

# RECENT FLORIDA REAL PROPERTY CASES

(January 2017 through March 2018)

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## I. EASEMENTS

**A. Use of Easement May Not Be Limited to Named Grantee.** Where an easement is not expressly confined to a limited use, the grantee's invitees may be entitled to use that does not exceed the original intent of the easement. *Kovach v. Holiday Springs RV, LLC*, 223 So.3d 1069 (Fla. 5th DCA 2017).

**B. Where Lessee Transfers Interest in Lease But Retains an Easement, Transaction is Sublease.** Where the lessee retained a "perpetual non-exclusive easement" over the property for ingress, egress, and parking, the transfer was a sublease, and not an assignment of the lease. *City of Pensacola v. Seville Harbour, Inc.*, 219 So.3d 984 (Fla. 1st DCA 2017).

## II. JUDGMENTS

**A. Citizen Input May Be Grounds to Support Government Land Use Decisions.** County's final decision denying development group's proposed amendment to land use plan was fairly debatable, and thus did not violate due process. *Pinellas County v. Richman Group of Florida, Inc.*, 42 Fla. L. Weekly D2526 (Fla. 2d DCA 2017).

## III. LEASES & LANDLORD/TENANT

**A. Where Lessee Transfers Interest in Lease But Retains an Easement, Transaction is Sublease.** Where the lessee retained a "perpetual non-exclusive easement" over the property for ingress, egress, and parking, the transfer was a sublease, and not an assignment of the lease. *City of Pensacola v. Seville Harbour, Inc.*, 219 So.3d 984 (Fla. 1st DCA 2017).

## IV. LIENS

**A. Foreclosure of Equitable Lien on Homestead Property.** An equitable lien may be properly imposed, even on homestead property, where equity so demands. *Flinn v. Doty*, 214 So.3d 683 (Fla. 4th DCA 2017).

**B. 20-year Time Limit to Foreclose Code Enforcement Lien.** Sec. 162.10, F.S., provides a twenty-year statute of limitations for filing an action founded on a code enforcement violation lien. *City of Riviera Beach, Florida v. J & B Motel Corp.*, 213 So.3d 1102 (Fla. 4th DCA 2017).

**C. Determining Priority of Competing Liens Held By a CDD and a County Tax Collector.** CDD liens are coequal with the lien of state, county, municipal, and school board taxes. As a result, one coequal lienholder should not be able to force the other coequal lienholder to wait until the first lienholder acts. *Villages of Avignon Community Development District v. Burton*, 215 So.3d 127 (Fla. 2d DCA 2017).

**D. Strict Compliance with Notice Requirements of Sec. 720.305, F.S. Needed for HOA Lien to Attach.** HOA's failure to provide homeowner with the 14-day notice of hearing required by Sec. 720.305(2)(b), F.S., rendered its lien unenforceable. *Dwork v. Executive Estates of Boynton Beach Homeowners Association*, 219 So.3d 858 (Fla. 4th DCA 2017).

**E. HOA Declarations Giving Mortgage Liens First Priority Not Invalidated by Sec. 720.3085(2)(b), F.S.** Sec. 720.3085, F.S., does not invalidate language in HOA declarations giving first mortgage liens priority. *Beacon Hill Homeowners Association et al., v. Colfin AH-Florida* 221 So.3d 710 (Fla. 3rd DCA 2017).

**F. Lender Maintains Subject Matter Jurisdiction in Competing Foreclosure.** Sec. 48.23(1)(d), F. S., only bars enforcement of liens which are unrecorded at the time a lis pendens is recorded. A lender who has a lien recorded prior to a competing lienor's lis pendens is not barred from enforcement by failure to intervene in the competing lienor's litigation. *Ditech Financial LLC v. White*, 222 So.3d 603 (Fla. 4th DCA 2017).

**G. A Court Can Lien Real Estate to Secure Future Payments.** An order for alimony and child support may allow for a lien to secure both arrearages as well as future payment obligations. *Mackoul v. Mackoul*, 224 So.3d 921 (Fla. 1st DCA 2017).

**H. Liens Placed on Property between Final Judgment of Foreclosure and Judicial Sale ARE Discharged by Sec. 48.23, F.S. – An Update on Ober.** *Ober v. Town of Lauderdale-by-the-Sea*, 218 So.3d 952 (Fla. 4th DCA 2017).

