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Real Property

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Abstract

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I. Introduction

This article presents a survey of important Florida appellate court decisions between December 1987 and September 1988 in the area of real property law. The article is divided into four substantive areas: Condominiums, Mortgages, Mechanics Liens, and Interests in Real Property (*i.e.*, Vendor-Vendee, Easements and Co-tenancies).

Florida courts have forged several emerging trends in the area of real property law. In both the areas of mortgage law and interests in real property, the courts have further refined their treatment of both marital and post-marital property. Additionally, the courts have again indicated the need for some form of legislation in the area of non-condominium homeowners associations and have in at least one case¹ blurred the distinctions between these two separate and distinct methodologies of residential development.

II. Condominiums

The issue of non-condominium master associations was again the subject of judicial review in *Downey v. Jungle Den Villas Recreation Association, Inc.*² In *Downey*, the Fifth District Court of Appeal held that a recreation association organized to provide an entity for ownership, operation, and management of recreational facilities for the use of all present and future condominium unit owners was, in substance and function, acting as a condominium association. Therefore, the association's right to build a swimming pool and assess unit owners was dependent upon obtaining a unanimous vote of unit owners, not upon a bare majority vote.³

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1. *Downey v. Jungle Den Villas Recreation Ass'n, Inc.*, 525 So. 2d 438 (Fla. 5th Dist. Ct. App. 1988).

2. *Id.*

3. *Id.* at 440.

The Jungle Den Villas Condominium was a large condominium project built in seven phases, with each phase having an individual condominium association. A prospectus for the entire condominium complex represented that a recreational facility would be constructed and would be deeded to a corporation to be owned by the several condominium associations for the use and benefit of all unit owners. A separate recreation association was organized to provide the entity for the ownership, operation and management of the recreational facilities. Each unit owner in the entire project automatically became a member of the recreation association upon the acquisition of title to a condominium unit. Membership could not be assigned or transferred except as an appurtenance to the condominium unit. Additionally, each member of the recreation association was entitled to one vote per each condominium unit owned in matters of the recreation association.

The recreational facilities had been constructed with the proceeds from a mortgage on which the developer defaulted. With foreclosure seeming imperative, the recreational building and an adjacent vacant piece of property were conveyed to the association, which in turn assumed the mortgage. A bare majority of members of the recreation association desired to construct a swimming pool on the vacant land and assess each unit owner \$450.00 for the construction of the swimming pool. Those unit owners objecting to the construction of the pool and the corresponding assessment filed an action for declaratory and injunctive relief. The action sought a determination of whether the recreation association had the authority to acquire land, build a swimming pool, and assess the members of the recreation association for the cost, absent unanimous approval of the members as required by Florida Statutes, section 718.110(4).

The trial court found that the recreational association was an entity separate from each of the condominium associations and further ruled that the recreation association had the right to acquire property, improve it, and assess it accordingly, without the unanimous approval of its members. The Fifth District Court of Appeal, however, reversed the trial court, holding that the recreation association had all of the attributes of a condominium association and was therefore subject to those laws governing the operation of condominium associations. The court entertained an analysis of the purposes of Florida Statutes, section 718.110(4), which requires that a unanimous approval of the unit owners be obtained to effect a material alteration or modification of the

appurtenances to a condominium.⁴ Based upon this analysis, the court determined that in order for a condominium association to acquire property, construct a pool on it, and assess each member for the cost of such construction, unanimous approval of each and every unit owner would be required.

The next phase of the court's analysis dealt with the issue of whether the recreation association would be treated as an entirely separate corporation not for profit, or as a "de facto condominium association subject to Chapter 718, Florida Statutes."⁵ The court utilized the constituency test.⁶ The constituency test, in the court's view, addresses "whether the recreation association's membership is comprised of only condominium unit owners, and only condominium unit owners have rights in the property administered by the association"⁷ Finding that the recreation association consisted only of condominium unit owners and that the recreation association's name was expressly held for the use and benefit of the condominium unit owners and no one else, the court determined that the recreation association's purpose and function was to serve only condominium unit owners.⁸

The court then proceeded to apply the function test to the recreation association. The court found that the operations and functions of the recreation association were, in substance, those of a condominium association under Chapter 718 of the Florida Statutes. The recreation association contended it was not a condominium association and cited two previous cases decided by the Florida Supreme Court.⁹

The *Downey* court readily distinguished *Raines v. Palm Beach Leisureville Community Association* on the basis that the community association in *Raines* governed single family homes as well as condo-

4. See *Beau Monde, Inc. v. Bramson*, 446 So. 2d 164 (Fla. 2d Dist. Ct. App.), rev. den'd, 453 So. 2d 43 (Fla. 1984); *Towerhouse Condominium, Inc. v. Millman*, 410 So. 2d 926 (Fla. 3d Dist. Ct. App. 1981), approved on different grounds, 475 So. 2d 674 (Fla. 1985).

5. *Downey*, 525 So. 2d at 440.

6. See *Siegel v. Division of Florida Land Sales & Condominiums*, Dep't of Business Regulation, 453 So. 2d 414, 417 (Fla. 3d Dist. Ct. App. 1984), quashed 479 So. 2d 112 (Fla. 1985).

7. *Downey*, 525 So. 2d at 440 (quoting *Siegel*, 453 So. 2d 417).

8. *Id.* at 441.

9. *Raines v. Palm Beach Leisureville Community Ass'n, Inc.*, 413 So. 2d 30 (Fla. 1982); *Department of Business Regulation, Div. of Land Sales v. Siegel*, 479 So. 2d 112 (Fla. 1985).

minium properties.¹⁰ With respect to *Department of Business Regulation, Division of Land Sales v. Siegel*, the court noted that the Florida Supreme Court had not viewed the homeowners association as a condominium association under Chapter 718 because the membership of the homeowners association "might eventually be partially comprised of non-condominium dwellers."¹¹ Also, the court indicated differences in the powers and functions held by the associations in *Siegel* and *Downey*. Thus, the court held that the recreation association was required to obtain the consent of 100% of all the unit owners to assess them for funds to build the proposed swimming pool. The court thus ignored the clear indication by the Florida Supreme Court in both *Raines* and *Siegel* that the court would not go beyond Chapter 718 and judicially legislate master associations or non-condominium associations where no such legislation exists.

The court in *Downey* saw fit to go beyond the standards set forth in *Siegel* and *Raines* and, utilizing a factual distinction set in the form of the constituency test, sought to apply the strict constraints of section 718.110(4) to a special purpose master association in the form of Jungle Den's recreation association.

