



CONCEPT

FLORIDA

NOVEMBER 2011

VOL. 43

PRIORITY OF LIENS UNDER NOTICE OF COMMENCEMENT FILED BY LESSEE

by John D. Benson, Fund Underwriting Counsel

Sec. 713.10, F.S., provides that a lien shall extend to the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is thereafter acquired in the real property. Where an improvement to a leasehold interest is made by a lessee in accordance with an agreement between such lessee and their lessor, the lien shall also extend to the real property interest of the lessor. Problems may arise even where the lease expressly provides that the real property interest of the lessor shall not be subject to liens for leasehold improvements made by the lessee.

Effective July 1, 2011, Sec. 713.10(2)(b), F.S., was amended to specify that a lessor's interest in property is not subject to a lien for construction of leasehold improvements made by lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or
2. The terms of the lease expressly prohibit such liability, and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:

- a. The name of the lessor.
- b. The legal description of the parcel of land to which the notice applies.
- c. The specific language contained in the various leases prohibiting such liability.
- d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

In addition, Sec. 713.10(3), F.S., was added to authorize a contractor or lienors to demand that a lessor provide verified copies of the lease, which copy shall be verified under Sec. 92.525, F.S., prohibiting liability for liens on improvements made by a lessee.

The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in Sec. 713.06(2), F.S. The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after

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CASE REVIEWS

Equitable Owners liable for Ad Valorem Taxes on Improvements

Accardo v. Brown,
63 So.3d 798
(Fla. 1st DCA 2011)

Various leaseholders appealed a trial court's order finding them liable for ad valorem taxes as equitable owners of real property. The leaseholders leased land from the county under renewable 99-year leases and used the property for private development purposes. The tax collector charged the leaseholders ad valorem taxes on improvements and the underlying land. The leaseholders disputed the charges and argued they were only liable for personal property taxes because they did not own the land.

Sec. 196.199(2)(b), F.S., states that a leasehold shall only be taxed on intangible personal property. However, in *Ward v. Brown*, 919 So.2d 462 (Fla. 1st DCA 2005), *rev. denied* 923 So.2d 1165 (Fla. 2006), the court held leaseholders were not exempt from ad valorem taxes pursuant to Sec. 196.199, F.S., because they were equitable owners of the property. The majority in the *Ward* case relied on the following factors to determine the leaseholders were equitable owners of the real property and subject to ad valorem taxes: (1) leaseholders had rights to perpetual lease renewals, (2) they had the right to use or rent the property, (3) they had the right to encumber their interest, (4) they had the right to transfer their property rights, (5) they had the right to realize appreciation in value, (6) they had to maintain the improvements, and (7) they were responsible for payment of taxes.

Following the *Ward* case, the First District Court held the trial court's ruling was proper and the leaseholders were equitable owners of the real property liable for ad valorem taxes.

Use of Tax Deed Sale Surplus Funds

BECC Holding II, Inc. v. Rachtanov,
66 So.3d 1089
(Fla. 3d DCA 2011)

A condominium unit was sold at a tax deed sale. The high bidder at the sale purchased the unit for \$40,000 and received a tax deed. There remained \$22,416.45 as surplus funds in the registry of the court. The tax deed purchaser redeemed a 2008 tax certificate by paying \$5,190.45 to the tax collector.

The purchaser then filed a supplemental motion for reimbursement from the surplus for his payment to redeem the 2008 tax certificate. The trial court granted the motion, holding that the 2008 tax certificate was a lien of record held by a governmental unit against the property and that accordingly the 2008 certificate must be redeemed from the surplus funds from the tax deed sale.

On appeal the Third District Court affirmed the trial court's order pursuant to Sec. 197.582 (2), F.S., which permits excess proceeds remaining after a tax deed sale to be used to pay off any "lien of record held by a governmental unit against the property."

Promise to Give Mortgage Insufficient for Constructive Trust

Bank of America v. Bank of Salem,
48 So.3d 155
(Fla. 1st DCA 2010)

Bank of America (BOA) and Bank of Salem (BOS) each loaned Howell \$400,000. Both loans were unsecured, but both banks claimed that they had loaned the money so that Howell could purchase a condominium and that he had promised to secure the loans with a mortgage on the unit. Shortly after he purchased the condominium unit, however, Howell died, and the unit went into his family trust.