## **V. MISCELLANEOUS**

**A. Substantial Compliance of Statute is enough to Enforce Construction Lien.** Where a sub-contractor has "substantially complied" with Sec. 713.06(2)(a), (b) and (c), F.S., errors and omissions on a Notice to Owner will not prevent the enforcement of a claim against a person who has not been adversely affected, with the exception of Sec. 713.06(2)(a), F.S., which calls for strict compliance with the time requirements, but not with service requirements. *Trump Endeavor 12, LLC, v. Fernich, Inc.*, 216 So.3d 704 (Fla. 3d DCA 2017).

**B. Construction Lien Limited to Contracted-For Services.** Costs associated with labor, material, or services that are not required by the direct contract are not lienable. *Criswell v. JM Custom Woodworking, Inc.*, 216 So.3d 717 (Fla. 4th DCA 2017).

**C. ‘Punch-List’ Clause May Extend Statute of Limitations and Statute of Repose.** Florida’s statute of repose under Sec. 95.11(3)(c), F.S., holds that, “An action founded on...construction of an improvement to real property... must be commenced within 10 years after the date of...completion...of the contract.” A contract is not deemed complete until both sides of the contract have been performed. A provision in the contract which provides a method for the parties to close the transaction with outstanding obligations remaining under the contract extends the completion date for the purposes of calculating the time under Sec. 95.11(3)(c), F.S. *Busch v. Lennar Homes, LLC*, 219 So.3d 93 (Fla. 5th DCA 2017).

**D. Challenge To City’s Special Assessment Rendered It Voidable.** Challenges to apportionment of an assessment do not render the special assessment void, but voidable. Further, a taxpayer must challenge a voidable assessment within due time. *City of Cooper City v. Joliff*, 227 So.3d 633 (Fla. 4th DCA 2017).

**E. The Issue of Arbitrability may be up to the Arbitrator and not the Courts.** When a contract delegates the issue of ‘arbitrability’ authority to the arbitrator, it is no longer an issue for the courts to decide. *Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So.3d 1278 (Fla. 5th DCA 2017).

**F. Reversal of a Tax Deed Requires Reimbursement to the Purchaser.** If a tax deed is ordered to be vacated as a result of invalidity, the successful bidder at the tax deed auction is entitled to a judgment in the amount paid for the tax deed and all taxes paid upon the land, interest from the date of the issuance of the tax deed, all legal expenses in obtaining the tax deed, and the fair value of any permanent improvements made by the tax deed holder. *Ashear v. Sklarey*, 43 Fla. L. Weekly D181 (Fla. 3d DCA 2018).

**G. Election of Remedy Does Not Waive Alternate Remedy Based on Consistent Facts.** Where alternative remedies are available based on consistent facts, the election of one remedy does not waive the others. *Allegro at Boynton Beach, L.L.C. v. Pearson*, 227 So.3d 1288 (Fla. 4th DCA 2017).

**H. Court Controls Discharge of Lis Pendens When Suit Not Based on Recorded Instrument.** Where a lis pendens is not based on a recorded instrument, the court has discretion to control and discharge the lis pendens. *Ortiz v. Weiss*, 227 So.3d 689 (Fla. 3d DCA 2017).

**I. No TILA Cause of Action Where Lender Timely Refunds Non-Disclosed Mortgage Insurance.** If a lender ceases collection of PMI that is not disclosed to the borrower, and refunds all payments made, within the sixty day correction period, there is no cause of action under TILA. *Bennett v. Mortgage Electronic Registration Systems, Inc.*, 230 So.3d 100 (Fla. 3d DCA 2017).

**J. Party Taking Title Prior to Foreclosure May Contest Plaintiff’s Standing.** A party who takes title subject to the mortgage and prior to the lis pendens is an indispensable party and has the right to contest the lender’s standing to foreclose the mortgage. *3709 N. Flagler Drive Prodigy Land Trust v. Bank of America, N.A.*, 226 So.3d 1040 (Fla. 4th DCA 2017).

**K. PILOT Agreement Memorialized in Public Records Binds Subsequent Purchasers and is a Covenant Running with the Land.** Agreement recorded in the public records provides constructive notice. *AHF-Bay Fund, LLC v. City of Largo*, 169 So.3d 133 (Fla. 2d DCA 2017).

**L. Award in Divorce Decree May Not Be Ignored in Execution Proceeding.** Party seeking to enforce lien against one ex-spouse may not rely on the divorce decree to assume the ex-spouses are now tenants-in-common while ignoring the language of the divorce decree awarding the property to one ex-spouse. *Kennedy v. RES-GA Lake Shadow, LLC*, 42 Fla. L. Weekly D1436 (Fla. 1st DCA 2017).