The ramifications of the *Downey* decision are significant. First, the practical effect in the planning and drafting of developments containing condominiums with the use of master associations in addition to condominium sub-associations will be to reserve some form of non-condominium property to allow the master or community association to be exempted under the *Downey* "constituency test." Second, and more important, *Downey* once again raises the issue of a lack of legislation in the area of non-condominium homeowner and master associations. It seems most inappropriate to attempt a wholesale application of the provisions of Chapter 718, which were designed for condominiums utilizing common elements as opposed to a typical master or homeowners association which, generally, has fee title to its common areas. Thus, the question is once again raised as to whether it is time to re-examine the need for enabling legislation for the non-condominium form of residential associations such as those found in the *Downey*, *Siegel*, and *Raines* cases.

In a case of significance to the development community, as well as residential associations seeking to determine rights and responsibilities of developers to pay their proportionate share of assessments for unsold

10. *Downey*, 525 So. 2d at 441.

11. *Id.*

condominium units, the case of the phantom unit was treated in *Welleby Condominium Association One, Inc. v. W. Lyon Co.*¹² In *Welleby*, a condominium association sought to foreclose liens filed against unimproved lands intended for condominium construction. The defendant contended that it was not the owner of "condominium units" as described in the declaration of condominium nor as defined under the Florida Statutes in force when it was recorded, and it was therefore not subject to assessment.¹³

The court undertook a careful analysis of the definition of "condominium parcel" under both the subject declaration of condominium and the Florida Statutes.¹⁴ The court, in examining the definition of "unit" as set forth in Florida Statutes, section 711.03 (15), indicated that the reference to "as specified in the Declaration of Condominium" was significant. The court further indicated that the subject Declaration of Condominium did not make "unit" the object of assessments, but rather utilized the term "condominium parcel" as the object of assessments by the association.¹⁵

Condominium parcel was defined under the *Welleby* declaration of condominium as "an apartment together with the undivided share in the common elements and all its easements, rights and interests which are appurtenant to the apartment."¹⁶ An apartment was further defined in the Declaration as "Section 1. Definitions: (a) Apartment; Unit — individual private dwelling."¹⁷ Based upon these definitions, the court undertook an analysis and concluded that a condominium parcel is an apartment and individual private dwelling. The court stated, "[I]t is not raw, unimproved lands"¹⁸; Therefore "Assessments according to this declaration could not be assessed and levied against anything other than an individual private dwelling, and the Declaration would not permit any interpretation allowing an assessment against raw, unimproved lands upon which there is no private dwelling."¹⁹

The court carefully distinguished the case of *Hyde Park Condominium Association v. Estero Island Real Estate*,²⁰ where the defini-

12. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987).

13. *Id.* at 36.

14. FLA. STAT. § 711.03(15) (1975).

15. *Welleby*, 522 So. 2d at 37.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 486 So. 2d 1 (Fla. 2d Dist. Ct. App. 1986).

tion of "unit" was that existing under the 1969 Condominium Act and different than that in force at the time of the Declaration of Condominium used in *Welleby*. In *Hyde Park* the Declaration provided that assessments would be against units under the 1969 Condominium Act,²¹ which proposed that a unit was any part of the condominium property subject to private ownership and could have included raw, unimproved land.

The application of this case becomes extremely significant to the real property practitioner when developments containing unbuilt phases or unimproved parcels create the question of whether the unimproved land comprising that parcel has been subject to the declaration of condominium and, if so, whether such unimproved parcel would be deemed subject to assessments or exempted by its unimproved nature. From the standpoint of the condominium association, there exists an expectation that the expense of maintenance and management of the entire condominium property would be borne by the total number of unit owners indicated in the condominium prospectus.²² Inability to assess for unbuilt units against the title holder of such parcel means a smaller group of owners will bear the burden of the entire common expense. At the same time, there exists the consideration that the common elements areas normally to be maintained (i.e., hallways, walkways, paved areas, etc.) would be less in quantity because of a failure to complete the project. Thus, the total costs to be proportionately allocated among existing unit owners would be lowered. It is anticipated that there will be a further balancing of the interests of developers and condominium associations in future cases dealing with the phantom unit issue.

In a case testing the inter-relationship between the Florida Condominium Act²³ and the existing platting requirements for subdivisions,²⁴ the court in *Orange West, Ltd. v. City of Winter Garden*²⁵ dealt with the issue of preemption relative to a city's ability to enforce its zoning regulations against the condominium development of a former mobile home park. A petition had been filed by the homeowners association, together with individual lot owners, seeking to declare certain municipal ordinances unconstitutional and in conflict with superior state stat-

21. FLA. STAT. § 711.03(13) (1969).

22. *Id.* § 718.504 (1987).

23. *Id.* § 718.

24. *Id.* § 177.071 (1986).

25. 528 So. 2d 84 (Fla. 5th Dist. Ct. App. 1988).

utes.²⁶ The city ordinances in question provided for the definition of regulation of mobile home parks in the Winter Garden City Code. The petitioners contended that Chapter 718 of the Florida Statutes preempted the field whereby a municipality was prevented from regulating the conversion of the property to condominium. The City, in its counterclaim, contended violations existed of those city ordinances requiring platting of a mobile home park. The lower court granted the City's motions and entered a final judgment enjoining the plaintiffs from the sale of lots until further court order or until a plat of the property was recorded pursuant to Chapter 177 of the Florida Statutes.²⁷

In the appeal, Orange West contended that such local ordinances were preempted by state condominium statutes and had no relation to the public health, safety, and welfare. Orange West further contended that the city should be equitably estopped from application of the ordinance. The court reviewed Florida Statutes, section 718.507,²⁸ but concluded that the provisions of section 718.507 could not be interpreted to mean that the municipal regulations did not apply to condominiums. The court cited a previous Attorney General's Opinion in which condominium development constituted a division of a parcel of land and the developer was therefore subject to municipal regulations and ordinances.²⁹ The court determined that there was no preemption of the field by the existence of section 718.507. The court emphasized certain factual distinctions since the lots were nonconforming and the property was divided and sold without the proper plat being filed for city approval.

