DUE. THE TRIAL COURT ERRED ON REHEARING BY DELETING THE PRE-JUDGMENT INTEREST AWARD ORIGINALLY MADE, BY DOGMATICALLY APPLYING CERTAIN MECHANICS' LIEN PRINCIPLES NOT RELEVANT TO THIS CAUSE.

The above argument on interest was not reached by the Fourth District majority, because the initial question of liability for the principal was resolved unfavorably to Florida Steel. It is submitted by Florida Steel that this issue should have been reached, and resolved in Florida Steel's favor, as the dissent urged.

It is basic law that where a liquidated amount is due from a particular fund -- but is not paid -- the fundholder owes the claimant interest from the date the money became due. See, e.g., Adams, George, Lee, et al. v. Westinghouse, 597 F.2d 570, 574 (5th Cir. 1979); Hatch v. Minot, 369 So.2d 974, 978 (Fla. 2d DCA 1979). Another principle, which the trial court applied after King's Point urged the red herring upon it post-judgment, is that materialmen to a contractor, not in privity with the owner, are not entitled to pre-judgment interest on their mechanics' lien claims against owners, since there is no initial contractual basis for the obligation. Viewing this standard another way, in most cases an owner or his property does not first become liable to the non-privity claimant until judgment is entered, and therefore interest should not be due

on the theretofore "non-liability." Florida Steel maintains that the latter principle is specious in this case.

If the Court decides favorably to Florida Steel on the first point in this brief, it must be decided which of the two lines of authority for the award, or not, of pre-judgment interest applies. To make this decision it is necessary to analyze the basis of the $186,575.07 principal award, and to answer the question -- when did King's Point first become liable to Florida Steel for the $186,575.07? If it was not until entry of the judgment, then pre-judgment interest may be inapplicable. Such is not the case here, however.

It must be recalled that underlying the $186,575.07 principal award is the statutory requirement, F.S. §713.06(3)(e), that King's Point had to give Florida Steel the money in its hands in April, 1981 when Logan & Clark abandoned the job, not in October, 1983 when the Court reduced the mandatory language of the statute to judgment. Simply, the facts from the Pre-Trial Stipulation (A. 7-12) are that Logan & Clark had a $3,305,010 contract, dated November, 1980, to build a concrete shell, and that when the job was abandoned mid-way in April, 1981, only $782,100 had been properly paid thereunder, leaving a $2,522,910 as yet unpaid balance on the contract. (A. 11, at ¶ 3b (xxix)).[11] The trial court then had to

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[11]The owner argued at the trial level that since the arbitrators (who heard the owner's dispute with Logan & Clark) determined that the contractor -- Logan & Clark -- had no money coming to it, there was no money left to distribute to lienors from the "contract price." The contract price in this case was agreed to be $3,305,010. (A. 11, at ¶ 3b (xxix)). Logan and

determine whether this $2,522,910 could be kept from those who worked on the project, and supplied material to it, through abandonment, and instead appropriated for subsequent work, as King's Point appropriated it, or whether the work up until abandonment had to be paid for with those funds first, before the fund could be used for the cost of completion.

The trial court found that F. S. § 713.07(4) applied, which provides that before an owner recommences construction after abandonment, he must be either:

> (a) pay all lienors, prior to recommencement, in full or pro rata in accordance with the payment provisions of the Act, § 713.06(4), or
>
> (b) record an Affidavit of Intention to Recommence Construction stating that all lienors giving notice to him have been paid in full, except for those lienors listed in the affidavit.

Since it was stipulated that King's Point did not file such an Affidavit of Intent to Recommence under (b), above, it had to

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[fn.11 cont.] Clark received only $782,100, leaving a balance under the contract of $2,522,910, not zero. Id. The contract price is "frozen" (but for extras and change orders) by its terms and has nothing to do with what the original contractor is himself entitled to if he abandons. F. S. §713.01(3). This point is made clear by the Fourth District's discussion of the Alton rule in the text at footnote 1, page 25, of Tamarac Village, Inc. v. Bates & Daly Co., 348 So.2d 23 (Fla. 4th DCA 1977). Any attempt by King's Point to stress that §713.01(3) allows reduction of the contract price for "breaches" is ineffective here since damages which it suffered in 1981 on abandonment were never stipulated to or proven, since it dropped its claim against Logan & Clark (A. 21), and because the 1982 completion contract price (which also was not in evidence) is not probative of its 1981 damages for breach of the 1980 contract.

pay lienors prior to recommencement, in full, or pursuant to F. S. §713.06(4) if there were not enough funds. (Again, this is not applicable here, as the only claim against the $2,522,910 was Florida Steel's $186,575.07 claim).

Similarly, F. S. §713.06(3)(e) requires:

> . . . (e) If the improvement is abandoned before completion, the owner shall determine the amount due each lienor giving notice and shall pay the same in full or prorate in the same manner as provided in subsection (4).

Since the Pre-Trial Stipulation proves that there was more than enough to pay Florida Steel in full, (i.e. there was $2,522,910 after Logan & Clark left and before the January, 1982 recommencement, (A. 11 at ¶ 3b (xxix)), and that Florida Steel had given notice (A. 11 at ¶ 3b (xxviii)), the money was due on abandonment, in April, 1981, or certainly at the latest on June 1, 1981, when the Claim of Lien was filed, and demand made. Arguments to the effect that the money was not due to Florida Steel from the undisbursed contract funds until judgment are simply inapposite, where the statute mandates that the owner shall pay in full, if the improvement is abandoned. Similarly, the logic supporting no prejudgment interest because of a lack of privity in other mechanics' lien cases are simply inappropriate here.