**M. Reciprocity Provision of Sec. 57.105(7), F.S., Does Not Apply Where No Contract Exists between Parties.** A party winning the argument that no contract exists, may not then rely on the language in the contract for award of attorneys' fees. *Bank of New York Mellon Trust Company, N.A. v. Fitzgerald*, 215 So.3d 116 (Fla. 3d DCA 2017).

**N. Ban on Front-Yard Vegetable Gardens Not Facially Violative of Florida Constitution.** *Ricketts v. Village of Miami Shores*, 232 So.3d 1095 (Fla. 3d DCA 2017).

**O. No Right to Contractual Fees When Underlying Instrument Declared Void.** A fraudulent mortgage is void and unenforceable. A prevailing party may not rely on a void mortgage containing a contractual prevailing party fees/costs provision for an award of the same. *Wells Fargo Bank National Association v. Bird*, 43 Fla. L. Weekly D120 (Fla. 5th DCA 2018).

## **VI. MORTGAGES & MORTGAGE FORECLOSURES**

**A. Reformation of Deed Not Required in Mortgage Foreclosure.** So long as the legal description in the mortgage being foreclosed contains an accurate description of the encumbered property, an action to foreclose that mortgage is proper, even if the deed conveying the property to the mortgagor contained scrivener's errors and was not reformed. *Heartwood 2, LLC v. Dori*, 208 So.3d 817 (Fla. 3d DCA 2017).

**B. Surplus Funds Claims Must Be Made Within 60 Days of Sale.** Any subordinate lienholders claiming an interest in surplus funds from a resulting foreclosure must do so within sixty days from the sale date, not the date of issuance of the certificate of sale. *Bank of New York Mellon v. Glenville*, 215 So.3d 1284 (Fla. 2d DCA 2017).

**C. Foreclosure of Equitable Lien on Homestead Property.** An equitable lien may be properly imposed, even on homestead property, where equity so demands. *Flinn v. Doty*, 214 So.3d 683 (Fla. 4th DCA 2017).

**D. 20-Year Time Limit to Foreclose Code Enforcement Lien.** Sec. 162.10, F.S., provides a twenty-year statute of limitations for filing an action founded on a code enforcement

violation lien. *City of Riviera Beach, Florida v. J & B Motel Corp.*, 213 So.3d 1102 (Fla. 4th DCA 2017).

**E. Personal Jurisdiction Not a Requirement to Initiate Foreclosure Action.** Since personal jurisdiction is not required in an in rem foreclosure action, constructive service provides the court with sufficient jurisdiction to adjudicate the in rem claim. *Archer v. U.S. Bank, N.A.*, 220 So. 3d 477 (Fla. 5th DCA 2017).

**F. Lender Maintains Subject Matter Jurisdiction in Competing Foreclosure.** Sec. 48.23(1)(d), F. S., only bars enforcement of liens which are unrecorded at the time a lis pendens is recorded. A lender who has a lien recorded prior to a competing lienor's LP, is not barred from enforcement by failure to intervene in the competing lienor's litigation. *Ditech Financial LLC v. White*, 222 So. 3d 603 (Fla. 4th DCA 2017).

**G. Post-LP Purchaser Has No Right to Intervene.** Aside from a very limited exception to the general rule, a purchaser of real property, which was purchased post-LP, is not entitled to intervene. *Carlisle v. U.S. Bank, Nat'l Ass'n for Harborview 2005-10 Tr. Fund*, 225 So.3d 893 (Fla. 3d DCA 2017).

**H. The Statute of Limitations Does Not Bar Subsequent Foreclosure Action.** Each subsequent failure to pay the following month's payment obligation under a mortgage and note results in a new actionable default, even when a subsequent foreclosure action is filed more than four years after the initial default that accelerated the payment obligations. *The Bank of New York Mellon v. Anton*, 230 So.3d 502 (Fla. 3d DCA 2017).

**I. No Right to Contractual Fees When Underlying Instrument is Declared Void.** A fraudulent mortgage is void and unenforceable. A prevailing party may not rely on a void mortgage containing a contractual prevailing party fees/costs provision for an award of the same. *Wells Fargo Bank National Association v Bird*, 43 Fla. L. Weekly D120b (Fla. 5th DCA 2018).

**J. Foreclosing Lender Not Entitled to Damages Occurring Outside of the Statute of Limitations.** Foreclosure claims related to defaults older than five years, may be subject to the statute of limitations period, and a final judgment for foreclosure should exclude from damages, of any defaults occurring beyond the statute of limitation. *Velden v. Nationstar Mortgage, LLC*, 43 Fla. L. Weekly D147 (Fla. 5th DCA 2018).