The significance of this case stems from the imposition of platting requirements triggered by a mere change of the nature of ownership from one unified owner in the form of rental property to that of multiple owners in the form of condominium ownership. In a prior decision, *City of Miami Beach v. Arlen King Cole Condominium Association, Inc.*,³⁰ the Third District Court of Appeal ruled that a mere change of the method of ownership was not tantamount to a change of use and that a conversion from rental housing to the condominium form of ownership would not permit a municipality to impose its zoning regula-

26. *Id.* at 86.

27. *Id.*

28. FLA. STAT. § 718.507 (1985) (Zonings and Building Laws, Ordinances and Regulations).

29. 1974 Op. Att'y. Gen. Fla. 074-242 (1974).

30. 302 So. 2d 777 (Fla. 3d Dist. Ct. App. 1974).

tions to prevent such conversion. In *Arlen King Cole*, the court indicated that "changing" the type of ownership of real estate will not destroy a valid existing nonconforming use.³¹ The unique facts in the *Orange West* case involving mobile home park lots and a possible subdivision appear to be the factors distinguishing the *Arlen King Cole* case. Nevertheless, one may question the propriety of a municipality's actions in seeking to regulate the conversion from rental housing to condominium ownership through platting or other zoning regulations.

III. Mortgage Law

In holding that a home buyer had an equitable lien to a deposit superior to the lien of a mortgage, the court in *Caribank v. Frankel*³² found that where a home buyer entered into a contract for the purchase of land and construction of a home on the land by a developer and where the buyer had paid a \$60,000.00 deposit in accordance with the contract, the lender had actual knowledge of the contract and the deposit before it made the loan and recorded the mortgage. The developer had subsequently acquired title to the property and, thereafter, obtained a purchase money mortgage from the lender. Therefore, the lender's knowledge of the contract between the parties, at the time it approved the developer's loan request and when it took a mortgage against the property, was deemed sufficient actual knowledge of a prior unrecorded conveyance or mortgage which was equivalent to the recording of the instrument.³³

In a case involving the rights of guarantors, where a guarantor paid the full amount of a foreclosure judgment, the court in *Photo Magic Industries, Inc. v. Broward Bank*³⁴ held that the guarantors were not entitled to subrogation because the fair market value of the real property exceeded the amount of the debt. The guarantors were mere volunteers who had paid without any legal requirement to do so. The court determined that where it was established at the trial court hearing that the fair market value of the real property (against which the guarantor's exposure was to be setoff) exceeded the amount of the debt, the guarantors were not in a position of jeopardy and, therefore,

31. *Id.* at 778.

32. 525 So. 2d 942 (Fla. 4th Dist. Ct. App. 1988).

33. 44 FLA. JUR. 2D REAL PROPERTY SALES AND EXCHANGES 263 (1984).

34. 526 So. 2d 136 (Fla. 3d Dist. Ct. App. 1988).

would not be entitled to subrogation.³⁵

The court cited the well established principle that a guarantor is allowed to pursue a primary debtor only when the guarantor is required to pay that debtor's obligation.³⁶ Therefore, the guarantor's payment was merely voluntary and no right of subrogation existed.³⁷

The court also noted the failure of appellants to exercise their right of redemption even though the right continued for ten days following the actual sale of the foreclosed property.³⁸ Thus, the court determined that appellant failed to take such steps as were necessary to protect its own interests and that this alone could not, based upon such failure, constitute grounds to vacate "judicially authorized acts to the detriment of other innocent parties."³⁹

In determining whether a judgment lien against one owner attaches against tenancy by the entireties property, the court in *Sharp v. Hamilton*⁴⁰ found that a judgment lien against a husband, where the mortgage was executed solely by the husband, did not attach to the parcel of property which had been held by husband and wife as tenants by the entirety where such parcel was awarded to the wife as "lump sum" alimony upon dissolution of marriage. The court revisited the question of whether, upon dissolution of the marital relationship, a party acquires an undivided one-half interest in the tenancy of the property upon which a judgment lien against one of the parties could attach.⁴¹ The court rejected the third district court's "twinkling of a

35. *Id.* at 137.

36. *Id.* See *North v. Albee*, 20 So. 2d 682 (Fla. 1945); *Fortenberry v. Mandell*, 271 So. 2d 170 (Fla. 4th Dist. Ct. App. 1972), *cert. discharged*, 290 So. 2d 3 (Fla. 1974); *Allstate Life Ins. Co. v. Weldon*, 213 So. 2d 15 (Fla. 3d Dist. Ct. App. 1968).

37. *Photomagic*, 526 So. 2d at 137. See *Boley v. Daniel*, 72 Fla. 121, 72 So. 644 (1916); *Eastern Nat'l Bank v. Glendale Federal Savings & Loan Ass'n*, 508 So. 2d 1323 (Fla. 3d Dist. Ct. App. 1987); *DeCespedes v. Prudence Mut. Casualty Co.*, 193 So. 2d 224 (Fla. 3d Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (Fla. 1967); *Furlong v. Leybourne*, 138 So. 2d 352, 356 n.4 (Fla. 3d Dist. Ct. App. 1962).

38. *Photomagic*, 526 So. 2d at 137. See *Allstate Mortgage Co. v. Strasser*, 277 So. 2d 843 (Fla. 3d Dist. Ct. App.), *aff'd*, 286 So. 2d 201 (Fla. 1973) (holding such right exists until the issuance of a certificate of title which is normally issued ten days following the date of foreclosure sale).

39. *Photomagic*, 526 So. 2d at 138 (quoting *John Crescent v. Schwartz*, 382 So. 2d 383, 385 (Fla. 4th Dist. Ct. App.), *cert. denied*, 389 So. 2d 1113 (Fla. 1980), *mandamus granted sub nom. John Crescent, Inc. v. Peterson*, 401 So. 2d 1150 (Fla. 4th Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 469 (Fla. 1982)).

40. 520 So. 2d 9 (Fla. 1988).

41. See *Hillman v. McCutchen*, 166 So. 2d 611 (Fla. 3d Dist. Ct. App.), *cert.*

legal eye" theory as pronounced in *Hillman v. McCutchen*,⁴² stating that entireties property is not subject to a lien against only one tenant.⁴³ The court found that the transfer of the husband's interest to the wife pursuant to the dissolution decree was a defeasance of the husband's interest in the property which would have occurred had he predeceased his wife while the parties were still married.⁴⁴ Therefore, neither the Sharp's mortgage nor the judgment lien was deemed to attach to the property.

