

## Litigating in Florida: Updates and Recent Decisions

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### Florida Equitable Lien : Subordinate to Mortgage with Third-Party Beneficiary

The U.S. Bankruptcy Court in the Northern District of Florida held that purchasers under condominium purchase agreements, who sought return of their deposits in a special deposit escrow account, are entitled to assert an equitable vendee's lien in the amount of the special deposits. However, the equitable lien is subordinate to a construction mortgage, where the purchasers expressly agree to subordinate any claims to the construction mortgage by signing a subordination clause in the purchase agreement. (*In re: Laketown Wharf Marketing Corp. n/k/a Laketown Wharf Marketing, LLC, Debtor*).

In *Corus Construction Venture, LLC v. Laketown Wharf Marketing Corp., et. al*, Adv. Proc. No. 09-04009, the Bankruptcy Court found that under Florida law, equitable liens are used to remedy those situations where there is either an absence of an available

lien or no adequate remedy at law. Florida law continues to recognize that equitable liens are particularly appropriate where the primary debtor has become insolvent. A vendee's lien is a remedy afforded to real estate purchasers in their recovery for money paid on the contract and can be used by a court "for the purpose of doing justice."

However, the court also found that even though the purchasers may assert an equitable lien, it may be of little value given the priority of the lien set by both the subordination clause and as a matter of Florida law. The court reasoned that where "contracting parties are free to agree as to their respective rights and remedies in the event of default," the purchasers agreed to subordination and that "such agreements are generally enforceable under Florida law." By signing the purchase agreement, containing a subordination clause, the purchasers expressly agreed to subordinate any lien claims to the construction mortgage.

Not only may subordination clauses be held enforceable, they may not be voided by a single party when there exists an intended third party beneficiary to the clause. Similarly, although a contract may be voided as a whole, the lien priority set by a contract which granted rights to third parties, should not be disturbed. Allowing the purchasers equitable lien to be superior in priority to the construction mortgage would impair the construction mortgage holders contractual rights.

Moreover, as a matter of Florida law in general, unrecorded rights such as constructive trusts or equitable liens are inferior to rights subsequently acquired without actual notice of them. As such, the purchasers equitable lien is junior in priority to the construction mortgage as a matter of Florida law because the construction mortgage holder had no constructive or actual notice of the equitable lien. Additionally, the return of deposits is based on Florida law. ( Fla. Stat. 718.202(2)

(2005)) Where a purchase contract for a condominium has been properly voided and the contract provides that the Special Deposits may be used in construction, a return of the Special deposit is limited to the funds that have not been used in construction. If the funds have been used, as was the case here, Fla. Stat. 718.202 does not mandate their return.

In sum, purchasers who sought a return of their Special Deposits after voiding their purchase agreements, were entitled to assert an equitable lien as a matter of Florida law. However, the purchasers equitable lien was junior in priority to the construction mortgage because of the subordination clause in the purchase agreement and, under Florida's recording statute, because the developer had no constructive or actual notice of unrecorded equitable liens.

### **Florida Long-Arm Statute: Court Defines What It Means to be "Engaged in" Activities in Florida for Purposes of Personal Jurisdiction**

The Fifth District Court of Appeals of Florida recently expanded the interpretation of "is engaged" in business to include past (rather than simply current) business activities, or ongoing business

operations for the purposes of personal jurisdiction under Florida's long-arm statute. In *Singer v. Unibilt Dev. Co., et al.*, No. 5D08-4502, 2010 WL 3056030 (Fla. 5th DCA Aug. 6, 2010), the Court reversed the trial court's order dismissing a claim for breach of a partnership agreement, where the trial court concluded that it lacked general personal jurisdiction over the out-of-state defendants because they were not conducting substantial business activity within Florida at the time suit was filed.

Generally, Section 48.193(2), Florida Statutes (2007), allows for lawsuits against nonresidents who engage in substantial activity in Florida, irrespective of whether the claim arises from the activity being sued upon. Section 48.193(2), states that "[a] defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of the state, whether or not the claim arises from that activity." The operative language of the statute is "engaged in" and "substantial activity" when determining whether Section 48.193(2) applies.

In *Singer*, the Court expanded the limited interpretation

of the statutory language "engaged in" previously employed by the Fourth District Court of Appeals of Florida in *Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Automotive Group, Inc.*, 987 So. 2d 818 (Fla. 4th DCA 2008) where "engaged in" was interpreted to mean "currently" engaged in substantial activity in Florida. When interpreting the specific language of Section 48.193(2), the Court noted that the problem with the Fourth District Court of Appeals' interpretation is that "it focuses on a temporal event that has no relevance to the constitutional standard with which it is said to be equivalent." The Court held that "[f]or the activity to be 'substantial,' it must involve a wider temporal window" and thus, "at a minimum, 'is engaged' must be interpreted to also involve past activities."

The Court went on to state that "a better interpretation focuses on the activities of the nonresident during a reasonable period of time prior to filing the complaint, but not necessarily up until the complaint is filed." Without clarifying a specific period for which a defendant may be subjected to general personal jurisdiction for past activities in Florida, the Court concluded that "when the activities of the

nonresident are of sufficient quality that it should in fairness expect to defend itself here, it should not make a difference that it happens to cease these activities prior to the filing of the complaint, especially where the activities occur close in time to the events giving rise to the cause of action.”

This broadened interpretation of the language of Section

48.193(2) by the Fifth District Court of Appeals will be useful to litigants in Florida who seek to bring claims against nonresidents who previously engaged in substantial activity in Florida and have since packed their bags and gone home. ■

*\*Courtesy of Berger Singerman’s Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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