**K. Current Property Owner Not Qualified for Safe Harbor Under Sec. 720.3085(2), F.S., May Benefit Indirectly Where Prior Property Owner Did Qualify.** *Villas of Windmill Point II Property Owners' Association, Inc. v. Nationstar Mortgage, LLC*, 229 So.3d 822 (Fla. 4th DCA 2017).

**L. Typographical Error in Legal Description May Not Bar Foreclosure.** Legal description containing an error was sufficient to enable the parties to ascertain and locate the property affected by the lien. *Bayview Loan Servicing, LLC v. Newell*, 231 So.3d 588 (Fla. 1st DCA 2017).

**M. No Standing to Foreclose Where Plaintiff Not Shown to Have Held Mortgage Note at Filing.** Unindorsed note made payable to original lender does not establish standing of subsequent entity to foreclose. *Green vs. Green Tree Servicing, LLC*, 230 So.3d 989 (Fla. 5th DCA 2017).

## **VII. RESTRICTIONS & HOMEOWNERS ASSOCIATIONS**

**A. Association Must Prove All Elements of Fraudulent and Negligent Misrepresentation Claims.** A party seeking to establish fraudulent misrepresentation is required to prove the following elements: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation. To establish negligent misrepresentation, a party is required to prove: (1) a misrepresentation of material fact that the defendant believed to be true but which was in fact false; (2) that defendant should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely on the misrepresentation; and (4) the plaintiff acted in justifiable reliance upon the misrepresentation, resulting in injury. *Arlington Pebble Creek, LLC v. Campus Edge Condominium Association, Inc.*, 232 So.3d 502 (Fla. 1st DCA 2017).

**B. Condo Owners Not Required to Pay Ad Valorem Taxes on Underlying Land Where They Are Non-Perpetual Sublessees of the County.** Association was not the equitable owner of underlying real property, and thus, not subject to ad valorem property taxation on the property. *Beach Club Towers Homeowners Association, Inc. v. Jones*, 231 So.3d 566 (Fla. 1st DCA 2017).

## **VIII. STATE TAXATION**

**A. Tax Appraiser May Revise Assessments if Homeowners are Given Notice and Opportunity to Contest.** Homeowners are entitled to contest corrected assessments at the “next scheduled value adjustment board,” pursuant to the Florida’s Taxpayer Bill of Rights as embodied in Sec. 192.0105, F.S. However, an adjustment not based on error is not necessarily void. *Nikolitis v. Haney and Gannon*, 221 So.3d 725 (Fla. 4th DCA 2017).

**B. PILOT Agreements Not Unconstitutional.** Payments-in-lieu-of-taxes (PILOT) agreement does not violate statute governing tax exemption for affordable housing operators and does not violate the state constitution. The Florida Supreme Court in *City of Largo v. AHF-Bay Fund LLC*, 215 So.3d 10 (Fla. 2017) quashed the decision of the 2d DCA in *City of Largo v. AHF-Bay Fund, LLC*, 169 So.3d 133 (Fla. 2d DCA 2017).

## **IX. VENDORS & PURCHASERS**

**A. Brokers May Have an Ownership Interest in Retained Deposits.** A listing agreement that provided that any unpaid commissions were to be paid from retained deposits when a unit did not close gave broker an ownership interest in the deposits. *Plaza Tower Realty Group, LLC v. 300 South Duval Associates, LLC and The Union Labor Life Insurance Company* 223 So.3d 1079 (Fla. 3d DCA 2017).

## **X. WATER & WATERCOURSES**

**A. Littoral Rights of Lakefront Property Owners Include Unobstructed View.** Owners of waterfront property have riparian and/or littoral rights. Riparian rights refer to waterfront owners along a river or stream, and littoral rights to waterfront owners abutting an ocean, sea, or lake. Lakefront property owners have several common law littoral rights, including that of an unobstructed view of the lake. *HagertySmith, LLC v. Gerlander*, 42 Fla. L. Weekly 2542 (Fla. 5th DCA 2017).

## **XI. ZONING & LAND USE**

**A. Citizen Input May Be Grounds to Support Government Land Use Decisions.** Public opposition to a land use amendment application, when rationally related to legitimate general welfare concerns, can provide a rational basis for a governmental land use decision, without the need for a more formal investigation that those concerns are valid and that the proposed development should not be permitted. *Pinellas County v. The Richman Group of Florida, Inc.*, 42 Fla. L. Weekly D2526 (Fla. 2d DCA 2017).