Whether a security interest in a modular home was one to be characterized as personal property or real property became the issue for the court in *Community Bank v. Barnett Bank of the Keys*.⁴⁵ In *Community Bank*, a builder had borrowed funds from Community Bank to construct a modular home. The bank acquired a security interest in the home. It was agreed in the loan documents that the modular home was to be deemed personal property and would remain personal property, even if it became attached to realty. Subsequently, the builder borrowed additional funds from Barnett Bank to purchase a lot for the home. In return, the builder gave Barnett a mortgage and security agreement on the lot. The agreement contained an after-acquired property and fixture clause. Barnett then recorded the mortgage and filed a Uniform Commercial Code fixture financing statement.

Holding that the question of whether the property annexed to realty is a fixture is a question of fact or a mixed question of law and fact, the court found that the intentions of the parties were the primary factor to be considered in resolving the issue. The trial court had declared that the modular home was a fixture and ruled that the priority of the liens was governed by Florida Statutes, section 679.313(2)(a)

denied, 171 So. 2d 391 (Fla. 1964), (In this case the husband unilaterally executed a mortgage on the entireties property. Upon divorce, the property was awarded to the wife as a "lump sum" alimony. In a suit seeking foreclosure of the mortgage, the lower court denied foreclosure and cancelled the mortgage. The Third District Court of Appeal reversed, stating that upon dissolution of marriage, title to the property became vested in the husband and wife as tenants in common pursuant to FLA. STAT. § 689.15 (1963), "for the twinkling of a legal eye," thereby subjecting the husband's undivided one-half interest to the mortgage lien before sole title was vested in the wife.).

42. 166 So. 2d 611 (Fla. 3d Dist. Ct. App.), *cert. denied*, 171 So. 2d 391 (Fla. 1964).

43. *Sharp*, 520 So. 2d at 10. *See* Teardo v. Teardo, 461 So. 2d 276 (Fla. 5th Dist. Ct. App. 1985).

44. *Sharp*, 520 So. 2d at 10. *See* Liberman v. Kelso, 354 So. 2d 137, 139 (Fla. 2d Dist. Ct. App. 1978).

45. 518 So. 2d 928 (Fla. 3d Dist. Ct. App. 1987).

(1985), thereby adjudging Barnett Bank's security interest superior to that of Community Bank. The appellate court undertook an analysis of various factors in determining whether a chattel annexed to realty has become a fixture. The factors enumerated by the court included the degree of annexation, the adaptation of the chattel to the use of land, and the intention of the party making the annexation.⁴⁶ The court found that the security agreement was evidence of the builder's intent that the modular home remain personalty even after attachment to the land occurred. Therefore, the equitable principles proffered by Community Bank overrode the after-acquired property provision of Barnett's mortgage contract. Nevertheless, the appellate court remanded the case for further determination of whether Barnett was without actual or constructive knowledge of Community Bank's agreement with the builder that the collateral would retain its character as personalty even if it attached to real property.

In several cases concerning validity of mortgages and mortgage assumptions relative to the proper affixation of documentary stamp taxes, Florida courts further clarified factual distinctions involving such issues.

In *NCNB National Bank v. Department of Revenue*,⁴⁷ the court held that a mortgage assumption agreement was not subject to documentary stamp taxes where there was no release of the original mortgagor. The court found that the note, which was a renewal consolidating four notes and adding a second maker to the note, did not enlarge the original obligation and satisfied the other requirements for exemption under the applicable Florida statute.⁴⁸ The original promissory notes upon which the tax had been paid were not attached to the new note. The agreement consolidating the notes and mortgages indicated, in a notation, the payment of stamp taxes on one of the original notes. The court found that this notation satisfied the requirements of the exemption.⁴⁹ Finally, the court cited its prior decision of *Florida, Department of Revenue v. Bonard Enterprises, Inc.*,⁵⁰ where the court had previously pronounced that there was no release of the original mortgagor and the mere assumption of a debt did not constitute an enlargement

46. *Id.* at 930.

47. 523 So. 2d 738 (Fla. 2d Dist. Ct. App. 1988).

48. FLA. STAT. § 201.09(1) (1987).

49. *NCNB*, 523 So. 2d at 740.

50. 515 So. 2d 358 (Fla. 2d Dist. Ct. App. 1987).

subjecting a new agreement to documentary stamp tax.⁵¹ Thus, the court upheld the exemption from documentary stamp taxes based upon the taxpayer's compliance with the other criteria for exemption.⁵²

In a suit regarding the ability of a mortgagee to obtain deficiency judgments against debtors, it was held in *Bank of South Florida v. Keenan, Van Duyne, and Borges*⁵³ that a mortgagee may sue to recover a deficiency after foreclosure, as long as the mortgagee neither obtained a deficiency judgment against the debtors, nor sought and was refused one in the foreclosure action. In the subject case, the bank had lent funds to Keenan and Van Duyne which was secured by a mortgage on property held only in Van Duyne's name. Mr. Borges purchased the parcel from Van Duyne and assumed the mortgage. Borges then defaulted and the bank foreclosed.

In the foreclosure action, the bank sought a deficiency judgment against Borges, but not against Keenan and Van Duyne. The trial court reversed judgment to enter a deficiency judgment against Borges. After successful bidding for the property at the foreclosure sale, the bank brought a separate deficiency action against Keenan, Van Duyne, and Borges. The court held that the mortgagee could sue to recover a deficiency after foreclosure, as long as the bank neither obtained a deficiency judgment against the debtors, nor sought and was refused one during the foreclosure action.⁵⁴ The court further found that even though the original foreclosure complaint sought a deficiency against Borges, the bank was not precluded from perfecting the deficiency against Keenan and Van Duyne in the subsequent action at law.⁵⁵

IV. Mechanics Liens

In a case determining the propriety of a contractor's claim to foreclose on a mechanic's lien on a lessor's property, the court held that the contractor's complaint, which alleged that renovations and improvements contemplated by the parties to the lease, at its inception, constituted the substance of the lease and was sufficient to state a cause of

51. See also *Hialeah, Inc. v. Department of Revenue*, 380 So. 2d 562 (Fla. 3d Dist. Ct. App. 1980).

52. *N.C.N.B.*, 523 So. 2d at 740 (such exemption criteria as stated in FLA. STAT. § 201.09(1) (1987)).

53. 519 So. 2d 51 (Fla. 3d Dist. Ct. App. 1988).

54. *Keenan*, 519 So. 2d at 52. See *Younghusband v. Ft. Pierce Bank & Trust Co.*, 100 Fla. 1088, 130 So. 725 (1930).