BOA sued the trust seeking to impose an equitable lien, equitable mortgage, and constructive trust on the unit, and BOS intervened and filed a cross claim and counterclaim seeking the same relief. BOA obtained a ultimately judgment against Howell from an unrelated debt and levied the judgment against the unit and had it sold. BOS then sought and the court granted a constructive trust ordering BOA to pay BOS \$400,000 from the proceeds of the sale of the unit.

On appeal the First District Court held that for a constructive trust a plaintiff must by clear and convincing proof show (1) a promise, express or implied, (2) a transfer of property in reliance on the promise, (3) a confidential relationship, and (4) unjust

enrichment. In this case, BOS was unable to show that its loan was contingent upon a mortgage on the unit and the allegation of Howell's future promise to give a mortgage was insufficient to grant a constructive trust. BOS also failed to show it had any right to the sales proceeds because it failed to show its loan was related to the acquisition of the unit and because it had no lien or lis pendens recorded against the unit.

Summary Judgment Requirements

Gick v Wells Fargo Bank,
68 So.3d 989
(Fla. 5th DCA 2011)

Wells Fargo filed an unverified mortgage foreclosure complaint against the Gicks. In response, the Gicks propounded discovery requests and sought an extension of time to answer the complaint. After responding to the Gicks discovery requests, Wells Fargo moved for summary judgment. Wells Fargo's affidavit in support of summary judgment contained conclusory statements and did not reference how the Gicks defaulted on their obligations to Wells Fargo. After a hearing, the trial court granted summary judgment in favor of Wells Fargo.

On appeal the Fifth District Court reversed the trial court's summary judgment, holding that a plaintiff may move for summary judgment even if the defendant has not filed an answer; however, under such circumstances, the plaintiff must conclusively demonstrate that the defendant cannot plead or raise issues of material fact. Because the affidavit filed in support of summary judgment did not conclusively establish the Gicks failed to make payments when due, the appellate court found issues of fact that precluded summary judgment.

Damages resulting from a Breach of Lease

Bucky's Barbeque of Fort Lauderdale, LLC v. Millennium Plaza Acquisition, LLC,
67 So.3d 1207
(Fla. 4th DCA 2011)

A landlord, Millennium, sued tenant, Bucky's BBQ, and guarantor, Mark Rodberg, for damages resulting from a breach of lease. The trial court entered summary judgment in favor of landlord, and against tenant and guarantor.

On appeal to the Fourth District Court the tenant and guarantor argued the trial court improperly

determined damages by failing to consider landlord's use of the premises after the tenant vacated. In Florida, a landlord's remedies for breach of lease are (1) to retake possession of the property for its own use, (2) to retake possession for the tenant and hold the tenant responsible for the difference between the rent owed and any rent landlord is able to recover from re-letting the premises, or (3) to sue the tenant as each installment of rent matures. The remedy chosen by the landlord is determined by the landlord's actual use of the premises when the premises have been vacated.

In this action, the trial court made no findings concerning the landlord's use of the premises, even though the tenant raised it as a defense. Moreover, when a court awards rent on an accelerated basis, it must consider and apply rents received by the landlord throughout the term of the lease. Because the trial court did not consider landlord's use of the premises or future rents landlord may receive, the damage award was objectionable. The appellate court therefore reversed the summary judgment and remanded the matter to the trial court on the issue of damages.

Payment of Disputed Rent into Court Registry

Hollywood Mobile Estates Ltd. v. Hollywood Estates Indep. Tenants Ass'n, Inc.,
67 So.3d 1194
(Fla. 4th DCA 2011)

A lessee of property that was developed into a mobile home park subleased individual lots. The sublessee tenants association sued the lessee to invalidate an allegedly unreasonable rent increase, to obtain damages or a reduction in rent for reducing services, and to obtain damages for not keeping the park in good repair as required under Ch. 723, F.S. The lessee filed a counterclaim for declaratory relief and an amended counterclaim for damages for accrued rent. The lessee moved for rent to be deposited into the court registry pursuant to Sec. 723.063(2), F.S., but the trial court denied the motion.