Why Interest Should be Paid - The Cases

Although the above statutory analysis should be enough to mandate reversal with directions to include prejudgment

interest, petitioner hastens to show that the cases support the interest award, too. As was stated in Flood v. Clark, 111 So.2d 465 (Fla. 3rd DCA 1959), where the owner, as here, disputed whether it was holding funds, but not whether the monies were due to the lienor or whether the lien was properly perfected,

> The amount and validity of the liens has never been in dispute. Only the size of the fund available for their discharge has been in dispute. The appellants could have saved the interest by paying out the fund ratably to the lienors, by depositing the money in court by a bill of interpleader, or by depositing it in court when this complaint was filed. They have improperly kept money belonging to others. We think that interest is allowable without the aid of statute, but we note that § 84.24, Fla. Stat., F.S.A., in dealing with the procedure for transferring a mechanic's lien from land to bond, requires that the amount of the bond should cover the interest in the sum claimed by the lienor. This seems a clear legislative declaration that mechanics' liens bear interest.
>
> 111 So.2d at 468.

This policy was also followed in Combs v. St. Joe Papermakers Federal Credit Union, 383 So.2d 298 (Fla. 1st DCA 1980), where a non-privity subcontractor was held entitled to make a claim against the retainage funds which the owner was, by statute, required to hold. The owner did not hold the funds. The Combs court reversed the trial court's denial of pre-judgment interest and awarded interest from the date the claim of lien was filed. Again, the theory is that the owner wrongfully maintained possession and use of the funds, when the funds rightfully belonged to the lien claimant since the date

of the lien.

Discussion of Inapplicable Cases

A discussion of both sides of the pre-judgment interest question is necessary to flesh out the speciousness of the "no privity, no pre-judgment interest" maxim which the respondents will undoubtedly raise in the answer brief, as they did in the trial court. Their principal support comes from Gerber Groves, Inc. v. Belle Glade Agricultural Contractors, Inc., 212 So.2d 669 (Fla. 2d DCA 1968). In Gerber Groves, an equitable lien case, Belle Glade was a land clearing subcontractor to Howard Drawdy, a general contractor, who contracted with Gerber Groves, Inc., the owner's agent. The court specifically found that Belle Glade "contracted with and looked to Drawdy for its money. . . [until] Drady 'went broke' and demonstrated inability to complete his contract." Id. at 672. The analysis in that case[12] provides the general rule -- where there is no contract between the subcontractor and owner, no interest is payable until the lien and its extent, and hence the owner's [land's] liability is established, which is ordinarily by judgment.[13] This general principle is re-

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[12]As well as in other cases relied upon by respondents below, such as Horne v. C&R Building Materials, Inc., 321 So.2d 617 (Fla. 3d DCA 1975) and Sharpe v. Ceco, 242 So.2d 464 (Fla. 3d DCA, 1971).

[13]Under the general rule, if the owner complies with the law and properly disburses all of the contract money, it will never have to pay the non-privity subcontractors and materialmen. F. S. §713.06(1). Only if a proven disbursement error or some other irregularity is shown at trial will the owner have to pay non-privity claimants.

affirmed by Gerber Groves, Inc., but influences nothing in the case at bar where the money, by law, had to be paid on abandonment.[14] Abandonment "forces" the owner into privity with lienors by requiring direct pro tanto payment to them on abandonment, not three years or later until the owner can no longer hold off a trial date.

Computation of Interest

The statutory rate applicable from June 1, 1981, the date the plaintiff's claim of lien was filed, through July 1, 1982 was six percent per year, for a total over those 13 months of 6.5%. F.S. § 687.01 (1981). Thereafter, the statutory rate of interest increased to 12% per year. F.S. § 687.01 (1982 Supp.) Over the 15.75 months between the change in the statute until the date of judgment, another 15.75% interest applies, for a total of $40,580.08, including per diem interest, as the court calculated in paragraph 3 of the original judgment dated October 24, 1983. (R. 81). The interest rate applicable to this claim increases when the statutory rate was increased. George L. Simonds Co. v. Graham, 395 So.2d 1190 (Fla. 5th DCA 1981).

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[14]True, if there were no funds in the owner's hands remaining on the contract, the owners would not have anything to pay. F. S. §§713.06(3)(e), 713.06(4). But here there were funds enough for the legally required 100% payment due to Florida Steel in April, 1981, when there was abandonment.

CONCLUSION

The rule in Alton Towers is good as far as it goes -- that is, it covers only those projects where construction is interrupted, but the improvement is not abandoned. This Court did not reach F. S. §713.06(3)(e) or §713.07(4) in Alton Towers, because those sections deal with abandonment of improvements, and the limited ability to reverse of priorities on cessation of construction. Those sections are relevant to disposition of this case. Their application here does not affect the viability of Alton Towers, generally; rather, their application recognizes the distinction of this case from the Alton Towers facts.

The certified question, then, must be answered in the negative, for Alton Towers does not apply to a construction project which is interrupted for a significant period of time.

Finally, since money was definitely due to Florida Steel from King's Point by June 1, 1981, the date the claim of lien was filed, King's Point is indebted for pre-judgment interest on the sums found by the trial court to be due.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Clunet R. Lewis, Esquire, Jaffe, Snider, Raitt & Heuer, P.A., Attorneys for King's Point, 1800 First National Building, Detroit, MI 48226 and Rosemary Cooney, Esquire, Paxton, Crow, Bragg & Austin, P.A., P. O. Drawer 1189, West Palm Beach, FL 33402 this 10th day of April, 1985.

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