55. *Keenan*, 519 So. 2d at 52.

action to foreclose the mechanic's lien on the lessor's property.⁵⁶ The lease contained a disclaimer of any and all liens, including mechanic's liens. The disclaimer stated that the tenant did not have the power to subject the landlord's interest in the property to such liens. The lease itself was found to contemplate major renovations to be undertaken by the lessee. Therefore, the improvements made in accordance with the terms of the lease would be the basis for a mechanic's lien to be placed on the landlord's interest, without regard to whether the landlord or tenant benefited from the improvements.⁵⁷

The question of priorities between a mortgage and a mechanics lien was dealt with in *Adamson v. First Federal Savings & Loan Association*,⁵⁸ where the court held that a mechanics lien which attached prior to the execution of a purchase money mortgage took priority over the mortgage even though the lien was filed subsequent to the recordation of the mortgage. The mechanics lien attached upon recordation of the notice of commencement. The court was specifically interpreting Florida Statutes, sections 713.07(2)-(3) in reaching its decision. The case also involved a lease provision which purported to prohibit construction on leased lots. The provision, however, did not prevent the construction company from asserting priority of its mechanics lien against the tenant, who thereafter acquired a fee simple interest. Further, the mechanic's lien was not limited to the leasehold interest since the lots were transferred to the tenant who contracted with the construction company for the subject improvements. The improvements became part of the interest in the real property and, hence, the subject of the mechanic's lien.⁵⁹ The court also noted that the statute requiring notice of commencement did not provide any exception for purchase money mortgages.⁶⁰ In *Van Eepol Real Estate Co. v. Sarasota Milk Co.*,⁶¹ the court stated, "[This] rule . . . holding the purchase - money mortgage superior to the mechanics lien, is applied in cases where the mechanic's lien is acquired for work done at the instance of the purchaser, and without the acquiescence of the vendor, prior to the execu-

56. *A. N. Drew v. Frenchy's World Famous Cajun Cafe, Inc.*, 517 So. 2d 767, 768 (Fla. 5th Dist. Ct. App. 1988).

57. *Id.* at 768.

58. 519 So. 2d 1036 (Fla. 1st Dist. Ct. App. 1988).

59. *Id.* at 1038.

60. *Id.* at 1037.

61. 100 Fla. 438, 129 So. 892 (1930).

tion of the mortgage."⁶² Noting that the statutes in question⁶³ were different from the proposition in the *Van Eepol* case, the court stated:

In addition, in the instant case, there is no recording problem. Rather, the purchase money mortgage did not exist at the time the notice of commencement was filed. The contractor's work was underway before the mortgage was executed. *Van Eepol* does not conflict with our application of the current mechanic's lien law. The contractor who performed work without notice of the purchase money mortgage was given priority. Under the present law, mechanics rely on the notice of commencement to establish their priority. To rule against the mechanic's lien in this case would place a more onerous burden on mechanics than is contemplated by Chapter 713.⁶⁴

Thus, the court found that the mechanic's lien in question had priority over the purchase money mortgage.

The validity of waivers in form contracts between general contractors and subcontractors was the subject of the court's decision in *Coastal Caisson Drill Co., Inc. v. American Casualty Co.*,⁶⁵ where the lower court had dismissed a claim after finding that the subcontractor waived its rights under a bond in an agreement with the general contractor. Citing the principle that an individual cannot waive the protection of a statute that is designed to protect both the public and the individual,⁶⁶ the court looked to the payment and performance bond definitions that had been previously stated by the courts,⁶⁷ indicating that such a bond is an agreement to protect the owner of a building from two particular defaults by a builder. The payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract will be fully performed. The court concluded by stating that allowing a private waiver of the statutory

62. *Id.* at 451, 129 So. at 897.

63. FLA. STAT. §§ 713.07(2)-(3) (1981).

64. *Adamson*, 519 So. 2d at 1038.

65. 523 So. 2d 791 (Fla. 2d Dist. Ct. App. 1988).

66. *Asbury Arms Dev. Corp. v. Florida Dep't. of Business Regulation*, 456 So. 2d 1291 (Fla. 2d Dist. Ct. App. 1984); see also *Lynch-Davidson Motors v. Griffin*, 171 So. 2d 911 (Fla. 1st Dist. Ct. App. 1965), *quashed on other grounds*, 182 So. 2d 7 (Fla. 1966).

67. *St. Paul & Northern Pac. v. Fidelity & Deposit Co.*, 416 So. 2d 30 (Fla. 5th Dist. Ct. App. 1982).

right to sue on the construction bond required by Florida Statutes, section 255.05, could frustrate the intent of the legislature by undermining the bidding process and by risking state involvement in a contractor/subcontractor dispute and consequently delaying public works projects. The court stated that "such a contractual waiver is in derogation of the public policy of the State, and therefore, unenforceable."⁶⁸ However, the court did determine that the matter was of great public importance and certified the question to the Florida Supreme Court: "May a subcontractor furnishing labor, services or equipment worth over \$200,000.00 on a public works project lawfully waive its rights to the contractor's bond required pursuant to Sections 255.05 and 337.18, Florida Statutes (1985)?"

In a case relating to the effect of an arbitration clause in a contract between a subcontractor and contractor of a surety, the court in *Excavating Engineers, Inc. v. National Fire Insurance Co.*⁶⁹ stated that a surety has no existing right to arbitrate,⁷⁰ but may have such a right if the parties to the contract intended to primarily and directly benefit the third party. As applied to the facts in *Excavating Engineers*, however, the arbitration clause and the contract between the contractor and subcontractor made it clear that it did not expressly intend that the surety benefit from the contract. Therefore, the surety could not be a third party beneficiary to the arbitration clause of the contract.

V. Interests in Lands

A. Contracts — Vendor/Vendee Relationships

In following the general rule that a defaulting buyer under an executory contract forfeits to the seller all sums paid in part performance, the court in *Johnson v. Wortzel*⁷¹ stated that upon a default by the buyer, the seller retained consideration which had been paid by the buyer amounting to 18.2% of the purchase price. The circumstances presented in the case did not render unconscionable the seller's retention of the buyer's money. Florida law has clearly held that a buyer in default is not entitled to recover from the seller money paid in part

68. *Coastal*, 523 So. 2d at 794.

69. 524 So. 2d 1112 (Fla. 4th Dist. Ct. App. 1988).