On appeal the Fourth District reversed the trial court's order, holding that because the lessee sued for damages for unpaid rent and the association had asserted material noncompliance with Ch. 723, F.S., the trial court erred when it failed to apply the mandatory requirement of Sec. 723.063(2), F.S., for mobile home owners to pay disputed rent into the court registry.

Failure to Give Adequate Notice Under Mortgage

Laurencio v. Deutsche Bank Nat. Trust Co.,
65 So.3d 1190
(Fla. 2d DCA 2011)

In a mortgage foreclosure, the trial court granted summary judgment in favor of the mortgagee, denying mortgagor's motion for leave to amend answer and affirmative defenses, where the mortgagor asserted the affirmative defense that the mortgagee failed to meet conditions precedent because it filed its foreclosure action without giving adequate notice as required in the mortgage.

On appeal the Second District Court reversed the trial court's action, holding that the mortgagee would not be prejudiced by an amendment to allege that the mortgagee failed to comply with its own documents and that the amendment was not futile in light of the unrefuted allegations that the bank failed to perform a condition precedent.

One-year Limitation applies to Condo Owners' Claim

Melbourne Ocean Club Condominium Ass'n, Inc. v. Elledge,
36 Fla. L. Weekly D1895
(Fla. 5th DCA 2011)

Condominium unit owners brought an action in August 2007 against the condominium association and the managing agent, who also served as each unit owner's exclusive rental agent. In one count, the owners alleged that the managing agent breached its contracts with the owners by failing to provide annual audited financial statements as required by the terms of the rental agreements. The owners sought injunctive relief requiring the managing agent to obtain audited financial statements for the years 2002-2007. The trial court ruled that some of the owners were entitled to receive audited financial statements from the managing agent for 2004-2006 and that all of the owners were entitled to audited statements for 2007.

On appeal the Fifth District Court affirming in part, reversing in part, and remanding of the trial court's judgment. The appellate court held that the action to require the managing agent to obtain and produce audited financial statements was in the nature of an action for specific performance and thus governed by the

one-year statute of limitations set forth in Sec. 95.11(5)(a), F.S. The court concluded that it was error for the trial court to order the managing agent to provide some of the owners with audited financial statements for the years 2004 and 2005.

Fence Blocking View of Waterway

Mickel v. Norton,
36 Fla. L. Weekly D2113
(Fla. 2d DCA 2011)

Mickels installed a six-foot high vinyl fence along the property line between their home and the Nortons' home. The Nortons sued the Mickels alleging the fence constituted a private nuisance and that it violated their "riparian and littoral rights" by obstructing their view of the water. The trial court entered a final judgment requiring the Mickels to remove their fence.

On appeal the Second District Court reversed the trial court's judgment granting an injunction because the fence did not obstruct Nortons' view of the water bordering their property. The court pointed out that the neighbors' properties, situated on a small peninsula, bordered different bodies of water. The court held that the Mickels' fence obstructed at most a view of a body of water not bordering the Nortons' property, and that Nortons did not have any "private or special riparian rights" in these circumstances. The appellate court also held that the Nortons' private nuisance claim failed because the fence "served a useful purpose by protecting [Defendants'] privacy and keeping trespassers from entering their property," and there was no evidence in the record supporting the Nortons' claims.

Application of Loan Spreading Statute

Northwood SG, LLC v. Builder Financial Corp.,
36 Fla. L. Weekly D2028
(Fla. 4th DCA 2011)

Borrowers executed a series of promissory notes in favor of lenders as consideration for loans for stated periods during which interest would accrue and the borrowers would be required to make monthly interest payments. At the end of the loan periods, principal would be due. After the loans matured and the borrowers did not repay them, they sued the lenders and sought declaratory judgment that the loans were usurious. The lenders filed motions for summary

judgment, and the trial court granted them and found that the loans were not usurious and that the lenders lacked corrupt intent to make usurious loans.

On appeal the Fourth District Court affirmed the trial court's judgment, holding that because each loan was structured as requiring a series of advances and the spreading statute in Sec. 687.071(3), F.S., controlled the calculation of the interest rate. The appellate court concluded that the trial court correctly applied the spreading statute and that the calculations on each note yielded a non-usurious rate of less than 25 percent.

Doc Stamps on Deed and Property Value

Ortmann v. Bell,
36 Fla. L. Weekly D2066
(Fla. 2d DCA 2011)

A trustee sold real estate, which was a trust asset, for \$1.5 million. The purchaser flipped the property to a second buyer for a purported purchase price of \$4.5 million. The beneficiaries of the trust sued trustee for breach of fiduciary duty for selling the property for \$3 million less than it was worth. The trial court entered a judgment against trustee for the \$3 million as well as trustee's fees and attorney's fees that trustee was required to repay to the trust.

On appeal to the Second District Court, the beneficiaries argued that trustee should be held accountable for the \$3 million difference because the documentary stamps on the warranty deed proved that the purchaser paid \$4.5 million for the property. Alternatively, the beneficiaries argued that the documentary stamps affixed to the warranty deed were prima facie evidence of the value of the property and that the trustee should be held accountable for selling the property for \$3 million less than it was worth.

The Second District rejected these arguments, reasoning that to the extent the documentary stamps created any presumption about the sales price, the presumption vanished when countered by evidence of the \$1.5 million contract between the trust and the purchaser and the appraisal for \$625,000 only three months before the sale as well as by the trustee's testimony that she received a settlement statement reflecting a sales prices of \$1.5 million and never saw a settlement statement reflecting a \$4.5 million sales price. The appellate court also reasoned that in this case the reference to the amount of the documentary stamps

on the deed did not constitute a statistically valid method of establishing the value of the property sold. The appellate noted that the appraisal was less than the price the trustee obtained for the property and that the sales price was consistent with the trustee's experience and the amount that the beneficiary had agreed to accept for the sale. The Second District Court reversed the trial court's judgment, holding that the final judgment was not supported by competent, substantial evidence.

Counterclaim to Foreclosure Action must be Considered

Peterson v. Affordable Homes on Palm Beach, Inc.,
65 So.3d 112
(Fla. 4th DCA 2011)

Affordable Homes sued Peterson to foreclose a mortgage. In response, Peterson filed a counterclaim alleging Affordable Homes perpetrated a fraud by failing to fully disclose the condition of the property at the time of sale. Peterson alleged the principal of Affordable Homes was the seller of the property. Affordable Homes moved for summary judgment and the trial court granted the motion before considering Peterson's counterclaim.

On appeal the Fourth District Court reversed the trial court's summary judgment, holding that allowing the foreclosure action to proceed before deciding Peterson's counterclaim effectively denied Peterson the right to a jury trial on Peterson's fraud action. The appellate court concluded that this was error and remanded the action for the trial court to consider the fraud claim before ruling on the foreclosure action.

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demand, or who serves a false or fraudulent copy, is subject to a lien under this part by the contractor or lienor who made the demand.

The amendments to the statute pose certain risks when insuring real property where a NOC for leasehold improvements is recorded by the lessee. Irrespective of whether the notice as provided under Sec. 713.10(2)(b), F.S., is filed, demand can be made on the lessor under Sec. 713.10(3), F.S., by any lienor that has furnished labor, services or materials. For ongoing construction of leasehold improvements, such demands can occur after closing resulting in a lien that has priority established back to the previously recorded NOC. Accordingly, where a NOC is recorded by the lessee for construction of leasehold improvements, they should be treated as encumbering the real property interest of the lessor as well as the lessee. For insuring title, compliance with TN 21.03.01 or TN 21.03.03, as applicable, or an exception for any claims of liens filed or which may be filed pursuant to the NOC will be required. □



Real Estate Councils: Creating Business Opportunities for Their Members

Great organizations require great leaders, and the Attorneys' Real Estate Councils of Florida are no different. Headed by attorneys who recognize the value of professional relations, continuing education and effective marketing, these organizations are creating new opportunities for REC members. Dedicated REC leaders continually provide the vision and the energy needed to make REC members shine.