70. See *Aetna Casualty & Surety Co. v. Jelac Corp.*, 505 So. 2d 37 (Fla. 4th Dist. Ct. App. 1987).

71. 517 So. 2d 42 (Fla. 3d Dist. Ct. App. 1987) (per curiam).

performance of an executory contract, even absent a forfeiture provision in the contract.⁷²

The court followed the *Beatty v. Flannery*⁷³ analysis requiring an inquiry into whether any of the following circumstances were present: (1) an intimation of fraud on the seller's part; (2) misfortune beyond his control accounting for the buyer's failure to fulfill the contract; (3) a mutual rescission of the contract; or (4) a benefit to the seller, "the retention of which [when compared to the total contract price, would be] shocking to the conscience of the court."⁷⁴ Finding none of the *Beatty* exceptions applicable, except the possibility of a fourth exception relating to unconscionability, the court concluded that the amount forfeited equalling 18.2% of the total contract was not sufficient to shock the conscience of the court. Based upon the facts of the *Johnson* case, one may question whether the court would have reached a similar conclusion if the amounts retained represented a substantially greater percentage of the purchase price.⁷⁵

In a case dealing with abandonment of contract, the seller sued the buyer for specific performance. When the buyer defaulted, the seller attempted to work out a settlement. Such course of action was not deemed an abandonment of the contract, since, according to the court, abandonment by conduct would be found only when the conduct is "positive, unequivocal and inconsistent with the existence of the contract."⁷⁶ Under the terms of the contract, the seller was permitted to use part of the buyer's deposit to pay certain expenses. It was also provided in the contract that the seller had alternative remedies of specific performance or retention of the deposit as liquidated damages. The buyer contended that the contract provision regarding the use of the deposit by the seller served to limit the seller's remedy to retention of the deposit. The court rejected this argument and stated that the addition of language to the printed contract authorizing disbursements of

72. *Beatty v. Flannery*, 49 So. 2d 81 (Fla. 1950); see also *Goldfarb v. Robertson*, 82 So. 2d 504 (1955); and *Herrera y Nogueira v. Helker*, 139 So. 2d 895 (Fla. 3d Dist. Ct. App. 1962).

73. 49 So. 2d 81 (Fla. 1950).

74. *Johnson*, 517 So. 2d 43 (quoting *Beatty*, 49 So. 2d at 82)).

75. For information on unconscionability and the standards to be applied, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Peacock Hotel, Inc. v. Shipman*, 103 Fla. 683, 138 So. 44 (1931); and *Hume v. United States*, 132 U.S. 406 (1889).

76. *Bilow v. Benoit*, 519 So. 2d 1114, 1117 (Fla. 1st Dist. Ct. App. 1988) (citing *McMullen v. McMullen*, 185 So. 2d 191 (Fla. 2d Dist. Ct. App. 1966)).

the deposit did not constitute an election to limit obligation of payment to payment of the deposits as liquidated damages and forego the right to enforce the contract in court.⁷⁷

The indefiniteness of the price term under an option contract was an issue before the court in *Kaufman v. Lassiter*.⁷⁸ In *Kaufman*, a lease contained an option to purchase for "a minimum sum of \$200,000.00." The lessor's interpretation of the language was that the parties would be required to negotiate a mutually agreeable price. The tenant, however, contended that he had the right to purchase the property for a fixed price of \$200,000.00. The court refused to accept either of the positions proffered and held that the option price was the market value of the property at the time the option was exercised, but in no event was less than \$200,000.00.⁷⁹ The court cited to another jurisdiction for authority on the subject. In *Shayeb v. Holland*,⁸⁰ the court attempted to void an indefinite, incomplete, and therefore unenforceable contract by implying a fair and reasonable price stating "otherwise the offer would have no practicable value, but would be a mere illusion or perhaps a sham to the unwary." The court analogized its case to those cases where no definite rent amounts were established during the renewal term.

The effect of the merger doctrine on collateral agreements and representations, warranties by the seller, and contracts for sale was the subject for the court in *American National Self-Storage, Inc. v. Lopez-Aguilar*.⁸¹ The seller warranted that certain utility services were available in the contract for sale. After the closing, the buyer determined that this warranty was breached and sued the seller, whose main contention was that the warranty at issue had merged into the deed. The court rejected the seller's contentions, noting that the merger rule does not apply with respect to "collateral agreements which call for acts by the seller which go beyond merely conveying clear title and placing the purchaser in possession of the property."⁸² The court further stated the

77. *Id.* at 1118.

78. 520 So. 2d 692 (Fla. 4th Dist. Ct. App. 1988).

79. *Id.* at 694.

80. 321 Mass. 429, 73 N.E.2d 731 (1947).

81. 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988).

82. *Id.* at 305. *See also* Campbell v. Rawls, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980) (The court reasoned because the seller's warranty in the contract of sale that the air-conditioning and heating systems would be in working order at the time of closing, the warranty was an independent covenant generally excepted from the merger doctrine. The buyer was not required to inspect the property and report discrepancies

seller was not precluded from presenting evidence, outside the deed, of the parties' intention that the warranty be extinguished upon transfer of title. Therefore, drafters should clearly delineate which warranties are intended to merge into the deed and which warranties are intended to survive the closing. Failure to do so, at the very least, raises both issues of merger doctrine applicability and of the parties' intentions.

In an action dealing with specific performance where a repurchase agreement was involved, the court in *Hembree v. Bradley*⁸³ reversed the lower court's granting of a prayer for specific performance, noting that a valid and fair contract is a prerequisite to a grant of specific performance. In *Hembree*, appellee agreed to make a loan to Sundance Construction Company to be secured by a lien encumbering three lots. However, the manner in which the transaction was structured appeared to be closer to a sale than a mortgage. Appellant, Sundance Construction Company, executed a deed in favor of Mrs. Bradley conveying the three lots and the closing statement reflected a purchase price of \$40,000.00. The parties simultaneously entered into a contract whereunder Sundance agreed to repurchase the property in one year for \$50,000.00. The trial court granted Mrs. Bradley's prayer for specific performance. Appellants were financially unable to repurchase the land as required by the contract and various discussions of alternate payment plans failed.