The 21st Annual Real Estate Law Symposium, "Where REALTORS® & Attorneys Meet," hosted by the Central Florida Real Estate Council (CFREC), is a perfect example of what is going on in the RECs. This day-long event was designed for Realtors seeking

the latest, essential information on today's most pressing issues in real estate law. The symposium explored the "ins" and "outs" of the sales contract, escrow deposits, DBPR complaint process, social media, international legal updates, title insurance, and much more. CFREC board members Henry Cooper, Frederick Jones, Kenneth L. Schlitt (newly elected president), Grace Ann Glavin, Stephen Chong (immediate past president), and Michael J. "Mick" Gasdick are to be congratulated on this event's ongoing success. As Mr. Chong explains, "The Symposium provides us an opportunity to partner with the Orlando Regional Realtor Association. We deliver valuable education for their associates and raise the profile of real estate attorneys." Over 200 realtors attended this year's event.

Events like this are happening all over the state, including the North Dade & The Beaches Real Estate Council School Supply Drive for Children in Need. This outreach program helped over 100 children at Fulford Elementary and the Community Partnership for Homeless in Miami. In March, the Escambia-Santa Rosa REC hosted the FAR/BAR Contract Seminar, which was attended by more than 80 realtors. This popular event allowed REC members to engage realtors on the FAR/BAR contract and continue to build rapport with this group of real estate professionals. The possibilities for creating a good event are limitless with the end results always being the same: better relationships and better attorneys.

The RECs are proving to be successful in reaching out to the community and marketing their members through the REC websites. In the past three months alone, 458 unique visitors navigated to these sites. Eighty-three of those visitors were referred from The Fund's consumer-focused website, www.fundhomeinfo.com.

The Fund continues to support these sites and other marketing initiatives to generate a greater awareness in the public about the importance of using real estate attorneys. René Rutan, Fund REC Relationship Manager, is the main point of contact that tethers together The Fund and the RECs. As Bay Area REC President, Marshall Deason explains: "The Bay Area REC would not exist if it were not for The Fund. We've met with Rene a couple of times, and she's been very helpful - all of our members are very appreciative."

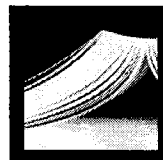
With an average membership nearing 100 attorneys per chapter, there is a lot of talent and energy harnessed within the RECs. The web presence and attorney directories are a great resource for realtor referrals and consumers seeking help. The RECs are something that every Fund Member can be proud of, can be a member of, and can look to for guidance to become a better lawyer. The Fund is proud to support the 19 RECs across Florida and appreciative of the REC leaders and members who make them effective. Joining is simple and further information can be found at www.JoinAREC.com. □

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TEAM EDUCATION

Team Education – Your Partner in Legal Education

A new statute totally revising Florida's laws relating to powers of attorney went into effect on Oct. 1, 2011. The changes in the law are numerous. The 2011 statutes provisions include, but are not limited to, the elimination of springing powers of attorney and the obligation to accept out-of-state powers that are not executed in the manner prescribed under Florida law. The statute makes it clear that contingent powers are not allowed. Proper execution of a power of attorney does not mean that the powers granted therein are acceptable for reliance in transactions and for insuring. Real estate practitioners will be greatly impacted by these changes. Find out your obligations in getting approval from lenders; how to draft a power of attorney that can be used to convey or finance homestead property; and what to look for in powers presented to you for use in a closing.

You can educate yourself and your office staff while conducting your practice by taking advantage of The Fund's latest Fundinar - *Harness the Power of Florida's New Power of Attorney Law in Real Estate Transactions*, being offered online beginning Nov. 7, 2011.

Other informative and dynamic three hour live in-person seminars and one hour live Fundinars (web based seminars) are available to Fund Members and their staff on timely legal topics including Surveys and Legal Descriptions; Title Examination Workshop; and Mortgage Modifications are available during November and December. A new Fundinar will be rolled out Dec. 12, 2011, on Condominium and Homeowners Associations. CLE credit with The Florida Bar, NALA and DFS is available for all live, in-person seminar course offerings. CLE credit with The Florida Bar and NALA is available for all live Fundinars.

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