The appellate court dealt with the issue of whether specific performance should have been granted by summary judgment. The court followed the long-standing principle that specific performance of a contract for sale of land would be decreed only if the contract is capable of being mutually enforced with results that are just and practical, the moving party is not guilty of laches, there is no countervailing equity against him, and there is no adequate remedy at law available to him.⁸⁴ The court further indicated that specific performance of a contract would be denied where the terms of the agreement suggest that the transaction is a loan disguised as a contract for purchase and sale of real property. The court examined the possible usury consequences in terms of legality of the loan transaction and concluded that the grant of specific performance of a contract was improper. The court reversed and remanded for further proceedings consistent with the its opinion. It

before the closing in order to preserve his rights under the warranty.).

83. 528 So. 2d 116 (Fla. 1st Dist. Ct. App. 1988).

84. Shirley v. Lake Butler Corp., 123 So. 2d 267, 270 (Fla. 2d Dist. Ct. App. 1960); Nobles v. L'Engle, 61 Fla. 696, 55 So. 839 (1911).

appears that the court was dismayed with the fact that the transaction was actually a loan disguised as a sale for the purpose of extracting a higher rate of interest that may have been permitted by law.

The use of auctions for the sale of both commercial and residential property has grown as a marketing tool. In one of the few reported Florida appellate decisions concerning auction sales of real estate, the court in *Rohlfing v. Tomorrow Realty & Auction Co.*⁸⁵ found that an auction sale together with its related documents were sufficiently definite and certain to establish a contract for land that was in compliance with the Statute of Frauds and legally enforceable against the purchase. In *Rohlfing*, a seller and an auctioneer entered into a written "auction agreement" whereby the auctioneer was authorized to sell the seller's land at public auction. Prior to the auction, the buyer executed a document known as "Real Estate Terms of Sale" and received a written buyer's guide as to the auction procedure. The buyer eventually made the highest bid on the land, the bid was accepted, and the auction sale was thereupon discontinued. Thereafter, the buyer executed a "Memorandum of Sale at Public Auction" and delivered a deposit check in the amount of \$37,500.00. Furthermore, a "Contract for Sale and Purchase" was prepared and executed by the auctioneer as agent for the land owner and the buyer. Later, the buyer stopped payment on his deposit check and a suit was brought against the purchaser seeking money damages for breach of contract to purchaser.

At trial, the court found that the documents admitted into evidence failed to satisfy the Statute of Frauds since the auction buyer's guide was not signed by either party. The written Real Estate Terms of Sale was signed only by the buyer and not the seller, and the post-sale Memorandum was signed by the buyer but not the seller. Additionally, the copy of the Written Contract for Purchase and Sale entered into evidence was signed by only one party. The trial court found that there was no enforceable contract because of a lack of mutually enforceable promises and because the buyer withdrew his offer by stopping payment of the check.

The appellate court reversed, holding that the various documents were sufficiently definite and certain to establish a contract by the land owner that complied with the Statute of Frauds and was enforceable against the buyer.⁸⁶ The court aptly pointed to the law of agency in a peculiar application to auctioneers who, while being the primary agent

85. 528 So. 2d 463 (Fla. 5th Dist. Ct. App. 1988).

86. *Id.* at 465 (finding sufficiency under FLA. STAT. § 725.01 (1987)).

of the seller in making the sale, are for some purposes the agent of both parties and whose authority may be express or implied or sought by ratification.⁸⁷ Similarly, the court indicated the significance of the oral nature of the auction process, whereby bids are solicited through public outcry and acceptance is indicated through public outcry and through the fall of the auctioneer's hammer or in some other customary manner determining the completion of the sale. The nature of an auction was inconsistent with the buyer's act of attempting to leave the auction arena with an "open" offer which he could withdraw by subsequently stopping payment of a deposit check. The court rejected the defense of lack of mutuality of remedy or obligation as a mere "smoke screen defense,"⁸⁸ indicating the nature of an executory contract is one where a second party accepts an offer or promise by the first party by doing an act which the second party did not have a contractual obligation to do. The court stated, "if and when the act by the second party is performed, the first party has received consideration and is then obligated to perform on his promise. At that point the second party needs a remedy to enforce the promise of the first party."⁸⁹ The court likened the situation to one of an option agreement or other unilateral contract being binding on only one party.⁹⁰ Therefore, the court determined that circumstances constituted sufficient compliance with the Statute of Frauds to become legally enforceable against the purchaser.

B. Easements

Several appellate decisions concerning the validity and enforceability of easements have been decided by the courts of Florida. In *Robertia v. Pine Tree Water Control District*,⁹¹ a deed of conveyance was "subject to an easement for ingress and egress for road purposes and for the construction, maintenance and use of utilities and drainage" The court indicated that such language was insufficient to reserve an easement since no evidence existed which would allow an agreement between the parties to reserve an easement. The court cited

87. *Id.* at 466 (citing 7A C.J.S. *Auctions and Auctioneers* § 8 at nn.34-36 (1980)).

88. *Id.*

89. *Id.*

90. *See* *LaBonte Precision, Inc. v. LPI Indus. Corp.*, 507 So. 2d 1202 (Fla. 4th Dist. Ct. App. 1987).

91. 516 So. 2d 1012 (Fla. 4th Dist. Ct. App. 1987).

to its earlier decision of *Procacci v. Zacco*,⁹² wherein the court held that the use of language including the use of the words "subject to" in a deed was not, by itself, sufficient to reserve an easement. The court further indicated it must examine the surrounding agreements and circumstances to determine the intentions of the parties at the time the language was used since the words "subject to," when used in a deed, are generally words of qualification rather than of contract.⁹³

In *Moran v. Brawner*⁹⁴ the court interpreted the statutory requirements for granting an easement of necessity.⁹⁵ In *Moran*, landowners sought to establish an implied grant of way of necessity across property owned by Paul and Margaret Brawner. The court stated the burden of proof upon a party seeking to establish an easement of necessity was that the claimant must establish no practicable route of ingress or egress except for the grant of way of necessity being sought. The claimant may not elect between several adequate means of access, even though one may be more convenient than another. Further the claimant was not entitled to the easement across the adjacent landowner's property where there was practicable ingress and egress along an existing dirt road across other property to a state road. In the court's view, the claimant failed to prove that she had no practical way of ingress and egress since she and her predecessor in title had used an existing dirt road as access to the property for more than thirty-three years. Although the dirt road did not constitute legal access since it was owned by an individual not a party to the litigation, the statutory requirement that the implied easement be "reasonably necessary for the beneficial use or enjoyment of the 'land'" was not satisfied.⁹⁶

In *Dean v. MOD Properties, Ltd.*,⁹⁷ MOD Properties granted to the City of Sanford an easement for road right-of-way which inartfully provided that the grantor, in the event of abandonment, would have the "reversion or reversions thereof." Dean acquired title to the property out of which the easement had been carved by mesne conveyances. The conveyances were all made "less and except" the easement. The road right-of-way was thereafter abandoned by the City, and MOD Proper-

92. 324 So. 2d 180 (Fla. 4th Dist. Ct. App. 1975).

93. *Robertia*, 516 So. 2d at 1013.

94. 519 So. 2d 1131 (Fla. 5th Dist. Ct. App. 1988).

95. FLA. STAT. § 704.01 (1985).

96. *Id.* at § 704.01(1); see also *Roy v. Euro-Holland Vastgoed V.B.*, 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981).

97. 528 So. 2d 432 (Fla. 5th Dist. Ct. App. 1988).

ties sued Dean for possession of the land upon which the easement was located. MOD Properties relied on the reservation language in the easement instrument and the "less and except" language in its conveyance. The court ruled that Dean, not MOD Properties, owned the land in question and the language in the easement instrument was regarded as unclear. In any event, the language was construed to create only an easement and not a transfer of the fee title, and the language in the deed was interpreted as identifying a matter to which the title was subject and thus excluded from the warranties of title. In its decision, the court distinguished the ownership of land as an estate from an easement which is the right of one, other than owner of land, to use land for some particular purpose or purposes. The easement, or right to use land not owned, is more in the nature of a claim or encumbrance against the title of the land than it is in the nature of title to, or an estate in, the land itself. The implication, however, of a conveyance of the fee simple title was, in the opinion of the court, overwhelmed by the title of the document and the repeated qualified phrases limiting the interest conveyed to be for the purpose of road right-of-way. Therefore the language constituted the granting of an easement to the City for right-of-way of public road, but did not convey fee simple title, or subject the easement to any reverter in the grantor, MOD Properties.

C. Co-Tenancies

In a case involving the effect of dissolution of marriage on the undivided one-half interest in the marital home, the Florida Supreme Court in *Barrow v. Barrow*⁹⁸ dealt with a final judgment for dissolution of marriage wherein the wife was awarded, as alimony, an undivided one-half interest in the marital home. However, the final judgment was silent as to possession and future disposition of the property. The former wife left the state and the former husband remained in exclusive possession of the property. Several years later Mrs. Barrow filed a partition action. Mr. Barrow counterclaimed for one-half of the sums expended by him for the improvement and preservation of the property. Mrs. Barrow responded to the counterclaim by claiming one-half of the fair rental value of the property for the period of her former husband's exclusive occupancy. The court concluded that:

- (1) the possession of a tenant in common is presumed to be the

98. 527 So. 2d 1373 (Fla. 1988).
<https://nsuworks.nova.edu/nlr/vol13/iss3/11>

possession of all tenants until the one in possession communicates to the other the knowledge that he or she claims the exclusive right or title and there can be no holding adversely or ouster by the cotenant in possession unless the adverse holding is communicated to the other; (2) where one cotenant has exclusive possession of lands and uses the land for his or her own benefit and does not receive rents or profits therefrom, such cotenant is *not* liable or accountable to the cotenant out of possession unless he or she holds adversely or as a result of an ouster or its equivalent; and (3) when a cotenant in possession seeks contribution for amounts expended in the improvement or preservation of the property, that claim may be offset by cotenants out of possession by the reasonable rental value of the use of the property by the cotenant in possession to the extent that it has exceeded his or her proportionate share of ownership.⁹⁹

The court specifically rejected the former wife's contention that the common law rules regarding communication by the cotenant in possession as to a claim of exclusive ownership (i.e., adverse possession should be different when the cotenants are former spouses). Mrs. Barrow was permitted to recover one-half the reasonable rental value of the property as an offset against her former husband's claim for the cost of maintaining the property. In reaching its decision, the court cited the seminal case of *Bird v. Bird*,¹⁰⁰ where the court held that one cotenant has exclusive possession of lands owned as a tenant in common with another and uses those lands for his own benefit and does not receive rents or profits therefrom; the cotenant is not liable or accountable to his cotenant out of possession unless the cotenant in exclusive possession holds adversely or as a result of ouster or the equivalent therefrom.¹⁰¹ The court also cited *Stokely v. Connor*¹⁰² to explain the concept of "ouster" and reaffirmed its decision in *Coggan v. Coggan*,¹⁰³ where it stated that there can be no holding adversely or ouster or its equivalent by one cotenant unless such holding is manifested or communicated to the other.¹⁰⁴ Finding there was no such communication by the cotenant in possession to the cotenant out of possession and

99. *Id.* at 1377 (emphasis in original).

100. 15 Fla. 424 (1875).

101. *Id.* at 442.

102. 69 Fla. 412, 68 So. 452 (1915).

103. 230 So. 2d 34, 36 (Fla. 2d Dist. Ct. App. 1969), *aff'd in part, quashed in part*, 239 So. 2d 17 (Fla. 1970).

104. *Coggan*, 239 So 2d at 19.

that the former was holding the property exclusively and adversely to the latter, the court reaffirmed the necessity for communication mandated by the common law rule. The court also expressed its disapproval of the reasoning in *Adkins v. Edwards*,¹⁰⁵ which had altered the established principles regarding possession by former spouses who were co-tenants. The court emphasized "that it is in the best interest of all the parties that property dispositions in matrimonial matters be concluded, if at all possible in the dissolution proceedings including a determination, if possible, of possession of any property held in a co-tenancy."¹⁰⁶

VI. Conclusion

The courts of Florida have once again announced several decisions of significance in the area of real property law. The various decisions presented in the area of mortgage law indicate the courts' emphasis on the formality of the mortgage encumbrance on real property, as well as its relative priority position vis-a-vis other types of real estate encumbrances.

In the area of marital property, the courts of Florida reaffirmed the long-standing principles concerning tenancy-in-common of real property in post-marital circumstances.

Finally, in what will continue to be one of the areas of emerging legal precedent, the Florida courts once again have attempted to grapple with the application of condominium law to non-condominium forms of property. There is little doubt that future court decisions and, perhaps legislation, will evolve from the *Downey* controversy.

105. 317 So. 2d 779 (Fla. 2d Dist. Ct. App. 1975).

106. *Barrow v. Barrow*, 527 So. 2d 1373, 1377 (Fla. 1988).